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*To my father,*

*For the endless support and conversations that have made me who I am today.*

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## ABSTRACT

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This dissertation focuses on the relationship between joint custody and the principle of the best interests of the child, which constitutes the cornerstone of all parental rights. As the notion of parental responsibility has evolved, the determination of the optimal custody arrangement for children has become a critical issue for legislators. Furthermore, as law is ever-changing, reflecting the changes in society, child custody cannot be seen solely as a legal matter, but as a social matter as well.

The principle of the best interests of the child reflects the paedocentric character of family law. It highlights the importance of the wellbeing of the children, placing their interests above all else. Joint custody ensures the participation of both parental parties in their children's lives, following their separation. Consequently, despite the marital separation, children are not deprived of any of their parents, the latter having the right to maintain an active role in the children's upbringing. Joint custody, thus, promotes equality between the two parents, and allows children to establish strong relationships with them, whilst simultaneously enhancing stability in their life. Numerous studies have shown that children in joint custody parenting plans experience a healthier emotional and psychological development than children in sole custody arrangements.

The challenges of joint custody, such as severe parental conflict, are also addressed in this paper. However, the view that is ultimately supported is that parents have a duty to put aside all their differences, in order to promote the best interests of their children, which are almost always better fulfilled through shared parenting plans. Furthermore, for the sake of completeness, certain behaviours of criminal nature will also be mentioned. Nonetheless, due to their exceptional nature, they are not taken into account for the formulation of the final opinion of the writer. Lastly, it is to be noted that the focus of this paper is on the child, and that no specific legal order is analysed in depth. Instead, a general overview is provided, which is centred on the child, aiming to promote their best interests through joint custody.



## INTRODUCTION

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One of the foundations upon which modern society has been built, is the institution of family. During the course of the past centuries, the notion of family has been subjected to revisions that have dramatically altered it in its core.

Historically, families constituted financial entities, under the authority of the head of the family. Children were treated not as persons, but as subjects of property. Moreover, in contrast to today, where the nuclear family is the focal point of the institution of family, in the past it consisted of a wider range of persons, amongst which were distant ancestors, relatives in direct ascending and/or collateral line. This was done to serve the purpose of authority of a lineage.<sup>1</sup>

In a strive to challenge the patriarchy, over the last half century, fathers' authority over their children has been reduced. In accordance with the principle of equality between men and women, the notion of parental responsibility<sup>2</sup> and child custody have been developed, replacing the authoritarian control of fathers over their children. In fact, the shift has been so significant that in many countries a reverse outcome has occurred. Today, parental care encompasses rights, as well as obligations of parents towards their minor children. It is a parent's duty to exercise parental care in such a way that it primarily favours their child's interests, instead of their own, according to the principle of the best interests of the child.<sup>3</sup>

Inevitably, effective exercise of parental responsibility becomes problematic when the parents' healthy marriage or cohabitation is disrupted. Prior to that disruption, parental rights, including custody, is exercised by both parents jointly. The contemporary crisis of the institution of marriage, which has led to an increase in divorces of parents, accompanied by the rise of non-traditional families, including single-parent families, has made the issue of the allocation of child custody between parents noticeably more prevalent.

Despite these ever-changing societal developments, however, it is a given that children have the right to grow up with both their parents. In a bidirectional manner, it is also a parent's right to not be reduced to a person who only has communication rights with their child, leading to them being, essentially, deprived of parenthood. From the moment a child is born, they become an essential part of their parent's identity and personality. Deprivation of one another, therefore,

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<sup>1</sup> Georgios Lekkas, *Η επιμέλεια του παιδιού κατά τον Αστικό Κώδικα - Μετά τον Ν. 4800/2021 [Custody of the child according to the Civil Code - After Law 4800/2021]*, 2021, p. 1, n. 1.

<sup>2</sup> For the purposes of this paper, the terms parental responsibility, parental care and parental authority are used interchangeably, unless stated otherwise.

<sup>3</sup> Nathalie Massager, Carine De Buck, *Être parents et se séparer : Regards croisés d'une avocate et d'une pédopsychiatre*, 2007, p. 56.

interferes with their right to enjoy each other; and that separation can be detrimental to their mental health. Equally, it is the parents' obligation to care for the upbringing and the welfare of their children. This is a responsibility that was assigned to them by society, and which they undertook upon their decision to become parents.

To conclude, it is of fundamental importance to note that family, divorce and custodial matters are not only legal issues, but societal issues as well.<sup>4</sup> Family law, which regulates all aforesaid matters, is not something immutable nor rigid. On the contrary, law, and especially family law, must be fluid and adaptable to the constant societal developments, in order to effectively regulate relations. Thus, societal changes greatly contribute to the advancement and modification of law. For that reason, the focus of this paper will not only be on the general legal framework of joint custody of children, but also on the rationale behind this concept, by taking into account the principle of the best interests of the child.

## **SECTION A: JOINT CUSTODY**

### **I. HISTORICAL BACKGROUND AND EVOLUTION OF CHILD CUSTODY**

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The concept of child custody has evolved tremendously in recent years. Despite the common refrain in the western world being that mothers usually get the children after divorce or separation; this has not always been the case. In fact, it is in the last decades that this shift has become prevalent.

In antiquity, family was an eminently patriarchal concept.<sup>5</sup> In the Ancient Roman society, the oldest living male of the family, the *pater familias*, was the head of the family. He had absolute power (*patria potestas*) over his household, and his children were viewed as objects (*res*) that belonged to him, who could be sold or be put in forced labour. Furthermore, he was the only one who could own any property in his name and manage financial affairs. He also held the power of life and death (*vitae necisque potestas*) over everyone in his household. The *patria potestas* of the *pater familias* was total and absolute until his death, following which, each of his sons became independent *patres familias*.<sup>6</sup> In contrast, mothers had no legal rights with

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<sup>4</sup> Éric Millard, "Le droit constitutionnel de la famille", *Code civil et constitution*, 2007, p. 67-68.

<sup>5</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 5, n. 10.

<sup>6</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 8, n. 18.

respect to their children, even as guardians in the event of the father's death.<sup>7</sup> This institution was unique to the Roman society, and it constituted the foundational nexus of Roman law.<sup>8</sup>

Historical and sociological developments surrounding women's place in society laid the foundations for a less authoritarian regime of fathers, which subsequently led to drastic changes in child custody law. The Napoleonic Code of 1804 had enacted paternal power (*puissance paternelle*) all throughout the First French Empire, following in the footsteps of the Roman regime. In France, as it will be discussed further in this paper, it was not until the reform of 1970 that paternal power was replaced by parental authority (*autorité parentale*),<sup>9</sup> exercised jointly by both married parents.<sup>10</sup>

The evolution of the institution of marriage over the years also impacted these societal changes. One of the most significant and groundbreaking evolutions of marriage is the introduction and normalisation of divorce. As marriage was tied to the church, so was divorce. This left divorce illegal for a long time in several nations (Italy, Spain, Ireland etc.), whereas even after it became possible, it was extremely uncommon.<sup>11</sup>

The aforementioned gradual transition from the authoritarian figure of the father and the androcentrism, to a more shared right of parents to raise their child, is mainly rooted in two principles. Firstly, the constitutional enshrinement of gender equality resulted in mothers being accorded the same rights and obligations as fathers, with regard to their child. This meant that the upbringing of the child was no longer solely a father's power, but it became a shared responsibility between both parents, who exercised that responsibility jointly and equitably.<sup>12</sup> Thus, slowly, child custody laws after parental divorce started becoming – ostensibly at least – gender-neutral, whereas up until then, custody was awarded to the father, even in cases where he was the primary instigator of the parental conflict, causing the marriage to end. In the 19<sup>th</sup> century, however, this began to change, and a rule based on fault emerged: ‘the children would

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<sup>7</sup> Joan B. Kelly, “The Determination of Child Custody”, *Children and Divorce, The Future of Children*, 4(1), 1994, p. 121.

<sup>8</sup> Jarod Burger, *The role of paterfamilias in Roman Law: An exegesis on Roman traditionalism, and traditionalist critique*, 2019, p. 1 ; Emma Johnson, *Patriarchal Power in the Roman Republic: Ideologies and Realities of the Paterfamilias*, 2007, p. 99.

<sup>9</sup> Etymologically the term ‘autorité’ derives from the Latin word ‘*augeo*’, which means to promote, to raise, and is not to be confused with the term ‘authority’ signifying power and control.

Philippe Malaurie and Hugues Fulchiron, *Droit de la famille*, 7<sup>th</sup> edition, 2020, n. 1208.

<sup>10</sup> Daniel Pical, “*L'autorité parentale dans le code civil*”, *Le Journal des psychologues*, 2014, p. 29-32 ; Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 32-33, n. 64-66.

<sup>11</sup> According to the statistical office of the European Union, Eurostat, the crude divorce rate doubled, increasing from 0.8 per 1,000 persons in 1964 to 1.6 in 2022.

<sup>12</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 29-30, n. 56.

be best taken care of and instructed by the innocent party’, leading to courts awarding custody to the mother when the father was at fault. Nonetheless, in reality, the ‘social convention’ that the wife filed for divorce resulted in mothers being awarded child custody in the majority of cases, given that no-fault divorces were not yet available, and fathers usually admitted fault to procure the divorce.<sup>13</sup>

In the 20<sup>th</sup> century, the focus of custody decisions started to shift from parental fault to the interests of the child. In the countries of common law, this shift was depicted through the implementation of the ‘tender years doctrine’, according to which, a mother is inherently better-suited, both biologically and emotionally, to care for young children.<sup>14</sup> This judicial maternal preference prevailed in countries of civil law too, although not explicitly based on the forementioned doctrine. In Greece, for instance, prior to the custodial family law reform of 2021, in almost all cases of parents’ separation, mothers were the ones who were awarded with the child’s custody. They were considered to be better custodians, perhaps for their perceived physical care-taking ability, in comparison to fathers who were reduced to being granted visiting and communication rights with their child. Therefore, it is only recently that the initial movement, which aimed at equal participation of both parental parties in their children’s upbringing, started actually being implemented.

The second principle pursuant to which parental care evolved into a shared responsibility between the parents, is the principle of the best interests of the child, which led to custody laws becoming progressively child-oriented.<sup>15</sup> Emphasis was given to the interests of children as a criterion for the legal regulation of the parent-child relationship, leading to the blossoming of the concept of parental responsibility. To further enhance and strengthen these societal and legal developments, numerous international legal texts and treaties, such as the Convention on the Rights of the Child of 1989 by the United Nations, the European Convention on the Exercise of Children's Rights of 25 January 1996 by the Council of Europe, were signed, institutionalising parental responsibilities vis-à-vis the child. These regulations highlighted the importance of the child’s interests, as the primary criterion and as a consideration to be taken into account by the court when deciding on a pertinent matter.

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<sup>13</sup> Robert H. Mnookin, “Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy”, *Law and Contemporary Problems*, 39(3), 1975, p. 234-235 ; Joan B. Kelly, “The Determination of Child Custody”, *Children and Divorce, The Future of Children*, 4(1), 1994, p. 121.

<sup>14</sup> Allan Roth, *The Tender Years Presumption in Child Custody Disputes, 1976-1977*, p. 861-862.

<sup>15</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 31, n. 60.

Accordingly, the UN Convention on the Rights of the Child asserted that children are to maintain personal relations and direct contact with both of their parents, except where it is contrary to their best interests.<sup>16</sup> Evidently, these developments show that *patria potestas* has been ‘upgraded’ from a father’s power to a child’s *right* and also to a parent’s *right and duty*.

## II. CONCEPT OF CHILD CUSTODY

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### A. Child custody and parental responsibility

The right to custody of a child forms part of the broader right of parental care. It constitutes its most fundamental assertion, due to the instrumental role that it plays in the formation of the child’s character. Consequently, the concept of child custody solely concerns minors, who have not reached the age of 18, and are still under the legal responsibility of their parents.<sup>17</sup> Moreover, child custody constitutes the care with which parents raise their minor children, manifestly contributing to the development of their personality as a person (and thus, a subject of law).<sup>18</sup> Joint custody, thus, refers to the right of both parents to influence their child’s upbringing by having an active role in all aspects of their life, whether it be material, spiritual or mental.<sup>19</sup> The family has a very deep impression on the development of the child’s personality and behaviour, whether overt or covert, as it majorly contributes to the grounding and the expansion of the child’s morals and social behaviour in general. That is why it is characterised as a ‘functional right’,<sup>20</sup> amplifying that parental care is both a right and an obligation of the person who exercises it. A parent cannot choose whether to exercise the right or not, nor can they decide to give it up. In a way, thus, society has entrusted parents with the duty of the upbringing of their child. It must be noted, however, that this ‘entrustment’ is not absolute. The exercise of parental responsibility is judicially controlled, and it can be withdrawn, in case of delinquency or improper exercise.<sup>21</sup>

According to the Council of Europe, parental responsibilities refer to the ‘*collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular*

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<sup>16</sup> Article 9 paragraph 3 of the UN Convention on the Rights of the Child.

<sup>17</sup> In most jurisdictions the legal age is 18. However, there are countries where the age of majority is higher or lower.

<sup>18</sup> See also Article 5 paragraph 1 of the Greek Constitution.

<sup>19</sup> Apostolos Georgiadis, *Εγχειρίδιο Οικογενειακού Δικαίου [Manual in Family Law]*, 3<sup>rd</sup> edition, 2023, p. 443, n. 2.

<sup>20</sup> Ioannis Spyridakis, *Οικογενειακό Δίκαιο [Family Law]*, 3<sup>rd</sup> edition, 2020, p. 473-474, n. 123.3 ; Apostolos Georgiadis, *Manual in Family Law*, 2023, p. 405-406, n. 2.

<sup>21</sup> Ioannis Spyridakis, *Family Law*, 3<sup>rd</sup> edition, 2020, p. 493-500, n. 128. See also Articles 1532 and 1533 of the Greek Civil Code.

by taking care of the person of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the administration of his property'.<sup>22</sup> By the same token, the Hague Convention of 1996 defines that 'the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child'.<sup>23</sup> Therefore, the distinctiveness and particular nature of parental responsibility and child custody as not *mere rights*, but also duties aiming at fulfilling a 'social role', are made obvious from the two foregoing definitions.

When the parents are married, or have entered into a registered partnership, they exercise custody over their children together. On the other hand, if the parental parties are not married or in a registered partnership, parental responsibility is exercised by the mother of the child, as their affiliation is established at childbirth. The non-married father can also obtain parental responsibility through the acknowledgement of his paternity.<sup>24</sup> Following the establishment of their legal paternity, fathers acquire the right to exercise parental responsibility over their children too, along with the child's mother. Consequently, in the course of healthy partnerships between parents, usually no custodial issues are prevalent. Problems arise following the disruption of marriages or registered partnerships by divorce or separation. As mentioned above, custodial arrangements are not only important for the children, parents and their families, but also for society. Children's well-being is largely dependent on the extent and quality of parenting received throughout their childhood, thus, it is in society's interest to ensure that children have the best possible upbringing after their parents' divorce or separation.<sup>25</sup>

## **B. Types of custody**

### **1. Joint custody**

There are mainly two types of child custody: joint custody and sole custody, which are regulated differently in each legal order. In some jurisdictions, a distinction is also explicitly

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<sup>22</sup> Principle 1(a) of Recommendation No. R (84) 4 of the Council of Europe and the Committee of Ministers to Member States on Parental Responsibilities.

<sup>23</sup> Article 1(2) of the Hague Convention of 1996 on *Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.

<sup>24</sup> Articles 1510, 1513 and 1515 of the Greek Civil Code.

<sup>25</sup> Joan B. Kelly, "The Determination of Child Custody", *Children and Divorce, The Future of Children*, 4(1), 1994, p. 121.

made between joint physical custody and joint legal custody. In general, nonetheless, joint custody refers to the right of two separated parents to continue to raise and make all decisions concerning their children together, as they did before the marital dissolution. Fundamentally, this means that both parents maintain an active role in their children's upbringing and have the possibility to influence their childhood in a substantial way. Through joint custody, children have the opportunity to grow up with both their parents, despite them having separated and, thus, most likely not sharing the same household. Consequently, strong parent-child bonds may be formed this way, seeing as no parent feels as if they are a visitor in their own child's life. And most importantly, children in joint custody arrangements do not feel like they are losing a parent or missing out on quality time and experiences with them.

Physical custody mainly deals with the child's place of residence. Therefore, in joint physical custody both parents have the right – and the responsibility – to care and reside with their child, on a primary basis. In practice, joint physical custody is oftentimes achieved through dual-residence agreements between parents, enabling an approximately equal distribution of time spent with the children, who must alternate their home life across two households.<sup>26</sup> This fully ensures the equitable exercise of the right of parental responsibility by each of the parental parties.<sup>27</sup> In fact, in Belgium this system has been a mandatory practice since 2006,<sup>28,29</sup> in cases where parents could not agree amongst themselves on their child's living arrangements.<sup>30</sup>

Legal custody refers to a parent's right to make the important decisions about a child's life. These decisions go beyond quotidian acts, and usually concern the child's education and schooling, religious upbringing, any possible medical treatment and more. The combination of physical and legal joint custody between the parental parties is, thus, what is more beneficial for the child, as it grants them the possibility to not have to come to terms with the constant and habitual absence of one parent from their life. On the contrary, a child that grows up with parents who, although separated, share the physical and legal custody, has the opportunity to create strong bonds with both of them.

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<sup>26</sup> Rakel Berman and Kristian Daneback, "Children in Dual-Residence Arrangements: A Literature Review," *Journal of Family Studies* 28(4), 2020, p. 1448.

<sup>27</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 53, n. 111.

<sup>28</sup> Moniteur Belge, *Law of 18 July 2006*, published on 4 September 2006.

<sup>29</sup> For the revised legal framework, see also Article 374 paragraph 2 sub-paragraph 2 of the Belgian Civil Code.

<sup>30</sup> Sofie Vanassche et al., "Alternating Residence for Children After Parental Separation: Recent Findings from Belgium," *Family Court Review*, 55(4), 2017, p. 546.

## 2. Sole custody

On the other side of the spectrum, sole custody refers to a parent's right to essentially decide on all child-related issues without consulting the other parent. Admittedly, every legal order has its own regulations about the parental rights of the non-custodial parent. However, in several jurisdictions, the parent not awarded with custody, only has the right to be informed by the custodial parent about the major decisions concerning the child. Naturally, this results in them having essentially no substantive role in their children's lives. Similarly, sole custody can be legal, physical, or both, in which case it is referred to as full custody. The parent with sole legal custody has the right to make all the decisions in respect of the child, whether they concern usual, quotidian matters, or more important life decisions, such as which school the child will attend. On the other hand, a parent with sole physical custody has full authority to determine where the child will permanently reside, whilst the other parent is granted mere visiting rights.

## 3. Comparison

From the above, it is evident that the sole custody regime deifies the one parent. Single-parent households are practically glorified through this system, assigning to the non-custodial parent an almost decorative role. Furthermore, given that mothers are usually the parental party to whom sole custody is granted, outdated cultural and social biases regarding the statuses of women in the family are revived. On the other hand, fathers are held at a distance from their children, considered to be peripheral and unnecessary to their children's emotional adjustment to the marital separation, but also to their overall development.<sup>31</sup> Following this analysis, it is obvious that the constant awarding of sole child custody to one parent, based exclusively on their gender, is regressive and it fuels ideas belonging to the past. Therefore, joint custody is the most optimal decision for children to cope more easily with the event of their parents' separation.

However, it must be admitted that there are situations where the system of joint custody is not the optimal decision. Instead, it must be avoided, as the risk of granting careless parents such pivotal rights for the development of their children can indeed be calamitous for them. These situations can vary from a lack of emotional availability from the side of a parent, to domestic abuse or violence. It is unquestionable that especially the two latter cases must be treated extremely carefully and must be examined very thoroughly. However, due to the criminal and

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<sup>31</sup> Joan B. Kelly, Michael Lamb, "Using child development research to make appropriate custody and access decisions", *Family Court Review*, 2005, p. 304.



exceptional nature of such events and behaviours, these cases will not be analysed in detail, as they fall outside of the scope of this paper. Nonetheless, for the sake of completeness, reference to them will be made in the next section. Conversely, concerning emotionally unavailable or inattentive parents, the assessment of each case must be based not on matriarchal principles, but on the legitimate quest for protecting the interests of the child as the most vulnerable subject. This was precisely the reason why the changes towards gender-neutral legislations occurred in the first place; as well as to redress the maternal preference.

Lastly, one could argue that the idea of ‘*superiority*’ of joint custody between parents, compared to sole custody, following a divorce or separation, is also apparent in the UN Convention on the Rights of the Child. More specifically, it emphasises that all States Parties must work towards the clear establishment of the principle that both parents have shared responsibilities for the upbringing and development of their child’s character and personality.<sup>32</sup> In that endeavour, the preservation of the principle of the child’s best interests must be of primary importance.<sup>33</sup> Moreover, the fundamentality of the mutual enjoyment between parents and children of each other, has also been well established by the case-law of the European Court of Human Rights, which has ruled on countless occasions about its importance, stating that any hindering measures by the Contracting Parties must be considered as an interference with the right to protection of one’s family life, as enshrined in Article 8 of the European Convention on Human Rights.<sup>34</sup>

### **C. Joint physical custody – Alternating residence**

#### **1. Definition and types of alternating residence agreements**

The arrangement of alternating residence has emerged and gained ground over the last decades.<sup>35,36</sup> In certain jurisdictions, it is even seen as the norm. As mentioned above, the dual-residence agreement is an agreement between the parental parties about their child’s residence, which allows them both to share their time with the child. It must be clarified that

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<sup>32</sup> Article 18 of the UN Convention on the Rights of the Child.

<sup>33</sup> See preamble and Articles 1, 5 and 6 of the UN Convention on the Rights of the Child.

<sup>34</sup> *K. and T. v. Finland* (ECtHR), Application no. 25702/94, judgment of 12 July 2001, paragraph 151 ; *Kutzner v. Germany* (ECtHR), Application no. 46544/99, judgment of 26 February 2002, paragraph 58 ; *Diamante and Pelliccioni v. San Marino* (ECtHR), Application no. 32250/08, judgment of 27 September 2011, paragraph 170.

<sup>35</sup> Thoroddur Bjarnason and Arsaell M. Arnarso, “Joint Physical Custody and Communication with Parents: A Cross-National Study of Children in 36 Western Countries”, *Journal of Comparative Family Studies*, 42(6), 2011, p. 871.

<sup>36</sup> During the pandemic of Covid-19, Italian courts opted for a biweekly system of alternating residence, in order to limit nonessential commute, and thus limit any further spread of the virus ; Ioannis Valmantonis, *Συνεπιμέλεια και βέλτιστο συμφέρον τέκνου [Joint custody and best interests of the child]*, 2022, p. 88.

the parents' decision about the child's residence is incorporated in the notion of one's custody. Therefore, in order for both parents to decide upon that, they must exercise it jointly.<sup>37</sup> Thus, the system of alternating residence is used in cases of joint custody only, in order to ensure that both parents are equally involved in their child's life.<sup>38</sup> Nonetheless, joint custody does not automatically imply alternating residence.<sup>39</sup> In a joint physical custody arrangement, the child has two homes, the maternal and the paternal, between which they alternate on a regular basis.

*i. Alternating weeks*

There are various ways that joint physical custody is applied today. The first and most common is the weekly or biweekly switch between the two households. Thus, the parental parties (or the courts sometimes) choose one day of the week, during which the children will move from one home to the other. Several other variations to this system exist too, where children exchange houses more times during the week.

A big advantage of this arrangement is that it equally distributes the time of the child's presence with each parent, therefore, promoting equality between the two former partners. Nonetheless, opposition towards this form of joint physical custody is not non-existent. Criticism has been made about the fact that such children lack a stable home environment and are forced to constantly adjust to different living conditions, resulting in general instability in their life.<sup>40</sup> However, as will be analysed in the next section, parental separation is by itself a very traumatic experience for children. The familial environment is completely reversed and replaced by new family norms. These norms require time for one to adjust, whether it be a young child, adolescent, or an adult, resulting in an inevitable period of instability. Consequently, the fact that children do not lose any of their parents from one moment to the next, but instead have the opportunity to spend half their time living with each of them, cannot be deemed as being equally emotionally challenging as alternating houses. Furthermore, what matters most is not so much the stability of the children's home per se, but the stability of the love, care and nurture

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<sup>37</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, 2021, p. 178, n. 375.

<sup>38</sup> Nathalie Massager, Carine De Buck, *Être parents et se séparer : Regards croisés d'une avocate et d'une pédiopsychiatre*, 2007, p. 70.

<sup>39</sup> Sofie Vanassche et al., "Alternating Residence for Children After Parental Separation: Recent Findings from Belgium," *Family Court Review*, 55(4), 2017, p. 548.

<sup>40</sup> Rafaela Lehtme and Karmen Toros, "Bird's nest parenting as a child-centered solution in the context of shared parenting", *The Child Welfare System: Perspective, Challenges and Future Directions*, 2019, p. 2.

that they receive from their parents.<sup>41</sup> Therefore, this criticism fails to prioritise the child's best interests, as the core principle of family law, regulating all parent-child relationships.

*ii. Bird's nest custody*

Another way that joint physical custody has been applied recently, although less frequent than the weekly alternation, is the method of the 'bird's nest'. Unlike the traditional alternating residence arrangement, where the children are the ones moving between houses, the system of the bird's nest is a co-parenting agreement where the children remain in the family home and the parents take turns living with them.<sup>42</sup> Undoubtedly, this is an arrangement that prioritises the children's stability, safety and well-being, pursuant to the principle of the best interests of the child, which will be analysed later.<sup>43</sup> More specifically, instead of the children having to face the strongest consequences of the new marital condition by constantly switching environments, it is the parents who undertake that burden. Nevertheless, a big drawback of this system is that it is significantly more costly because it requires the maintenance of three homes in total. This means that both parents must be relatively financially comfortable, in order to afford to reside in another home during the weeks that they are not living with their child.<sup>44</sup>

Furthermore, questions arise concerning the willingness of the former spouses to continue sharing a home after their breakup. A separation between partners is always emotionally challenging, even if it is consensual. Whereas when children are involved, the weight becomes even heavier for the parents. Oftentimes, this emotional turmoil is accompanied by conflict, feelings of rage and anger, or heartbreak and grief. In such situations, thus, expecting a parent to share the same home with their former partner – even if they are not actually living there at the same time – might be too distressing. Besides, although family law is child-centred, and although the child's interests are essentially the governing force of the institution of family and parental responsibility, one must not forget that parental care and child custody are also rights of the parents, meaning that their interests must not be disregarded.

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<sup>41</sup> Ioannis Valmantonis, *Συνεπιμέλεια και βέλτιστο συμφέρον τέκνου [Joint custody and best interests of the child]*, p. 93.

<sup>42</sup> Rafaela Lehtme and Karmen Toros, "Bird's nest parenting as a child-centered solution in the context of shared parenting", *The Child Welfare System: Perspective, Challenges and Future Directions*, 2019, p. 3.

<sup>43</sup> Rafaela Lehtme and Karmen Toros, *Ibid*, p. 10.

<sup>44</sup> Ioannis Valmantonis, *Joint custody and best interests of the child*, p. 89.

## 2. Criteria

### *i. Proximity of houses*

Following the forementioned analysis about the various ways that joint physical custody may be applied, as well as its implications in certain circumstances, it is evident that a number of criteria must be considered before the arrangement of alternating residence is decided upon. Such criteria have also been developed by the courts. More particularly, one of the first factors to be examined is the proximity between the maternal and paternal homes.<sup>45</sup> In cases where the two parental households are not located far from each other, alternating residence can be more easily applied because the child does not have to become accustomed to a new neighbourhood or be far from their friends, which would add to their already existing emotional upheaval and distress. This ensures that the emotional and overall stability of the child are preserved. Besides, long distance between the two homes may also have implications on the child's school life and extra-curricular activities, seeing as they may not be as easily accessible from the new house. Thence, provided that it is financially feasible, it is best for the child that the parents' houses are located close to each other.

### *ii. Age*

The child's age is also a key factor taken into consideration by the courts, especially when infants or toddlers are involved.<sup>46,47</sup> It is supported by many that such vulnerable ages require a constant maternal presence, and that motherhood should be prioritised over fatherhood. This is based on the idea that '*women, but not men, are biologically wired to care for their babies, by virtue of having generally larger orbitofrontal cortexes and enhanced capacities for nonverbal communication and empathy*'.<sup>48</sup> However, it is the writer's opinion that such arguments no longer have substantial grounds today. Instead, in an attempt to revive outdated views about women's role in society, and alienate fathers from paternity, the tender years doctrine is brought back in disguise by relying on anatomical and sentimental arguments that prove nothing.

According to research, actually, there has been no evidence to suggest that the introduction of regular and frequent involvement of fathers, as well as over-night stays in their house post

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<sup>45</sup> Ioannis Valmantonis, *Joint custody and best interests of the child*, p. 87.

<sup>46</sup> Ioannis Valmantonis, *Ibid*, p. 87.

<sup>47</sup> Laura Bernardi and Dimitri Mortelmans, eds., *Shared Physical Custody: Interdisciplinary Insights in Child Custody Arrangements*, 2021, p. 43.

<sup>48</sup> Richard A. Warshak, "Social Science and Parenting Plans for Young Children: A Consensus Report", *Psychology, Public Policy, and Law*, 20(1), 2014, p. 56.

parental separation, cause any detrimental effects to infants and toddlers.<sup>49,50</sup> Full-time maternal nurturing has been proven to not be indispensable for children to develop normally, especially when the father is the one taking care of them in the mother's place.<sup>51</sup> In fact, studies have shown that in comparison to children in families with only one dominant care giver, children in shared parenting plans develop fewer social or behavioural problems.<sup>52</sup> Moreover, for toddlers aged between 2 and 3 years old, there were no significant differences in regard to sleep, anxiety or aggression issues. As for children of 4 to 6 years old who were in a shared parenting plan, they were associated with even more positive outcomes.<sup>53</sup> Conversely, any results that showed that toddlers who were alternating homes did not fare as well as children in sole custody regimes, were not linked to that specific parenting plan. Instead, these issues were associated with the parents' inconsistent and neglectful behaviour towards the children.<sup>54</sup> Thus, age must certainly not be the sole determinant factor when deciding about whether alternating custody should be applied.

### *iii. Parental conflict*

Evidently, joint physical custody presupposes parental cooperation. Dual-residence agreements cannot be properly applied if the parental parties are not willing to work together.<sup>55</sup> Their relationship, therefore, is an important parameter to consider, which determines, in many respects, the success of such arrangements. Although no spousal separation can be free of emotional complications, and although parental conflict is not a rare occurrence between separated partners, it is a parent's duty to not allow such conflict to influence the child. This duty derives directly from the institution of parental responsibility, which requires parents to exercise that right primarily according to their children's interests.

More specifically, the Greek courts have ruled that the parents' inability to come to a common agreement must not, in and of itself, negate the possibility of them exercising custody over their children jointly. It is the parental parties' responsibility – and duty – to find a way to ease the tension between them and put their differences aside to find some common ground in matters relating to their child. Any existing conflict, thus, must not prevent them from

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<sup>49</sup> Linda Nielsen, "Parenting Plans for Infants, Toddlers, and Preschoolers: Research and Issues", *Journal of Divorce and Remarriage*, 55(4), 2014, p. 330.

<sup>50</sup> Richard A. Warshak, *Ibid*, p. 56.

<sup>51</sup> Richard A. Warshak, *Ibid*, p. 50.

<sup>52</sup> Richard A. Warshak, *Ibid*, p. 323.

<sup>53</sup> Richard A. Warshak, *Ibid*, p. 321.

<sup>54</sup> Richard A. Warshak, *Ibid*, p. 329.

<sup>55</sup> Ioannis Valmantonis, *Joint custody and best interests of the child*, p. 88.

prioritising the child's interests over their own.<sup>56</sup> By the same token, any deliberate hindering of a child's relationship with the other parent may result in custody being withdrawn, as it amounts to bad exercise of parental responsibility.<sup>57</sup> Besides, in accordance with the relevant provisions of the various national Constitutions, **the institution of family is under the auspices of the state**,<sup>58</sup> which has an obligation to protect minor children not only against third parties, but also against their parents themselves, when their interests are threatened.

*iv. The child's interests and opinion*

Last but not least, the arrangement of alternating residence must serve the interests of the child. It must be assessed whether the children's interests are better protected *in concreto*, by taking into account all relevant circumstances of each case. The physical, mental and emotional availability of a parent towards their child is a crucial factor for the healthy upbringing of the child, and they must be guaranteed. What must also be assessed is whether a parent's lifestyle can negatively impact the child, for instance due to extremely long hours at work, or constant night working hours, which leave no time for quality time between the parent and the child. Parents who wish for joint physical custody to be applied in their case, thus, must ensure that they will be able to provide their children with the necessary time, care, attention and nurture. For that reason, and in order to strengthen parent-child relationships, social services, such as relationship counselling, parental support, marriage guidance and general mental health services, should be available to the parents. In regard to bird's nest parenting specifically, research suggests that ongoing psychological support should be offered to parents to mentally prepare them for it.<sup>59</sup> Finally yet importantly, the child, who is the main person concerned in such arrangements, must also be given the possibility to express their views on the matter, as will be discussed further in the next section.

### 3. Benefits

*i. Gender equality – Equality between the former spouses*

Joint physical custody is continuously winning acceptance. One of the main reasons why is obviously the changing parenting and childbearing practices that have been analysed priorly.

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<sup>56</sup> Judgment No. 3827/2023 of the Single Member Court of First Instance of Athens.

<sup>57</sup> Article 1532 paragraph 2(b) of the Greek Civil Code.

<sup>58</sup> Article 21 paragraph 1 of the Greek Constitution ; Article 41 of the Irish Constitution ; Article 29 of the Italian Constitution etc.

<sup>59</sup> Rafaela Lehtme and Karmen Toros, "Bird's nest parenting as a child-centered solution in the context of shared parenting", *The Child Welfare System: Perspective, Challenges and Future Directions*, 2019, p. 14.

Shared physical custody promotes the constitutional principle of gender equality,<sup>60</sup> following the marital dissolution, because it compels the parents to balance their personal and family life with their work life.<sup>61</sup> In fact, research has proven that in countries where joint physical custody through alternating residence is more common, mothers' employment opportunities are greater, and their labour force participation is higher.<sup>62</sup>

*ii. Better parent-child relationships*

Furthermore, studies have shown that children's communication with both their parents is considerably improved in families with dual-residence agreements compared to other broken families.<sup>63</sup> More specifically, the fact that the children spend periods of time living solely with one of their parents allows them to form ways of communicating with both of them, that are founded on patience and persistence, and are obviously significantly stronger than if they only saw each other during occasional meetings.

In addition to better communication, children's overall relationship with their parents are stronger and deeper when parents have a sufficiently extensive and regular interaction with them. This is especially true for father-child relationships.<sup>64</sup> Thus, through alternating residence, the participation of both parents in quotidian, yet important, aspects of a child's life, as for instance, bedtime, school, or extra-curricular activities, plays a significant role in the lives of their children and their development.<sup>65</sup>

*iii. Fewer psychological problems*

The active participation of the parents in their children's lives, despite the marital separation, greatly contributes to the children having fewer behavioural and psychological problems growing up, as will be analysed more in detail in the next section. It is worth mentioning that studies have also shown that children who lived with both their parents in dual-residence

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<sup>60</sup> See also Article 23 of the Charter of Fundamental Rights of the EU.

<sup>61</sup> Laura Bernardi and Dimitri Mortelmans, eds., *Shared Physical Custody: Interdisciplinary Insights in Child Custody Arrangements*, 2021, p. 2.

<sup>62</sup> Laura Bernardi and Dimitri Mortelmans, *Ibid*, p. 23, 286.

<sup>63</sup> Thoroddur Bjarnason and Arsaell Arnarsson, "Joint Physical Custody and Communication with Parents: A Cross-National Study of Children in 36 Western Countries", *Journal of Comparative Family Studies*, 2011, p. 886.

<sup>64</sup> Laura Bernardi and Dimitri Mortelmans, eds., *Shared Physical Custody: Interdisciplinary Insights in Child Custody Arrangements*, 2021, p. 24.

<sup>65</sup> Richard A. Warshak, "Social Science and Parenting Plans for Young Children: A Consensus Report", *Psychology Public Policy and Law*, 20(1), 2014, p. 59.

agreements present fewer psychiatric symptoms than children raised in single-parent households.<sup>66</sup>

Joint physical custody can also reduce divorce-related stress such as that of economic hardship.<sup>67</sup> After the partners' separation, each of them must finance a separate household. More particularly, limited financial resources have been documented as a negative factor for single-parent families.<sup>68</sup> Through dual-residence agreements, the actual cost of supporting a child is more likely to be equally divided between the parents, than if the non-residential parent covered child maintenance. In consequence, a heavy weight is oftentimes lifted off of single parents because expenses are split in half, as is the child's time in each household. Besides, alternating residence also grants parents periods of time where they do not have childcare responsibilities, giving them opportunities for rest or leisure activities.<sup>69</sup> Naturally, this elevates the quality of their life, which is then further projected in their children's lives, whilst also contributing to them forming better relationships.<sup>70</sup>

*iv. Parental cooperation*

Initial parental conflict between the parents may also be weakened through joint physical custody. The continual and necessary cooperation between the former partners can gradually lead to a decline in their disagreements. This has also been proven by a study conducted for the German Ministry of Justice, which depicts that joint custody – both physical and legal – is more likely than sole custody to reduce tension between the parents and limit the negative effects of divorce on children.<sup>71</sup> Single parents may also find it hard to adequately supervise or monitor their children on their own,<sup>72</sup> thus reaching out to the other parent to help or advise them. Slowly, their cooperation may be enhanced; and the former partners may also agree to share certain parental responsibilities, resulting in even better communication between them.<sup>73</sup>

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<sup>66</sup> Marie Wadsby, Gisela Priebe & Carl Göran Svedin, "Adolescents With Alternating Residence After Parental Divorce: A Comparison With Adolescents Living With Both Parents or With a Single Parent", *Journal of Child Custody*, 11(3), 2014, p. 210.

<sup>67</sup> Thoroddur Bjarnason and Arsaell Arnarsson, *Ibid*, p. 885.

<sup>68</sup> Marie Wadsby, Gisela Priebe & Carl Göran Svedin, "Adolescents With Alternating Residence After Parental Divorce: A Comparison With Adolescents Living With Both Parents or With a Single Parent", *Journal of Child Custody*, 11(3), 2014, p. 212.

<sup>69</sup> Laura Bernardi and Dimitri Mortelmans, eds., *Shared Physical Custody: Interdisciplinary Insights in Child Custody Arrangements*, 2021, p. 24.

<sup>70</sup> Thoroddur Bjarnason and Arsaell Arnarsson, *Ibid*, p. 885.

<sup>71</sup> Page 6 of *R.W and C. T.G.-W. v. Austria* (ECtHR), Application no. 36222/97, decision of 22 November 2001.

<sup>72</sup> Thoroddur Bjarnason and Arsaell Arnarsson, *Ibid*, p. 871.

<sup>73</sup> Thoroddur Bjarnason and Arsaell Arnarsson, *Ibid*, p. 885.



v. *Conclusions*

Thus, as it is clear from the above, there is no evidence proving that alternating residence arrangements are less stable than single-parent households. On the contrary, actually, joint physical custody appears to provide a significantly more stable environment for children, who are not deprived of any of their parents. Through the parents' frequent and consistent care, children have equal opportunities to create strong bonds with both of them, which results in them enjoying more stability and emotional balance.<sup>74</sup> Evidently, the fact that certain parents lack the basic necessary skills of parenting, must not negate the positive results that have been proven and analysed in this chapter.

### **III. PARENT-CHILD RELATIONSHIPS UNDER EUROPEAN UNION LAW AND THE MEMBER STATES**

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#### **A. European family law**

In terms of European Union law, the Union has a limited role in family affairs. According to the principle of conferral, the Union acts only within the limits of the competence that its Member States have conferred upon it in the Treaties.<sup>75</sup> Competences not conferred upon the EU remain fully with the Member States.<sup>76</sup> Thus, each Member State has its own rules about separation, divorce, maintenance of spouses and children, custody and other family law matters.

Nonetheless, the EU's objective of constituting an area of freedom, security and justice, allows it to legislate accordingly, in order to promote judicial co-operation in civil matters having cross-border implications. More precisely, through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters, it ensures the cross-border implementation of national courts' custody and access orders.<sup>77</sup> To that end, several legal acts dealing with judicial co-operation have been developed, as is for instance Council Regulation 2019/1111 (Brussels IIb). These are based on the fundamental principle of mutual trust, according to which, decisions of a Member State relating to matrimonial matters and to matters of parental responsibility are to be recognised in the other Member States without the need for any

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<sup>74</sup> Richard A. Warshak, "Social Science and Parenting Plans for Young Children: A Consensus Report", *Psychology, Public Policy, and Law*, 20(1), 2014, p. 50.

<sup>75</sup> Article 5 of the Treaty on European Union.

<sup>76</sup> See also Articles 2-6 of the Treaty on the Functioning of the European Union.

<sup>77</sup> Article 3(2) of the Treaty on the European Union ; Articles 67(1)(4) of the Treaty on the Functioning of the European Union, Recitals 3 and 4 of Council Regulation (EU) 2019/1111.

recognition procedure.<sup>78</sup> Consequently, EU law does not mandate *who* is entitled to have child custody, but it does have rules aiming at ensuring that custody orders issued in one Member State can be put into effect in another.

According to the aforementioned Regulation, which replaced Council Regulation (EC) No 2201/2003 (Brussels IIa),<sup>79</sup> ‘*parental responsibility*’ means *all 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.*’ The provision also asserts that the right of custody and the right of access to the child are included in the term.<sup>80</sup>

Lastly, in an endeavour to harmonise family law throughout Europe, the Commission on European Family Law (CEFL) was formed in 2001 by an international group of scholars. In order to contribute to the prospect of European integration, the CEFL created a set of common principles in the area of family law, based on the domestic legislations of the European states. Predominantly, these principles emphasise the importance of promoting and safeguarding the welfare of the child, by explicitly stipulating the rights of a child to be heard, to be autonomous, and to be taken as the primary consideration in all matters concerning parental responsibilities.<sup>81</sup>

In fine, following the foregoing analysis, one can easily see that the concept of parental care is dramatically differentiated today, compared to how it used to be. It has evolved from a pure authority belonging to the father, into an institution granting not only rights but also obligations to the parental parties.

## **B. Child custody law in various Member States of the European Union**

Joint custody is on a steep rise in the Member States of the European Union. In this respect, three national legal orders will be detailed below.

### **1. Greece**

#### *i. Current legislative framework and ancillary role of the court*

Pursuant to the Greek Civil Code, parental care comprises three separate aspects. These are the custody of the child, the administration of their property and their representation regarding any

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<sup>78</sup> Recitals 54 and 55 of Council Regulation (EU) 2019/1111. See also paragraphs 168, 191 and 194 of *Opinion 2/13 of the Court* ; paragraph 34, *Slowakische Republik v Achmea BV*, C-284/16.

<sup>79</sup> Recital 1 of Council Regulation (EU) 2019/1111.

<sup>80</sup> Article 2 paragraph 2(7) of Council Regulation (EU) 2019/1111.

<sup>81</sup> Principles of European Family Law regarding Parental Responsibilities.

matter, legal or not, concerning the children themselves or their property.<sup>82</sup> Furthermore, the provision clarifies that it constitutes both a duty and a right of the parents. Its exercise is intended to satisfy primarily not the latter's interests, but the interests of the child.<sup>83</sup> As has been stated above, the child's interests are essentially the guidelines and the general criterion determining how parental care must be exercised.<sup>84</sup> In all situations where the child's interests conflict – even indirectly – with the manner in which parental responsibility is carried out, such exercise of parental care must be regarded as abusive.<sup>85</sup>

Since the reform of Family Law of 2021, with the passing of Law 4800/2021, the Greek Civil Code states explicitly that parents exercise parental care, not only jointly, but also equally.<sup>86</sup> This provision is mandatory and is applicable also after the parental parties' divorce, separation, dissolution of their registered partnership, or their cohabitation breakdown.<sup>87,88</sup> In practice, this means that the child may live with both parents in an alternating residence agreement. The parent with whom the child is residing at a given time, is entrusted with the quotidian acts concerning the child and their property, as well as with all acts of urgent nature, after having previously informed the other parent.<sup>89</sup>

The biggest advancement and change that the recent reform brought to the Greek judicial practice, as well as to the Greek society in general, is the ancillary role of courts in child custody matters. According to the new provision of Article 1513 of the Civil Code, the right of both parents to have custody of their children remains unaltered after their separation. The legislator established that, henceforth, joint custody is to be the rule. Parents can deviate from that rule only if they agree to regulate parental care differently. More specifically, they can decide to distribute parental care temporally or functionally between them. The agreement must be done in writing, and it must also regulate the parents' regular communication with the child.<sup>90</sup>

It follows that parents can only resort to the courts if they have fruitlessly attempted to solve their differences through mediation first. The new provisions clearly depict that the legislator

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<sup>82</sup> Article 1510 paragraph 1 passage (b) of the Greek Civil Code.

<sup>83</sup> In Greek this is referred to as a 'function right', meaning that in exercising that right the parent is also performing a duty, an obligation.

<sup>84</sup> Georgiadis, *Οικογενειακό Δίκαιο [Family Law]*, 3<sup>rd</sup> edition, 2022, p. 623, n. 36. See also Article 1511 paragraph 1 of the Greek Civil Code.

<sup>85</sup> Georgiadis, *Manual in Family Law*, 3<sup>rd</sup> edition, 2023, p. 405, n. 2.

<sup>86</sup> Article 1510 paragraph 1 passage (a) of the Greek Civil Code.

<sup>87</sup> Article 1513 passage (a) of the Greek Civil Code.

<sup>88</sup> Cohabitation obviously refers to parents who have had children out of wedlock, who are treated the same way as children born within wedlock, in accordance with Article 1515 of the Greek Civil Code.

<sup>89</sup> Articles 1513 and 1516 paragraph 1 subparagraph 2 of the Greek Civil Code.

<sup>90</sup> Article 1514 paragraph 1 of the Greek Civil Code.

aims to prioritise the child's interests, which are generally better served when both parents have an active role in the child's life.<sup>91</sup> It is mandated that parents must make the necessary efforts to find mutually acceptable decisions when they exercise their right to parental responsibility.<sup>92</sup>

*ii. Communication rights*

In case alternating residence has not been agreed upon by the parents, they still exercise custody over their children jointly. More particularly, the parent with whom the child does not reside maintains extensive communication rights, under Article 1520 of the Civil Code. The right of personal communication between the parent and the child is a crucial element of the healthy development of the child's personality. Moreover, it constitutes a separate parental right *and* obligation towards the child,<sup>93,94</sup> deriving from the mere blood bond between the parent and the child.<sup>95</sup>

The right of communication includes all physical contact and communication through telephone or messages, as well as the child's occasional stay in the non-resident parent's home. As mentioned above, the communication between the child and the non-resident parent is mandatory. In this respect, the law sets a rebuttable presumption that physical contact amounts to one third (1/3) of the child's time (essentially meaning that they spend together 10 days per month).<sup>96</sup> Nevertheless, one may wonder how the actual time that the child spends with their non-resident parent can be 'presumed', given that it is something that can easily be proven. Clearly, the presumption indicates the time that the two of them should spend together, in order to ensure the substantial contribution of the non-resident parent to the development of the child's personality.<sup>97</sup>

In any case, the resident parent must facilitate and encourage the child's communication with the other parent, on a regular basis.<sup>98</sup> Communication, in this respect, means that the parents

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<sup>91</sup> Georgiadis, *Manual in Family Law*, p. 410-411, n. 15.

<sup>92</sup> Article 1512 of the Greek Civil Code.

<sup>93</sup> The right of communication is by itself a 'functional' right, meaning that it must be exercised primarily in accordance with the child's interests, instead of those of the parent.

<sup>94</sup> Georgiadis, *Manual in Family Law*, p. 452, n. 21 ; Valmantonis, *Joint custody and best interests of the child*, p. 106.

<sup>95</sup> Judgment No. 255/2011 of the Greek Supreme Court [Areios Pagos], Civil department A1, *Elliniki Dikaosini [Greek Justice]*.

<sup>96</sup> Article 1520 of the Greek Civil Code.

<sup>97</sup> Kimon Saitakis, *Τα πρώτα νομολογιακά πορίσματα σε σχέση με τη νέα ΑΚ 1520 (δικαίωμα επικοινωνίας του γονέα)*, [The first jurisprudential findings in relation to the new Article 1520 of the Civil Code (a parent's right of communication)], 2022.

<sup>98</sup> Article 1520 paragraph 1 passage (b) of the Greek Civil Code.

should exert themselves to be able to participate in their children's world, by listening and protecting their feelings, vulnerabilities and secrets.<sup>99</sup>

*iii. Distinction from 'temporal distribution of parental responsibility' and the 'functional distribution of parental responsibility'*

The new regime provided parents with the opportunity to split parental care between them, in deviation of the rule of the joint exercise. This distribution of parental care can be either temporal, through shared time agreements, or functional.<sup>100</sup> The temporal distribution of the exercise of parental responsibility, thus, must be distinguished from joint physical custody, despite certain similarities. As has been analysed above, under an alternating residence arrangement, the parental parties continue to exercise the custody of the child together and equitably, even though the latter's time at home is split between two households.<sup>101</sup> This means that all decisions concerning the child are taken by both parents, through cooperation and mutual consent.<sup>102</sup> Obviously, due to the fact that the parents no longer reside together in the marital home, and due to the plethora of decisions that parents must make about their children on a daily basis, the other parent cannot be informed about every single one of them, as that would inevitably result in constant communication between the two former partners, and may eventually cause points of friction.<sup>103</sup> For instance, decisions about the child's daily diet do not have to be the product of a common consensus between the parents. Nonetheless, the parent with whom the child does not reside at a given moment, must be relatively aware about most things regarding the child. In addition to the quotidian non-important acts that the resident parent is in charge of, they can also decide by themselves about matters of urgent nature (e.g. a sudden hospital visit due to a child's illness).

On the other hand, when the exercise of parental responsibility has been temporally split between the two parents, which can be decided by the parents or be ordered by the court, the parent with whom the child resides at a certain point, is the one responsible for all matters and decisions relating to them.<sup>104</sup> This is a form of distribution of the exercise of parental care, in which the parents alternately exercise it periodically, whilst the child switches between their two households. During the child's stay with each parent, the latter exercises parental

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<sup>99</sup> Valmantonis, *Joint custody and best interests of the child*, p. 105.

<sup>100</sup> Article 1514 paragraph 3(a) of the Greek Civil Code.

<sup>101</sup> Nathalie Massager, Carine De Buck, *Être parents et se séparer : Regards croisés d'une avocate et d'une pédopsychiatre*, 2007, p. 70.

<sup>102</sup> Valmantonis, *Joint custody and best interests of the child*, p. 79.

<sup>103</sup> Georgiadis, *Manual in Family Law*, p. 425, n. 42.

<sup>104</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 224, n. 488.

responsibility alone, including acts of custody for all matters. This means that child custody is exercised almost autonomously by each parent during certain periods of time.<sup>105</sup> Therefore, despite children alternating between their parents' households under both arrangements, the striking difference between the two is that when parental responsibility has been temporally distributed between the parental parties, they do not share the child's custody. Instead, each one of them is responsible to care and decide for all matters concerning the child during the time that they live together.<sup>106</sup> Nevertheless, the legislator has mandated that even when parental responsibility is exercised solely by one of the parental parties, matters that fall within the core of the concept of child custody, must be decided upon by both parents.<sup>107</sup> This provision establishes an exception for matters having long-term and decisive effects in the child's life and wellbeing, such as their name, religion, health and educational matters.<sup>108</sup>

The Greek legislation also regulates the functional distribution of parental care.<sup>109</sup> Similarly to the temporal distribution of parental care, the functional distribution allocates the exercise of the various aspects of parental care between the parental parties. For instance, one of the parents may be responsible solely for the administration of the child's property, whereas the other parent is responsible for the child's custody and legal representation. By the same token, a functional allocation of specific aspects of the right of custody can also be agreed, meaning that one parent may be solely responsible for all school-related matters, whilst the other parent handles the rest.<sup>110</sup>

#### *iv. Previous legislative framework and comparison*

Under the previous regime, which was put in force in 1983, parental care was primarily given to the mother, following the parents' divorce or separation. At the time, the relevant provisions were considered to be strongly liberal and characterised by a feminist approach.<sup>111</sup> More specifically, Law 1329/1983 abolished the anachronistic omnipotence of the father (and husband) over his family, and replaced it by the notion of parental care, denoting that it constitutes a right to be exercised by both parents, according to the child's interests. The

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<sup>105</sup> Georgiadis, *Manual in Family Law*, p. 429, n. 48.

<sup>106</sup> Lekkas, *Ibid*, p. 224, n. 488.

<sup>107</sup> Lekkas, *Ibid*, p. 224, 238-240, n. 488, 523-529.

<sup>108</sup> Article 1519 paragraph 1 of the Greek Civil Code

<sup>109</sup> Article 1514 paragraph 3(a) of the Greek Civil Code.

<sup>110</sup> Georgiadis, *Manual in Family Law*, p. 429, n. 48.

<sup>111</sup> Valmantonis, *Joint custody and best interests of the child*, p. 4.

changes were groundbreaking and ahead of their time – not only for Greece but for many other European countries – reflecting the constitutional enshrinement of gender equality.<sup>112</sup>

Following the spouses' divorce, the law mandated that the exercise of parental care was decided upon by the court, whilst the interests of the child remained the sole criterion. It was in the court's discretion, thus, to determine who should exercise parental care, with no normative guidelines from the legislator, except that parental care *may* be awarded to one parent, unless both parents agreed to exercise it jointly. In reality though, this allowed the Greek courts to exhibit a clear maternal preference, seeing as the only way custody could be awarded to both parental parties jointly was if they consented to it, and simultaneously agreed on the child's place of residence. This practice evidently led to the curve shifting towards a new, very gynocentric regime. Court rulings where custody was granted to both parents were only exceptional.<sup>113</sup> Consequently, the single-parent model of household became the norm, resulting in an asymmetrical participation of the parents in the child's life. Under this regime, the mother had a leading role in the child's upbringing, whilst the father's role was only supporting, which oftentimes gradually led to alienation between him and his child.<sup>114</sup>

The preceding analysis of the current and previous child custody regimes of Greece, makes the legislator's headway evident. In 2021 there was a clear and intentional shift towards the idea that both parents should and must be equally involved in the upbringing of their children. In fact, this involvement must be constant and immediate, as the presence of both parents in a child's life has direct and significant impact on the latter's wellbeing. Furthermore, the secondary position of the court in the new regime is also obvious in the new provision of Article 1512 of the Civil Code, which requires that the parental parties strive to find mutually acceptable solutions. In contrast, according to the previous provision of said Article, the court was responsible to solve any disagreement between the parental parties relating to the child. This is significant as it depicts, once again, the importance and seriousness of the institution of parental responsibility, and how it must be exercised in a way that primarily favours the child.

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<sup>112</sup> Valmantonis, *Ibid.*, p. 4 ; Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 29, n. 56.

<sup>113</sup> Valmantonis, *Joint custody and best interests of the child*, p. 6.

<sup>114</sup> Valmantonis, *Ibid.*, p. 7.

## 2. France

### *i. Evolution of child custody laws*

In contrast to Greece, where family law reforms have been especially gradual and rare, the French regime has undergone several significant changes in the last decades. As aforementioned, prior to 1970, paternal power (*puissance paternelle*), which had been established by the Napoleonic Code of 1804, gave to the father, the '*chef de famille*', an analogous power to the *patria potestas* of the Roman *pater familias*. Following the passing of Law No. 70-459, parental authority (*autorité parentale*) was enacted, replacing the old patriarchal system regulating parent-child relationships, and establishing the mother's role in the upbringing of children.<sup>115</sup>

Moreover, through the Malhuret law of 1987, joint parental responsibility was extended to unmarried and divorced couples.<sup>116</sup> Although the judge's intervention was still necessary, in order to determine the child's habitual residence, these provisions were an important step forward, clearly reflecting the principle of equality between the two sexes, which had been enshrined in international treaties and constitutions more than half a century.<sup>117</sup> In 1993, the joint exercise of parental responsibility by the parents was established in principle. However, certain conditions still prevented it from being applied as a rule. Ultimately, it was Law No. 2002-305 of 2002, which institutionalised joint parental custody ('*co-parentalité*'). The law sought to address two issues. On one hand, it aimed to ensure equality between children born within or out of wedlock, according no importance on the marital status of their parents, overcoming the conditions that were previously set. On the other hand, it sought to strengthen the principle of co-parenting, according to which it is in the child's best interest to be raised by both their parents, even when they have been separated. It was mandated that, barring exceptional circumstances, children had the right to maintain personal relations with their parents.<sup>118</sup> In addition, arrangements of alternating residence were introduced.<sup>119</sup> The new provisions responded to the rising demand for an equitable participation of both parents in the upbringing of their child and the demand for equality between the former partners.<sup>120</sup>

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<sup>115</sup> Pierre Murat, *Droit de la famille*, 5<sup>th</sup> edition, 2010, p. 776, n. 232.11.

<sup>116</sup> French Law No. 87-570 of 22 July 1987.

<sup>117</sup> See also Article 14 of the of the European Convention on Human Rights ; Article 23 of the Charter of Fundamental Rights of the European Union.

<sup>118</sup> Pierre Murat, *Droit de la famille*, p. 776, n. 232.11.

<sup>119</sup> Article 373-2-9 of the French Civil Code.

<sup>120</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 75, n. 149. See also Article 5 of Protocol 7 of the ECHR.



ii. *The interconnection of parental responsibility and the child's interests*

The French Civil Code defines parental authority as the parents' collection of rights and duties aiming to promote the child's interests (*l'intérêt de l'enfant*). The law further specifies that it concerns minor children's safety, health, private life, education and personal development.<sup>121</sup> Through this definition, it is evident that the legislator aimed to emphasise the functionality of the right and duty of parental responsibility, which is no other than the protection of the child and their interests.<sup>122</sup> More particularly, parental authority is a function of the public order (*une fonction d'ordre public*), and the innate obligation of parents to satisfy their children's rights and needs, which constitute the cornerstone of the child custody laws.<sup>123</sup>

The French Civil Code clearly depicts the primary role of the child's interests in several other provisions. More specifically, according to Article 371-4, a child's particular interests may be the sole reason why their right to maintain personal relationships with their parents is restricted. Furthermore, the importance of sibling relationships – as they will be analysed in the next section of this paper – is also stipulated in the law, which states that siblings must not be separated from each other, unless their interests call for another solution. What's more, depending on the children's age and degree of maturity, parents must involve them in the decision-making process of matters that concern them.<sup>124</sup>

iii. *Exercise of custody and parental responsibility*

Parents exercise their right to parental care jointly. The event of their separation does not affect this rule.<sup>125</sup> In this regard, they also bear an obligation to promote the strengthening of the child's relationship with the other parent, provide for their education and prepare them for their future.<sup>126</sup>

Parental care is comprised of numerous attributes. The most significant of those is the right to physical custody (*garde*), which gives the parent the power to decide on the place of residence of the child, as well as the power to demand that the child actually resides there.<sup>127</sup> When the parental parties share the parental responsibility, the right to physical custody belongs to both of them, resulting in the children alternating between their parents' homes on a regular basis.

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<sup>121</sup> Article 371-1 alinea 1 and 2 of the French Civil Code.

<sup>122</sup> Patrick Courbe, *Droit de la famille*, 2<sup>nd</sup> edition, 2001, p. 396, n. 1011.

<sup>123</sup> Pierre Murat, *Droit de la famille*, p. 778-779, n. 232.16, 232.17.

<sup>124</sup> Article 371-1 alinea 4 of the French Civil Code.

<sup>125</sup> Article 372 of the French Civil Code.

<sup>126</sup> Article 213 of the French Civil Code.

<sup>127</sup> Pierre Murat, *Droit de la famille*, p. 780, n. 232.31.

The right of surveillance of a child is also included in parental care, along with the right – and duty – to promote the child’s education, whether it be academic, professional, moral, religious or political.<sup>128</sup>

The principle of equality between the parents governs parental responsibility in France. This means that all decisions concerning the child must be taken by both parents. Furthermore, with regard to third parties, each parent is presumed to act with the agreement of the other, when they perform a usual act of parental authority in relation to the person of the child, alone.<sup>129</sup> A usual act is defined as a decision that concerns the child’s quotidian life. However, it is specified that it cannot diverge from past similar acts, and it cannot involve the child’s future.<sup>130</sup>

*iv. Delegation of the exercise of parental responsibility*

The French Civil Code also provides for the possibility of parental care to be delegated to another person (*délégation de l’autorité parentale*), as a way to ensure the fulfilment of a child’s needs. The paedocentrism of the legislation is evident through this mechanism. More specifically, under Article 377 of the Civil Code, one or both parents may transfer, partially or completely, their parental rights to a third party, a family member, a trustworthy relative, an approved institution for the care of children or a departmental child welfare service. The delegation may be initiated by the parents voluntarily, or by the court, in case of neglect or inability on behalf of the parents to exercise their parental rights in a way that favours the child, or in case a parental party commits a crime. Therefore, the delegation is always done with the best interests of the child as the primary consideration. It is the courts’ competence and duty to assess whether the child’s needs will be better served that way, by taking into account the parental parties’ behaviour towards them, and the child’s overall living conditions and relationship with the parents.

**3. Germany**

*i. Child custody as a functional right*

The strong functional and institutional aspect of parental responsibility is made obvious in the German Constitution, the Basic Law for the Federal Republic of Germany, which states that the care and upbringing of children is the natural right of parents, and a duty primarily conferred upon them. Furthermore, the same provision highlights the societal purpose and importance of

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<sup>128</sup> Pierre Murat, *Droit de la famille*, p. 781, n. 232.40, p. 787, n. 232.71.

<sup>129</sup> Article 373-2 of the French Civil Code.

<sup>130</sup> Pierre Murat, *Droit de la famille*, p. 793, n. 232.171, 232.172.

parental responsibility, stipulating that the state shall be watching over parents in the performance of this duty.<sup>131</sup> Similarly, the German Civil Code defines parental care as being comprised of the obligation and the right of the parents to care for their minor children. They have the obligation and the right to nurture and supervise their children, determine their residence and take care for their property.<sup>132</sup>

As in the legislations that have been discussed above, the fundamental principle regulating parental care is the child's interests (*Kindeswohl*). In that respect, parents must discuss with their children all matters relating to their care, and consult them, in accordance with their degree of maturity. Whilst in case of disagreement between the parental parties concerning matters related to the child's custody and overall upbringing, they have an obligation to strive to find a commonly accepted solution.<sup>133</sup>

*ii. Exercise and evolution of the right to custody*

The joint exercise of parental care by the parents is established as the rule when a child is born within wedlock. This remains the case even after the separation or divorce of the parental parties. In regard to children born out of wedlock, the law stipulates that parents may submit a custody declaration to the Youth Welfare Office, even prior to the child's birth, stating that they wish to exercise custody jointly. In contrast, when the parental parties are not in agreement for the submission of such a declaration, the father may apply to a Family Court for joint custody. In the majority of cases, the application is approved on the basis that the interests of the child call for the participation of both parents in their lives. So, unless it is inconsistent with a child's best interests in a particular case, joint parental custody is granted.

What is noteworthy is that until the reform of 2013, the mother had the right to refuse the judicial ruling awarding custody to the father as well. The relevant provision had been met with scepticism and had received criticism due to the difference in treatment that it entailed.<sup>134</sup> More specifically, it raised concerns about its compatibility with the right to protection of one's family life and the prohibition of discrimination, protected under Articles 8 and 14 of the European Convention on Human Rights accordingly. The different provisions for children born within wedlock and those born outside, resulted in an obvious violation of the principle of

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<sup>131</sup> Article 6 of the Basic Law for the Federal Republic of Germany.

<sup>132</sup> Article 1631(1) of the German Civil Code.

<sup>133</sup> Articles 1626(3) and 1627 of the German Civil Code.

<sup>134</sup> *Zaunegger v. Germany* (ECtHR), Application no. 22028/04, judgment of 3 December 2009.

equality between them, enshrined in the Basic Law for the Federal Republic of Germany under Article 6(5).<sup>135</sup>

Notably, the non-affection of legal parent-child relationships due to the parental parties' divorce was legislated in 1997. Nevertheless, because the former spouses do not reside together anymore, the law requires that in order for shared custody to be exercised between them, they must be in agreement regarding the important matters that concern the child, which play a leading role in their life. Amongst those decisions is the agreement about the child's habitual residence. The parent with whom the child does not reside in a quotidian basis has extended communication rights. Whereas the resident parent is responsible for all decisions concerning the child's every-day life, having no severe impact in the development of the child's personality and overall life. However, dual-residence agreements concerning the child are also provided by the law and have become increasingly common. In contrast, the bird's nest parenting plan is not as prevalent.<sup>136</sup>

### *iii. Exception from 'parental' care*

Lastly, in a similar way to France's mechanism of delegation of parental care, the German legislature does not maintain such a strong focus on the two-parent model. Instead, in cases where only one of the parental parties has been granted custody rights, their spouse (who is not a parent of the child) may legally participate in decisions relating to the child's daily life, if the custodial parent consents to it.<sup>137</sup> This is an exception to the prosopocentrism that encompasses parental responsibility in general, as a right and duty of the parents towards their children.

## **IV. EUROPEAN CONVENTION ON HUMAN RIGHTS**

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The Council of Europe has laid down principles regulating parental care, child custody and their exercise. Parental responsibility and the right to custody form part of the broader right to respect for private and family life, as that is enshrined and protected in Article 8 of the European Convention on Human Rights (ECHR or the Convention). According to the European Court of Human Rights (ECtHR or the Court), the right to parental care is primarily a child's right and a parent's duty; only under specific circumstances does it constitute a parent's right as well.<sup>138</sup>

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<sup>135</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 38-39, n. 80.

<sup>136</sup> Lekkas, *Ibid*, p. 39, n. 81.

<sup>137</sup> Article 1687b of the German Civil Code.

<sup>138</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 66, n. 135.

### **A. Article 8 of the European Convention on Human Rights – Right to respect for family life**

Pursuant to Article 8 of the ECHR, everyone has the right to respect for their private and family life. The second paragraph of the same article contains the limitations imposed on the right to respect for private and family life, meaning that even if, in principle, the applicant's right has been violated, the interference is justified. These provisions are the legal basis upon which the Court relies, in order to assess whether a violation of one's right to family life has occurred. More specifically, paragraph 2 states that '*there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*'. Thus, any limitation to the right to respect for family life is justified if all the impugned measures have a basis in the legal order of a Contracting State, they pursue a legitimate aim (as those are explicitly mentioned in the provision) and are necessary in a democratic society. The notion of necessity implies that the interference by the public authority corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.<sup>139</sup> In this respect, an objective standard has to be applied, irrespective of whether the public authority's acts were implemented in good faith.<sup>140</sup>

The Convention does not define what 'family life' entails. However, in the interest of the coherence of the Convention as a whole, and pursuant to the principle of autonomous concept, the notions of 'family' and 'family life' used in the Convention have an independent meaning.<sup>141</sup> Namely, they are interpreted by the Court in a different way compared to the meaning they hold in the national legislations of the Contracting States. Thus, it is through the Court's case-law that these two notions are explained and clarified.

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<sup>139</sup> *Olsson v. Sweden (No. 1)* (ECtHR), Application no. 10465/83, judgment of 24 March 1988, paragraph 67 ; *Cernecki v. Austria* (ECtHR), Application no. 31061/96, decision of 11 July 2000, page 5.

<sup>140</sup> *Olsson v. Sweden (No. 1)* (ECtHR), paragraph 82.

<sup>141</sup> George Letsas, *The Truth in Autonomous Concepts: How To Interpret the ECHR*, *European Journal of International Law*, 15(2), 2004, p. 282-283 ; Rachele Zamperini, "Establishing Parenthood through Adoption and Surrogacy: A Test Case for the ECtHR Use of the Best Interests of the Child Principle", *Family & Law*, 2024, p. 5.

The Court has reiterated that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life.<sup>142</sup> By the same token, domestic measures hindering this enjoyment amount to an interference with the right protected by Article 8 of the Convention.<sup>143</sup> This applies even if the relationship between the parental parties has broken down. Both the parents and their children maintain the same right to enjoy each other's company.<sup>144</sup>

According to the ECtHR, Article 8 of the Convention also imposes a positive obligation on every State to aid in the reunification of a parent with their child. This '*positive obligation under Article 8 includes a right for parents to measures that will enable them to be united with their children*'.<sup>145</sup> However, the national authorities' obligation to put such measures into effect is not absolute. The interests and the rights and freedoms of all concerned must be taken into account in the process, whilst giving all the more attention to what the best interests of the child are in each particular case. Where contact with the parent might appear to threaten or conflict with those rights, national authorities must strike a fair balance between them.<sup>146</sup>

## **B. Right to joint custody, in light of the jurisprudence of the European Court of Human Rights**

Prior to the advent of joint custody, time spent between the non-custodial parent and their child was oftentimes very limited. The ECtHR has consistently held that the right to family, as it is enshrined in Article 8 of the ECHR, encompasses contact and visiting rights.<sup>147</sup> In this respect, States must take the necessary measures in order to secure the exercise of the non-custodial parent's contact rights. Appropriate measures must be taken to make the full exercise of the contact rights possible and ensure the establishment of a meaningful relationship between the parent and their child.<sup>148</sup> On this account, failure to secure such contact – unless that is

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<sup>142</sup> *K. and T. v. Finland* (ECtHR), Application no. 25702/94, judgment of 12 July 2001, paragraph 151 ; *Kutzner v. Germany* (ECtHR), Application no. 46544/99, judgment of 26 February 2002, paragraph 58 ; *Diamante and Pelliccioni v. San Marino* (ECtHR), Application no. 32250/08, judgment of 27 September 2011, paragraph 170.

<sup>143</sup> *Johansen v. Norway* (ECtHR), Application no. 17383/90, judgment of 27 June 1996, paragraph 52 ; *K. and T. v. Finland* (ECtHR), Application no. 25702/94, judgment of 12 July 2001, paragraph 151.

<sup>144</sup> *Kosmopoulou v. Greece* (ECtHR), Application no. 60457/00, judgment of 5 February 2004, paragraph 47.

<sup>145</sup> *Karadzic v. Croatia* (ECtHR), Application no. 35030/04, judgment of 15 March 2006, paragraph 52 ; *Hokkanen v. Finland* (ECtHR), Application no. 19823/92, judgment of 23 September 1994, paragraph 58.

<sup>146</sup> *Sahin v. Germany* (ECtHR), Application no. 30943/96, judgment of 8 July 2003, paragraph 66 ; *Sommerfeld v. Germany* (ECtHR), Application no. 31871/96, judgment of 8 July 2003, paragraph 64 ; *Buchs v. Switzerland* (ECtHR), Application no. 9929/12, judgment of 27 May 2014, paragraph 51.

<sup>147</sup> Nigel Vaughan Lowe, "A study into the rights and legal status of children being brought up in various forms of marital and non-marital partnerships and cohabitation", Europe Council, 2008, p. 10 ; Article 4 of the 2003 Convention on Contact Concerning Children of the Council of Europe.

<sup>148</sup> *Giorgioni v. Italy* (ECtHR), Application no. 43299/12, judgment of 15 September 2016, paragraphs 75-76.

imperative due to specific circumstances – conflicts with the general principle of the best interests of the child, who deprived of one of their parents for no apparent reason.<sup>149</sup>

On the opposite end of the spectrum, the Court has ruled in a plethora of cases that the joint custody does not, in actuality, constitute a *right*. Etymologically, rights are *provided*, by a constitution, a statute, a regulation, a judicial precedent. A legal order *gives* rights to persons, who can then invoke them in courts of law, and which are enforceable by legal institutions. In that respect, according to the case-law of the ECtHR, States Parties have no obligation to *provide* parents with the possibility – so essentially the *right* – to share the custody of their children.<sup>150</sup>

More particularly, in the case of *R.W and C. T.G.-W. against Austria*<sup>151</sup> of 2001, the applicants agreed, following their divorce, to continue exercising joint custody over their son. According to Austrian law, though, settlements regulating the legal consequences of a divorce had to be approved by the court. Approval of the applicants' settlement was denied, on the ground that national law did not allow for shared custody of children after the parents' divorce, except if the former spouses maintained a common residence, which was not the case for the applicants.

In an appeal lodged by the parents, expert opinions were submitted by them to the court. The experts corroborated that joint custody would be preferable for the child's welfare, considering the strong bond each of the parents had with their son. The experts' conclusions were further strengthened by the fact that both of the applicants had voiced their desire, ability and willingness to care for their son together. Nevertheless, the appellate court dismissed their appeal, ruling that the Civil Code's wording was clear, and did not leave the interpretation of its provisions to their discretion. The applicants' second appeal to the Supreme Court of Austria also proved to be fruitless. The ruling was based on points of law.<sup>152</sup> In essence, one can conclude that even though in a particular case the best interests of the child call for the sharing of custody by the parents, unless they continue to live in a common household, joint custody is prohibited.

Moreover, in 1995 the specific provision of the Austrian Civil Code had been subjected to court proceedings before the Constitutional Court of Austria, which had affirmed the Supreme Court's constant case-law to eliminate the possibility for divorced parents to exercise custody

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<sup>149</sup> *Strumia v. Italy* (ECtHR), Application no. 53377/13, judgment of 23 September 2016, paragraphs 122-125.

<sup>150</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 67, n. 136.

<sup>151</sup> *R.W and C. T.G.-W. v. Austria* (ECtHR), Application no. 36222/97, decision of 22 November 2001.

<sup>152</sup> *R.W and C. T.G.-W. v. Austria*, p. 2-3.

of their child jointly, save they all lived together. In regard to the Convention, the Supreme Court found that the exclusion of such a possibility for divorced parents fell within the scope of the second paragraph of Article 8 of the Convention. It concluded that national legislators of the Contracting States had a margin of appreciation to decide on the measures ‘*considered necessary for the protection of the rights of others*’, alluding mainly to those of the children.<sup>153</sup> Furthermore, it considered the provision as proportionate, as the parent not having custody retained a number of rights, such as the right of access to the child, the right to be informed by the other parent about certain measures and the right to be heard within a reasonable time pertaining to certain important matters.

The applicants complained that the impossibility to obtain joint custody over their son after their divorce, in spite of them being willing to share the responsibility for him, is opposed to the latter’s interests. In that regard, they invoked Article 8 of the ECHR, claiming a violation of their right to respect for their family life, as well as that of their son. The divorcees also argued that Article 5 of Protocol No. 7 of the ECHR, laying down equality between spouses, had been breached. Regardless, the Court found the application inadmissible. It concluded that the ECHR imposes no obligation to the Contracting States to provide in their domestic law the possibility for parents to exercise custody over their children jointly after they dissolve their marriage.

What’s more, it must be noted that the application by the applicants was filed in 1997 and that the Court issued its ruling in November 2001. In the meantime, and more specifically on the 1<sup>st</sup> of July 2001, an amendment of the disputed provisions of the Austrian Civil Code entered into force, mandating that, henceforth, parents with minor children born in wedlock are allowed to exercise custody over them jointly.

Likewise, in the case of *Cernecki against Austria*<sup>154</sup> of 2000, the applicant and his wife agreed upon their divorce to share the parental responsibility and custody of their two daughters. In their settlement, they also agreed that the children would mainly reside with their mother, but the applicant would have extensive access rights. Their settlement was partly denied by the Austrian court, which awarded sole custody of the two daughters to the applicant’s ex-wife. In

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<sup>153</sup> *R. W and C. T.G.-W. v. Austria*, p. 3.

<sup>154</sup> *Cernecki v. Austria* (ECtHR), Application no. 31061/96, decision of 11 July 2000.



terms of the applicant's rights of access and maintenance obligations towards his daughters, the court endorsed the settlement.<sup>155</sup>

At first glance the two cases seem similar, though a distinguishing feature between them is the fact that at the time of issuance of the Court's decision regarding Mr. Cernecki's application, no amendment of the Austrian Civil Law had taken place. Additionally, Mr. Cernecki's complaint is based on the claim that he had been treated unequally compared to his former spouse, resulting in a breach of Article 5 of Protocol No. 7 of the ECHR. Namely, the national court had preferred the children's mother over him, to exercise sole custody over their daughters, despite the two former spouses having made a common proposal to the court to share that responsibility. Further, the applicant asserted that a general rule excluding any possibility to award joint custody to parents after divorce is not necessary in the interests of the children, within the meaning of the clause contained in the aforementioned provision of the ECHR Protocol.<sup>156</sup>

In its ruling the ECtHR held that the necessity clause contained in Article 5 of Protocol No. 7 of the Convention is to be interpreted in the same way as the necessity clause contained in other provisions of the Convention, including Article 8, meaning that the impugned interference must correspond to a pressing social need and be proportionate to the legitimate aim pursued. In determining the necessity of an interference, a margin of appreciation falling under the Court's supervision is left to the Contracting States. In that regard, the Court determines whether the reasons adduced to justify that interference are relevant and sufficient.<sup>157</sup>

In addition, the Court accepted the Austrian Government's argument that there is an apparent need to provide a clear solution for custody immediately upon divorce in all cases where the former spouses are unwilling or unable to exercise the custody of their children jointly. It maintained that, although some divorcees may have a genuine wish to share their children's custody at first, a subsequent change of circumstances may hamper their good understanding, resulting in the re-opening of custody proceedings. As a result, the children would be subjected to yet another change of their situation and would be put through a period of uncertainty, all of which would be even more emotionally challenging. Thus, considering that the applicant

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<sup>155</sup> *Cernecki v. Austria* (ECtHR), p. 2.

<sup>156</sup> Article 5 of Protocol No. 7 of the ECHR states that '*spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children*'.

<sup>157</sup> *Cernecki v. Austria* (ECtHR), p. 5.

retained certain parental rights, the Court concluded that such an interference is proportionate to the aim of primarily protecting the interests of the children.<sup>158</sup>

### C. Commentary

From the preceding analysis of the two decisions of the European Court of Human Rights, one can conclude that no *right to joint custody* can be derived from the European Convention on Human Rights, and more specifically, from Article 8. The Contracting States have been granted a certain margin of appreciation by the Strasbourg organs, allowing them to enjoy a certain power of discretion in fulfilling their obligations under the Convention.<sup>159</sup>

The fact that, in practice, the Austrian law did not prohibit parents who wished to share their parental rights after divorce from doing so, cannot be considered as a legitimate argument. Legal orders were created, in the first place, to regulate society and the relationships between the various subjects of law. In this regard, laws are put into place to establish standards, maintain order, resolve disputes and protect liberties and rights. The fact that, in their private lives, subjects of law – in this case, the parental parties – may agree to regulate their relationships after their separation in a different way, deviating from the rules set by the law, is not a valid reason to not provide them with the right to exercise the custody of their children jointly.

Furthermore, it is interesting to relate these decisions by the Court to this paper. The European Convention on Human Rights can be regarded as a pioneer in protecting and promoting human rights. Yet, the custody of a child, which is a fundamental aspect of one's basic human right to protection of their family life – whether it be the child's or the parent's – cannot be invoked with the Convention. In this regard, it is the writer's opinion that the margin of appreciation, which has been granted to the States Parties by the Convention, should be delineated, based on the generally accepted idea that it is more beneficial for children to grow up with both their parents. Thus, this possibility should be provided for by the law, regardless of the fact that in certain exceptional cases, it may not be the optimal solution.

Furthermore, due to joint custody not being available in certain legislations, or not being favoured by the courts,<sup>160</sup> fathers, who are usually set aside because of the maternal preference, may not initiate divorce, out of fear that they will lose their children. Obviously, the

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<sup>158</sup> *Cernecki v. Austria* (ECtHR), p. 6.

<sup>159</sup> *R.W and C. T.G.-W. v. Austria*, p. 3 ; *Cernecki v. Austria* p. 6.

<sup>160</sup> As was the case in Greece until the reform of 2022.

perpetuation of unhealthy parental relationships and family environments, results in increased friction and conflict between the parental parties, which, in turn, is substantially more detrimental to the child.<sup>161</sup>

Admittedly, many Western countries have adopted laws that promote shared parenting. However, a general consensus between all Contracting States of the ECHR has not yet been reached. Family law is especially linked to the traditions and customs of each state. Nevertheless, the promotion and protection of the interests of children should triumph over old customs and practices, and the stability and welfare of children should be put above all else.

Although the aforementioned cases are not very recent, they are indicative of the progress that has been made in several States Parties of the Convention, whilst for others, joint custody after parental divorce remains an exception. Lastly, and specifically in relation to the right to equality between spouses, enshrined in Article 5 of Protocol No. 7 of the Convention, it is the writer's opinion that it has been violated. More particularly, the domestic courts favoured the mother of the children over Mr. Cernecki, awarding her the custody of the girls, without any justification. It is especially interesting to note that, in both cases, all of the former partners were fit and willing to raise their children. Therefore, it cannot be concluded that this measure was necessary in the children's interest – as the above provision requires – leading to a difference in treatment based on gender, and thus to a breach of the principle of equal treatment.

## **SECTION B: THE BEST INTERESTS OF THE CHILD**

### **I. THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD**

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#### **A. The concept of the interests of a child**

##### **1. Nature of the principle of the child's best interests**

As has been stated previously, the primary criterion and consideration to be taken into account when deciding on a matter relating to the custody of a child and to the way parents exercise their right and duty of parental responsibility, is the best interests of the child. The child-centred nature of family law is depicted through this principle, which is the prevailing basis for determining custody. Ensuring the best interests of the child is the most distinct and superior social purpose of parental care, which denotes its highly functional and institutional character. In a quest for protecting children's interests, this principle has been institutionalised, reflecting

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<sup>161</sup> This position will be further explained below, in the next section of this dissertation.

the ideal that the child and their interests are the focal point, as well as the main ground around which today's system of regulating parental responsibility has been centred.<sup>162</sup> What's more, the best interests principle, along with the forementioned shift to gender-neutral standards, has been what paved the path for the concept of joint custody to emerge.<sup>163</sup>

The principle of the best interests of the child refers to an indefinite legal concept, in the sense that it is abstract and vague. There is no one definition that can adequately describe it *a priori*. On the contrary, the term is explained and specified on an *ad hoc* basis. Furthermore, it is a fundamental legal principle, which is determined by taking into account all particular circumstances of each case, and all conditions present in a specific time and place. In this sense, specific criteria cannot be set in advance, nor can any benchmark be set, giving priority to some indicators over others. It can also be defined as a very fluid concept, as it is heavily influenced by societal changes. As analysed previously, there have been substantial shifts in what we consider as more favourable and beneficial for children. Not so long ago, in the vast majority of cases, mothers were granted custody of their children simply because they were mothers. As this practice has been reevaluated, so has the interpretation of the principle of the best interests of the child. Thus, for it to be applied correctly, children's interests must be subjected to the closest scrutiny.

According to the European Court of Human Rights, the principle of the best interests of the child is to be interpreted in a consistent manner.<sup>164</sup> Moreover, there is a broad understanding of what their best interests may be in each situation. As children grow up, mature, evolve and develop their personality based on their experiences, so do their needs and interests, which are gradually redefined. Both the short-term and long-term interests of the child must be considered and promoted, in the exercise of the right of parental responsibility. Nonetheless, because that may be impossible sometimes, priority should be given to the short-term interests of the child, due to the unpredictability that the future entails.<sup>165</sup>

The assessment of what is best for a child is primarily made by their parents. This is evident as the right of parental responsibility is of such nature as to contribute to and promote the wellbeing of a child. Several legislations explicitly stipulate this obligation.<sup>166</sup> It must be noted

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<sup>162</sup> Pierre Murat, *Droit de la famille*, p. 776, n. 232.16.

<sup>163</sup> Kelly, "The Determination of Child Custody", *Children and Divorce, The Future of Children*, 4(1), 1994, p. 122.

<sup>164</sup> *Maumousseau and Washington v. France* (ECtHR), Application no. 39388/05, judgment of 6 December 2007, paragraph 71.

<sup>165</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 92-93, n. 186.

<sup>166</sup> Article 1511 paragraph 1 of the Greek Civil Code ; Article 371-1 paragraph 1 of the French Civil Code.

that parents must abide by this obligation from the moment that the child is born, until the age of majority is reached. Further, specifically in medically assisted reproduction, the interests of the unborn child are especially taken into consideration, due to the peculiarity of the case.<sup>167</sup> Moreover, the fact that the parents may not be married, or may not be living together anymore, does not alter that obligation.

Lastly, it must also be considered that, since parental care is both a right and a duty of parents, it is plausible that their interests collide with the interests of their children. In such cases, a fair balance must be struck between the two, according to the European Court of Human Rights.<sup>168</sup> However, in that balancing process, particular importance must be attached to the *best* interests of the child, which may override those of the parents. Thus, the child's interests prevail over anything else.

## 2. Enshrinement in international legal texts

The UN Convention on the Rights of the Child, as the most widely ratified human rights treaty in history, enshrines the principle of the best interests of the child. Specifically, in Article 3 of said convention it is stipulated that '*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*'. The provision, thus, lays down the rule that children's interests must be taken into account in all decisions and measures taken regarding them. This approach views the child not as an abstract legal entity but as an individual with their own rights.<sup>169</sup> It also establishes that custody proceedings must be interwoven with the children's interests. Additionally, the forementioned convention includes provisions aimed at supporting children's needs for safety, health, wellbeing, education, family relationships, physical, psychological and emotional development, identity, freedom of expression, privacy and personal agency to form their own views and have them heard.<sup>170</sup>

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<sup>167</sup> *Pejřilová v. the Czech Republic* (ECtHR), Application no. 14889/19, judgment of 8 December 2022, paragraph 21.

<sup>168</sup> *Sahin v. Germany* (ECtHR), Application no. 30943/96, judgment of 8 July 2003, paragraph 66 ; *Sommerfeld v. Germany* (ECtHR), Application no. 31871/96, judgment of 8 July 2003, paragraph 64 ; *Buchs v. Switzerland* (ECtHR), Application no. 9929/12, judgment of 27 May 2014, paragraph 51.

<sup>169</sup> In contrast with the initial 'practice' where the child was treated as an object of property by their parents, instead of a person.

See also: Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 1, n. 1.

<sup>170</sup> Articles 12, 16, 24, 29 of the UN Convention on the Rights of the Child.

The Charter of Fundamental Rights of the European Union also stipulates that a child's best interests must be a primary consideration, in all actions relating to children, irrespective of whether they are taken by public authorities or private institutions.<sup>171</sup> The same rule is mandated in Principle 2 of Recommendation No. R (84) of the Council of Europe, which simultaneously enshrines the principles of equality between the parental parties and of non-discrimination. Likewise, Principle 8 states that parents with whom the child does not reside, should have the possibility to build and sustain relationships with them, unless these relationships could severely harm the child's interests.

Finally, yet importantly, at EU law level, Regulation Brussels IIb establishes that the laws of the Member States, which concern the protection of the best interests of the child, form part of the international public order of the Member States of the European Union. More particularly, according to Article 39, the recognition in another Member State of a decision in matters of parental responsibility shall be refused if it is plainly contradictory to the other Member State's public policy, taking into consideration the principle of the best interests of the child.<sup>172</sup>

#### **B. Criteria for the assessment and determination of the best interests of a child**

The courts are also recipients of the obligation to determine what the best interests of a child are in each case. It is particularly in case of discord between the parents that the court's competence comes into play, so as to solve the parents' disagreement.<sup>173</sup>

Regarding the criteria that the court must assess when specifying what the best interests of a child may be in each situation, the law provides clear instructions. In the Greek Civil Code, for instance, the legislator stipulates that the interests of the child are best served when both parents are substantially involved in the upbringing and nurturing of the child. Through this provision, the preference towards the system of joint child custody is evident. It is stated that rupture in the parent-child relationship should also be avoided.<sup>174</sup> This provision must be taken into account by the court especially when it is asked to rule on the granting of parental care, or the way it is exercised. The fundamental and constitutional principles of gender equality and non-discrimination are reflected through these clauses, meaning that a court decision cannot be

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<sup>171</sup> Article 24(2) of the Charter of Fundamental Rights of the European Union.

<sup>172</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 64, n. 132.

<sup>173</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, p. 93, n. 187.

<sup>174</sup> Article 1511 paragraph 2 of the Greek Civil Code. See also Article 213 of the French Civil Code.

based on criteria such as gender, race, nationality, religion, sexual orientation, ideology.<sup>175</sup> Furthermore, parameters such as the respect parents show to each other regarding one another's rights, as well as their overall behaviour should also be given consideration.<sup>176</sup>

The European Court of Human Rights has repeatedly ruled on such matters too, condemning States Parties for violating these principles. As previously stated, family law especially is very 'alive' and 'fluid'. It is directly impacted and influenced by socio-economic developments and societal changes, which lead to the need for constant reforms. The 'outdatedness' of family law, compared to the social norms of today, is what led, for example, to the adoption of the Greek Law No. 4800/2021 for joint custody, or Law No. 5089/2024, which legalised same-sex marriage. Interestingly enough, the ECtHR had ruled on the prohibition to base a child custody decision on the sexual orientation of one of the parents since 1999.

More particularly, in the case of *Salguiero da Silva Mouta against Portugal*,<sup>177</sup> a complaint had been lodged to the Court in 1996 by a Portuguese national who claimed that he had been discriminated against by the domestic courts in the custody proceedings. Following the applicant's divorce with his ex-wife, they agreed for her to have custody of their daughter and him to have communication and access rights. However, due to the mother's non-cooperation, the applicant was unable to exercise his contact rights. In addition, contrary to the agreement, the daughter spent most of her time with her grandparents, instead of her mother. As a result, the applicant sought an order giving him custody over his daughter. What's more, in the pertinent proceedings, his ex-wife unfoundedly accused him of having sexually abused their daughter.<sup>178</sup>

After the allegations were proven to be false, and also to have been prompted by the girl's maternal grandparents, the national courts granted custody to the applicant, on the basis that the mother was incapable of providing her daughter the calm and balanced life she needed, whereas her father was able to do so. However, upon appeal by the mother, the judgment of the Court of First Instance was reversed by reason of the fact that the applicant was living with another man. The Court of Appeal further held that '*the child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has*

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<sup>175</sup> Articles 20, 21 and 23 of the Charter of Fundamental Rights of the European Union ; Article 14 of the European Convention on Human Rights.

<sup>176</sup> Article 1511 paragraph 2 of the Greek Civil Code. See also Article 213 of the French Civil Code.

<sup>177</sup> *Salguiero da Silva Mouta v. Portugal* (ECtHR), Application no. 33290/96, judgment of 21 December 1999

<sup>178</sup> *Salguiero da Silva Mouta v. Portugal* (ECtHR), paragraphs 8-12.

*decided to enter into, since he is living with another man as if they were man and wife*'. Further, the court stated that the mother's non-compliance with the initial agreement of the former spouses, which granted the applicant-father access rights to his daughter, did not amount to a sufficient reason to withdraw her rights of custody. Lastly, what should be highlighted, is that the applicant's love for his daughter or his ability to look after her was never questioned or doubted. Whereas it had been shown that the daughter was deeply attached to both her parents, and her connection with them played an important role in her emotional wellbeing.<sup>179</sup>

Upon reviewing the situation, the ECtHR concluded that the Portuguese Court of Appeal had unjustifiably interfered with the applicant's right to protection of his family life. In spite of this interference taking place for the pursuit of a legitimate aim, which was the protection of the health and rights of the child, it was done in a way that was not '*necessary in a democratic society*'.<sup>180</sup> The national court had based its decision on the applicant's sexual orientation, in breach of the principle of non-discrimination.<sup>181</sup> He had, thus, been treated differently compared to the mother, and there had been no proportionality between the means employed and the aim pursued. Accordingly, Portugal had violated the applicant's right to protection of their family life and the prohibition of discrimination.<sup>182</sup>

### **C. Sibling relationships**

Another important criterion to consider whilst determining what the best interests of a child may be, is the maintenance of contact between siblings. Sibling relationships are obviously an integral component of the institution of family. They play a major role in the overall development of children, providing emotional and instrumental positive support to one another, especially when coping with the stressful effects of parental divorce or separation, during which times the sibling relationship may notably gain in importance.<sup>183</sup>

As a result, when courts are called upon to decide on custody matters, a primary concern during the assessment of the best interests of the divorced parents' children, is the sibling bond. In the case of *Mustafa and Armağan Akin against Turkey*,<sup>184</sup> the ECtHR reiterated that the mutual

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<sup>179</sup> *Salguiero da Silva Mouta v. Portugal*, paragraph 14.

<sup>180</sup> Article 8 of the European Convention on Human Rights.

<sup>181</sup> Article 14 of the European Convention on Human Rights.

<sup>182</sup> *Salguiero da Silva Mouta v. Portugal*, paragraphs 30-36.

<sup>183</sup> Nina Howe, Holly Recchia, Christine Kinsley, *Sibling Relations and Their Impact on Children's Development*, 2<sup>nd</sup> edition, 2023, p. 2 ; Laura Bernardi and Dimitri Mortelmans, eds., *Shared Physical Custody: Interdisciplinary Insights in Child Custody Arrangements*, 2021, p. 25.

<sup>184</sup> *Mustafa and Armağan Akin v. Turkey* (ECtHR), Application no. 4694/03, judgment of 6 April 2010.



enjoyment by parents and children of each other's company constitutes a fundamental element of family life.<sup>185</sup> Such a bond, amounting to family life within the meaning of the ECHR, also exists between siblings.<sup>186</sup> In the forementioned case, the two applicants – who were father and son – claimed that their right to family life had been violated by the national courts. More specifically, upon the first applicant's divorce with his ex-wife, he had been awarded custody solely over their son. On the other hand, the mother had been granted sole custody of their daughter. Furthermore, the parents had to exchange their children during the year, in order for each child to spend some time with the other parent as well.<sup>187</sup>

The father had requested to be granted interim measures to be able to spend time with both his children at the same time for one weekend, whilst his ex-wife would have them the next, however, the Turkish court had rejected it. Consequently, the two siblings were unable to see each other, and the first applicant was prevented from spending time with both his children together. What's more, despite the siblings living in the same neighbourhood, their mother prevented them from talking to each other. Continuous actions and appeals were filed by the father against his ex-wife, requesting that the children should be able to see each other every weekend. Despite the applicant's appeals reaching the Court of Cassation of Turkey, his attempts were fruitless. On the basis that the constant changes of environment would expose the daughter to differing discipline instructions, the two siblings had not seen each other for almost three years.<sup>188</sup>

The applicants, then, turned to the ECtHR, arguing that the domestic courts' decisions amounted to an unjustified interference with their right to respect for their family life, and that in reaching their decisions the domestic courts had failed to consider and protect the best interests of the two children. The Court considered that the Turkish courts, which had ordered the separation of the two siblings, had interfered with both the applicants' right to respect for their family life, first, by preventing the two siblings from seeing each other, and second, by forbidding the father to enjoy both his children simultaneously.<sup>189</sup> In fine, Turkey was condemned for failing to have due regard to the best interests of the family, therefore, infringing Article 8 of the Convention.

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<sup>185</sup> *Mustafa and Armağan Akin v. Turkey*, paragraph 28.

<sup>186</sup> *Mustafa and Armağan Akin v. Turkey*, paragraph 19.

<sup>187</sup> *Mustafa and Armağan Akin v. Turkey*, paragraph 7.

<sup>188</sup> *Mustafa and Armağan Akin v. Turkey*, paragraphs 8-13.

<sup>189</sup> *Mustafa and Armağan Akin v. Turkey*, paragraphs 21, 28 and 30.

In light of the foregoing, one can conclude that, in spite of the Turkish courts stating that ‘diligence had to be shown to satisfy the needs of the parents and their children and to improve the ties between them’, no such consideration was given to those interests.<sup>190</sup> On the contrary, the children were treated as ‘prizes’, where each of them was allocated to a different parent. The children’s interests, and most importantly, the benefits they would have by growing up together, in the same household, were never deliberated over. In contrast, they were made to grow up separately, unable to foster a relationship with each other during their most vulnerable years. Thus, in the writer’s opinion, it is obvious that the alienation between siblings is also amongst the aspects that joint custody of children aims to tackle.

#### **D. Psychological factors**

##### **1. Psychological impact**

Marriage does not only constitute a private matter between two persons, but also a public matter, because a public authority must consent to its performance. Likewise, divorces impact not only the parties privately but also society as whole, leading to the end of the common life of spouses. Nevertheless, the most prominent effect of divorce is that towards children, who face the harsh consequences of actions that are not theirs. Moreover, it is undisputable that in no way does the fact that a child has been born to non-married parents affect the gravity of the child’s psychological impact from the separation. Whether the parents are merely cohabitating in an *union libre*,<sup>191</sup> or have formalised their relationship through the act of marriage or a registered partnership, the effect of separation on the children is the same. Thus, due to the major influence that the nuclear family holds on the development of children’s character and personality, the emotional upheaval of the parental separation can deeply scar them. Naturally, family breakdowns are even more impactful for very young children. The impact of divorce on a child is apparent through their behaviour, which reflects, in one way or another, directly or indirectly, the experiences that they undergo at home.

Despite the fact that in some cases divorce may be beneficial for children, they usually have a hard time fully mentally grasping that, especially in the first few years after the parental separation. That is to say that children oftentimes do not comprehend that the emotional turmoil that they are enduring at home – possibly due to constant fighting between the parental parties –

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<sup>190</sup> *Mustafa and Armağan Akin v. Turkey*, paragraph 11.

<sup>191</sup> Partners living in an *union libre* cohabit like married spouses but are not bound by a typical act like marriage or a registered civil partnership. See also Article 515-8 of the French Civil Code.

is more detrimental to their well-being than the divorce itself. The sudden disruption that comes with a parent leaving the marital home, therefore, oftentimes leads to the child feeling helpless and alone. In many instances, they also feel that they are to blame for the problems between their parents. The translation of these feelings usually comes with a subsequent noticeable change in the child's behaviour. Emotional adjustment to the new situation at home does not happen overnight. As a result, before the outcomes of divorce become favourable for the child – due to the fact that they are no longer growing up in a dysfunctional and perhaps even toxic family environment – their quality of life has been shown to decrease for at least the first few years.

Evidently, all children are not affected in the same way by a divorce. For some, it may almost be inconsequential. Whereas others may view it as a traumatic event even in their adult life. The situation is no different between siblings. Although they grow up in the same household and they experience similar situations and behaviours, each of them adjusts to the change brought by the separation differently. Naturally, marital divorce is especially challenging for children when the split is not amicable between the parents. The level of conflict between parents is the key factor in how well children overcome the challenges that a divorce creates. In those cases, more often than not, children are subjected to the justice system, which is empowered to allocate the parental rights between the two parents. Court proceedings can be a draining experience on one's mental health,<sup>192</sup> even more so for children due to their vulnerability.<sup>193,194</sup>

Custody proceedings are also emotionally draining for the parents, who may strive to be seen as the 'better' parent, in order to be awarded the custody of the children. During the court process of such high-conflict separations, parents may also show vengeful behaviour, essentially weaponizing the children against their former partner. Naturally, this can fuel negative feelings to the child towards the other parent. As a consequence, their parent-child relationship may be disrupted, leading to eventual negative adjustment to the post-divorce situation.<sup>195</sup>

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<sup>192</sup> Miguel Clemente, Dolores Padilla-Racero, "The effects of the justice system on mental health", *Psychiatry, Psychology and Law*, 27(5), 2020, p. 865.

<sup>193</sup> Lucy Jane Griffiths et al., "Anxiety and depression among children and young people involved in family justice court proceedings: longitudinal national data linkage study", *BJPsych Open*, 2022, p. 7.

<sup>194</sup> Victoria Bream, Ann Buchanan, "Distress among Children Whose Separated or Divorced Parents Cannot Agree Arrangements for Them." *The British Journal of Social Work*, 33(2), 2003, p. 231.

<sup>195</sup> Paul R. Amato, "Life-Span Adjustment of Children to Their Parents' Divorce", *Children and Divorce, The Future of Children*, 4(1), 1994, p. 145.

## 2. Better emotional adjustment

Scientific research has shown that children from broken families have more problems, in general, than children who grow up in healthy household environments. On the other hand, according to other studies, children with divorced parents '*are better off in certain respects than children in two-parent families*'.<sup>196</sup> However, what should be emphasised in this case is that many objectively dysfunctional families never separate. Consequently, the unhealthy family environments are perpetuated, resulting in more detrimental effects to the children. Therefore, it must be supported that, in order for studies to be more authoritative and accurate, they must be done in a way that the participants' situations do not vary significantly, but instead are all in comparable situations.

Likewise, the cases that should be taken as samples when meaning to conclude on an objective and substantial finding, are not all children with divorced parents, but children whose both parents *want* to be actively involved and present in their children's lives, but are not allowed to because of the law, or because the established case-law of a certain country, does not favour joint parental custody.<sup>197</sup> Just as there are parents who refuse to be present in their child's life after the divorce, there are parents who neglect their care duties during the marriage. These families are neither healthy nor functional. Therefore, children who are raised in such environments have not had any healthy stimuli growing up, and therefore, cannot be seen as a frame of reference for what is good and what is not.<sup>198</sup>

It is also apparent that even though the principle of the best interests of the child is rightfully determined on a case-by-case basis, there have been countless reports and extensive research by psychologists and other experts, proving that children must have contact with both of their parents for a more harmonious development. Emotional adjustment of children to the new situation at home is also easier by maintaining close contact with both parents. There is no doubt that close contact and strong bonds between the child and the parent are more attainable if the child resides with the parent, meaning that the parents share custody. Otherwise, in many cases it is difficult for the child to overcome the feeling of the non-custodial parent being a

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<sup>196</sup> Paul R. Amato, "Life-Span Adjustment of Children to Their Parents' Divorce", *Children and Divorce, The Future of Children*, 4(1), 1994, p. 145.

<sup>197</sup> As was the case in Greece until recently.

<sup>198</sup> Paul R. Amato, "Life-Span Adjustment of Children to Their Parents' Divorce", *Children and Divorce, The Future of Children*, 4(1), 1994, p. 151.

mere visitor in their life. By the same token, joint custody can reduce the extent to which a child may feel as if they are ‘losing’ a parent.

### 3. The issue of child custody on the borderline of law and psychology

From the aforementioned, it is obvious that the topic of this dissertation, apart from being a legal matter, also has numerous psychological aspects. These psychological aspects must be taken into account by the legislator when drafting the law. Despite there being a debate about whether and to what extent social sciences should be used to influence legislation,<sup>199</sup> one must not forget that laws are created in order to regulate society and human relations. As social changes occur, laws must advance with them, reflecting the continuous changes. Consequently, no conversation can be held about the general legal regimes governing child custody after divorce, without considering the time and place of each legal order. In western societies, psychology has flourished as a social science over the past several years. Thus, the above psychological factors, which greatly influence the children and the parental parties in the – not merely – legal issue of child custody, are of crucial importance for the proper regulation of the matter.

In consequence, the forementioned analysed reasons strengthen the writer’s belief that the rule should, in principle, be that of shared child custody between parents. Only if, following an individual assessment of each case, specific reasons point to sole child custody as a better way to protect the interests of the child, should it be preferred. Furthermore, on the basis of all the surveys showing that children of divorced parents experience more hardship in their life due to the heavy burden they carry before coming to terms with the marital separation, emotional and psychological support by experts must also be offered.

#### **E. Socio-economic aspects**

The issue of allocation of custody and parental responsibility also has socio-economic aspects. The regime of joint child custody can be beneficial for society too, for the reasons that will be discussed below. Obviously, parental separation can take a heavy toll on children’s mental health. Behavioural changes in children are also a certain consequence resulting from the separation. What is uncertain, though, is the extent of these changes in every child’s behaviour, which can vary from subtle to harsh.

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<sup>199</sup> Joan B. Kelly, “The Determination of Child Custody”, *Children and Divorce, The Future of Children*, 4(1), 1994, p. 128.

## 1. Increased risk and criminal behaviour

There have been studies proving that a marital separation greatly increases the probability of children's risk behaviours.<sup>200</sup> More particularly, children whose parents have separated have a bigger tendency to engage in binge drinking, tobacco use, drug use or frequent alcohol consumption. Specifically, children with divorced parents, aged between 12 and 18 years old, were around 10% more likely to engage in binge drinking, tobacco use, marijuana use and alcohol consumption. Especially regarding tobacco and marijuana use, the effects from the divorce were persistent for both girls and boys. Whilst girls specifically also showed a bigger tendency to reach for alcohol. On the other hand, according to the survey, hard drug use was not so much associated with the effects of divorce.<sup>201</sup> Evidently, such behavioural tendencies do not contribute to the advancement of society. Instead, they delay its improvement and its evolution because resources are needed to combat these issues. These findings should urge states and policy makers to invest more in children from broken families. The support offered would help alleviate some of the detrimental effects of divorce on children and prevent them from leaning towards such risk behaviours, which would, in turn, benefit society as a whole.<sup>202</sup>

The explanation given by researchers for the increased likelihood of children from divorced families becoming involved in risk behaviours is based on the inference that divorces generally increase children's emotional instability, causing more overall stress.<sup>203</sup> Drastic decrease in one's standards of living may also be consequential to a divorce.<sup>204</sup> Financial problems oftentimes arise due to occurring expenses, such as moving costs and court costs, but also due to the fact that it is significantly more costly for one person alone to maintain a household alone and attain a certain standard of living, than it is for a couple.<sup>205</sup> Such economic deprivation may also present challenges in children's educational performance, whose single-parent families cannot afford, for example, private tutoring or cannot dedicate time at home to help them. This low academic achievement usually leads to lower income job opportunities, which is directly

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<sup>200</sup> Geir Gustavsen, "Effects of Parental Divorce on Teenage Children's Risk Behaviors: Incidence and Persistence", *Journal of Family and Economic Issues*, 37(3), 2015, p. 474.

<sup>201</sup> Geir Gustavsen, "Effects of Parental Divorce on Teenage Children's Risk Behaviors: Incidence and Persistence", *Journal of Family and Economic Issues*, 37(3), 2015, p. 483.

<sup>202</sup> Geir Gustavsen, *Ibid*, p. 483.

<sup>203</sup> Paul R. Amato, "Life-Span Adjustment of Children to Their Parents' Divorce", *Children and Divorce, The Future of Children*, 4(1), 1994, p. 149.

<sup>204</sup> Paul R. Amato and Bruce Keith, "Parental Divorce and the Well-Being of Children: A Meta-Analysis", *Psychological Bulletin*, 1991, p. 43.

<sup>205</sup> Geir Gustavsen, "Effects of Parental Divorce on Teenage Children's Risk Behaviors: Incidence and Persistence", *Journal of Family and Economic Issues*, 37(3), 2015, p. 483.

correlated with more economic deprivation and psychological struggles.<sup>206</sup> In turn, and in an attempt to cope with these difficulties and their own feelings, many heavily impacted children may turn to high-risk behaviours.

In addition to the increased likelihood of risk behaviour, it has been proven that children who have not lived with both their parents throughout their upbringing, have a significantly higher risk for violent and criminal behaviour. More specifically, children who had been separated from their fathers at a very young age presented higher risks for subsequent violent behaviour.<sup>207</sup> Moreover, according to further research, the non-quotidian involvement of fathers in their children's lives has resulted in the latter feeling abandoned.<sup>208</sup> This feeling is further enhanced, especially for boys, by the lack of a father figure actively involved in their lives. Thus, the automatic allocation of custody to mothers, whilst completely disregarding the father's vital role in the upbringing of a child, is detrimental to the child's healthy evolution and emotional stability. By contrast, by attributing custody of their child to both parents, several basic foundations are established for the child's healthy upbringing. Lastly, it is needless to say that with the active presence of both parents in their lives, children have someone to look up to and confide in, in case of need, instead of resorting to substance abuse or violent behaviours to cope with their family instability.

## 2. More financial investment

Lastly, it has been shown that parents invest more in their children financially, when custody is shared with their ex-partner.<sup>209</sup> The reason behind that is that the non-custodial parent oftentimes feels like they are a visitor in their own child's life. By being allowed to see their child only occasionally, fathers – who are usually the ones not being granted custody, and instead are reduced to mere visiting and access to information rights – do not have the opportunity to form strong emotional bonds with their child. This results in paternal alienation. Furthermore, because the law sometimes (depending on the legal order) does not require the

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<sup>206</sup> Paul R. Amato and Bruce Keith, "Parental Divorce and the Well-Being of Children: A Meta-Analysis.," *Psychological Bulletin*, 1991, p. 43-44 ;

Paul R. Amato, "Life-Span Adjustment of Children to Their Parents' Divorce", *Children and Divorce, The Future of Children*, 4(1), 1994, p. 151 ;

Madhu S. Mohanty & Aman Ullah, "Why Does Growing up in an Intact Family during Childhood Lead to Higher Earnings during Adulthood in the United States?," *American Journal of Economics and Sociology*, 71(3), 2012, pp. 668.

<sup>207</sup> Mok Pearl et al., "Experience of Child-Parent Separation and Later Risk of Violent Criminality," *American Journal of Preventive Medicine*, 55(2), 2018, p. 181.

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<sup>209</sup> Margaret F. Brinig, Frank H. Buckley, "Joint Custody: Bonding and Monitoring Theories", *Indiana Law Journal*, 73(2), 1998, p. 402.

custodial parent to consult the other parent regarding important matters relating to the child, such as the latter's education and health, the father may feel as though he has been reduced to merely serving financial purposes.

Following the above analysis, it is evident that when discussing child custody as a legal matter, socio-economic factors come into play as well. Therefore, the forementioned reasons strengthen the position of this dissertation, showing that joint custody of children should be the norm, in order to avoid issues as those examined, and promote the children's well-being. Through the shared custody system, emotional adjustment of children to the new family status is facilitated and, as such, better attained, which is also vital for the good functioning of society.

## **II. RIGHT OF A CHILD TO BE HEARD**

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### **A. Essence of the right of a child to be heard**

#### **1. According to international conventions**

The right of every child to be heard is a crucial element of the overall assessment of their best interests.<sup>210</sup> The children must have the right to express their views on all matters that concern them. Accordingly, the parents and the courts must take into consideration the child's opinion, and give it due weight, in accordance with two criteria. The first criterion is age, which is an objective element to consider, whilst the second is the child's maturity which entails a subjective element.<sup>211</sup> This right has been enshrined in international conventions and texts relating to fundamental human rights. Specifically, the UN Convention on the Rights of the Child states that States Parties must ensure that a child who is capable of forming their own views, has the right to express them freely in all matters affecting them.<sup>212</sup> Furthermore, the right of a child to be heard is protected in the Charter of Fundamental Rights of the European Union, in Regulation Brussels IIb, as well as national regulations of the EU Member States.<sup>213</sup> More insight to what the right of a child to express their views entails, is given in the European Convention on the Exercise of Children's Rights, which mandates that a child who is considered

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<sup>210</sup> Jéssica Delgado Sáez, "The Right of the Child to be Heard in Parental Responsibility Proceedings", *Plurality and Diversity of Family Relations in Europe*, 1<sup>st</sup> edition, 2019, p. 227.

<sup>211</sup> Marie-Françoise Lückner-Babel, "The Right of the Child to Express Views and to Be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child", *The International Journal of Children's Rights*, 3(3-4), 1995, p. 399.

<sup>212</sup> Article 12 of the UN Convention on the Rights of the Child.

<sup>213</sup> Article 24(3) of the Charter of Fundamental Rights of the European Union ; Article 21 of Regulation Brussels IIb ; Article 1511 paragraph 4 of the Greek Civil Code ; Articles 1004/1 and 1004/2 of the Belgian Judicial Code ; Articles 338-1 to 338-12 of the French Code of Civil Procedure.



to have an adequate understanding, must have the right to receive all relevant information to the case of legal proceedings that affect them. In addition, they must be informed about the possible consequences of compliance with their views and the possible consequences of any pertinent decision.<sup>214</sup> Moreover, it is specified that children have the right to be assisted in this process, by a representative or an appropriate body.<sup>215</sup>

## 2. According to the European Court of Human Rights

The right of a child to be heard has also been institutionalised by the European Court of Human Rights. The Court has ruled on numerous occasions that the child must be sufficiently involved in the decision-making process of matters relating to their private and family life, as that is protected by Article 8 of the Convention.<sup>216</sup> More specifically, in the case of *M. and M. against Croatia*, the Court held that the right of the child to be consulted and heard is part of their broader right to personal autonomy. In relation to adults, the right to personal autonomy incorporates the right to decide on how to lead their own life. In relation to children though, the scope of that right is slightly differentiated due to their lack of full autonomy. Nonetheless, children, as subjects of law and of rights, can exercise their right to personal autonomy through their prerogative to voice their views and opinions on matters that concern them, in accordance with their age, their maturity and their capacity to express their viewpoint, which gradually increases.<sup>217</sup>

Further, in the more recent case of *C. against Croatia* of 2020, the Court held that failure to duly represent and hear a child's view during the proceedings, directly and irremediably undermines the decision-making process, therefore, leading to a violation of that child's right to protection of their private and family life (8 ECHR).<sup>218</sup> The Court stressed again that a fair balance must be struck between the interests of the child and those of the parents. And that during that balancing process, special consideration must be given to the best interests of the child, as they are of paramount importance, and may thus, override the interests of the parents.<sup>219</sup> Nonetheless, it is specified through the case-law of the ECtHR that the right of the child to be heard (which is part of the right to protection of one's family life, protected under Article 8 of the Convention) does not always require the domestic courts to hear the child in

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<sup>214</sup> Article 3 of the European Convention on the Exercise of Children's Rights of 25 January 1996.

<sup>215</sup> Article 21 of Regulation Brussels IIb ; Article 12 paragraph 2 of the UN Convention on the Rights of the Child.

<sup>216</sup> *Sommerfeld v. Germany* (ECtHR), Application no. 31871/96, judgment of 8 July 2003, paragraphs 70 and 72-74.

<sup>217</sup> *M. and M. v. Croatia* (ECtHR), Application no. 10161/13, judgment of 3 December 2015, paragraph 171.

<sup>218</sup> *C. v. Croatia* (ECtHR), Application no. 80117/17, judgment of 8 October 2020, paragraph 81.

<sup>219</sup> *C. v. Croatia*, paragraph 72.

court. Court questioning is oftentimes emotionally challenging for the individual, all the more so if they are a child. Therefore, national courts do not automatically exceed their margin of appreciation by solely relying on experts' findings and reports, instead of hearing the child in a legal proceeding.<sup>220</sup>

### **B. Exercise of the child's right to be heard**

In terms of how the right to be heard must be exercised, it is certain that the child must be able to express their views and opinions freely, without pressure. Any advice or suggestions from a parent, or other third persons, which aim to persuade the child to voice something different than what they are feeling, must not be tolerated. By the same token, in case such suggestions are detected by the court, the child's formulated opinion must not be taken into account.<sup>221</sup> The reason for that is obviously the child's inability to filter external thoughts from their own. Young age is naturally associated with emotional immaturity and less developed critical thinking capabilities. Consequently, young children lack the necessary skills to avoid internalising what they hear and are more susceptible to being influenced by others. However, due to the court's non-expertise in such matters, it is usually difficult for it to assess whether a child has actually been guided by a third party in what they have to say. That is why assistance from experts, such as child psychologists and social workers, who have the requisite knowledge, experience and expertise, is oftentimes indispensable.<sup>222</sup>

Nevertheless, it should be noted that according to the ECtHR's case-law, national courts are not always obliged to appoint experts to further examine or evaluate the child's behaviour. Depending on the specific circumstances of each case, as well as what the child's age and maturity level are, courts are allowed to have some freedom in evaluating the facts of the case and the evidence presented before them.<sup>223</sup> On the contrary, certain national legislations, such as the Greek one, appear to set stricter rules in certain cases, requiring the submission of expert reports.<sup>224</sup>

Moreover, prior to the child expressing their opinion before the court, the judge informs them that it is their prerogative to not answer a question if they do not wish to. Most importantly, the

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<sup>220</sup> *Sahin v. Germany* (ECtHR), Application no. 30943/96, judgment of 8 July 2003, paragraphs 73-75, *R.M. v. Latvia* (ECtHR), Application no. 53487/13, judgment of 4 April 2022, paragraph 117 ; *Petrov and X v. Russia* (ECtHR), Application no. 23608/16, judgment of 23 October 2018, paragraph 108.

<sup>221</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, 2021, p. 304, n. 721.

<sup>222</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, 2021, p. 304, n. 721.

<sup>223</sup> *Sommerfeld v. Germany* (ECtHR), Application no. 31871/96, judgment of 8 July 2003, paragraph 71.

<sup>224</sup> Lekkas, *Custody of the child according to the Civil Code - After Law 4800/2021*, 2021, p. 306, n. 722 ; Article 1520 passage 5 of the Greek Civil Code.

judge also explains to the child that the final decision may not be in absolute conformity with the views that the child will express, due to there being many other factors to consider.<sup>225</sup> Nonetheless, as the child grows and matures, courts attach greater weight to their views and feelings, as well as to their right to respect for their private life (8 ECHR).<sup>226</sup> Finally, during the hearing, direct questions about any custody preferences must not be asked.<sup>227</sup> Such straightforward questions could mean that the child has to choose between their parents, which may, in turn, result to parental conflict, thus obviously undermining the child's best interests. Instead, judges should aim to resolve any possible underlying disputes between the parents, by asking the child exploratory and peripheral questions about their life, the quality of their relationship with both parents and other relevant elements.<sup>228</sup>

In conclusion, the right of the child to be heard is critical in determining what their *specific* interests are in each individual case. No two situations are the same, so general inferences about what the best interests of children entail, can be accurate to a certain extent only. One may argue, thus, that this is the *ratio decidendi* behind the right of the child to be heard. *A priori* determination of what is most beneficial or least detrimental for each child can only be speculative. Therefore, the child – as the main person concerned – should be given the possibility to have their views and opinion heard, depending always on their age and level of maturity. Finally, it should be noted that the fulfilment of the child's right to be heard contributes to their personal development by enabling them to exercise agency over their own lives, which, in turn, helps them build their self-confidence.<sup>229</sup>

### III. REMOVAL FROM CUSTODY – EXPLOITATION OF RIGHT TO PARENTAL RESPONSIBILITY

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The state watches over parents in their performance of their duty to parental responsibility.<sup>230</sup> Parental responsibility must prioritise the child's interests. It is a given that these interests are

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<sup>225</sup> Nathalie Massager, Carine De Buck, *Être parents et se séparer : Regards croisés d'une avocate et d'une pédopsychiatre*, 2007, p. 114.

<sup>226</sup> *N.Ts. and Others v. Georgia* (ECtHR), Application no. 71776/12, judgment of 2 May 2016, paragraph 72.

<sup>227</sup> Nathalie Massager, Carine De Buck, *Être parents et se séparer : Regards croisés d'une avocate et d'une pédopsychiatre*, 2007, p. 115.

<sup>228</sup> Nathalie Massager, *Droit familial de l'enfance*, 2009, p. 438 ; Jéssica Delgado Sáez, "The Right of the Child to be Heard in Parental Responsibility Proceedings", *Plurality and Diversity of Family Relations in Europe*, 1<sup>st</sup> edition, 2019, p. 231.

<sup>229</sup> Gerison Lansdown, *Every Child's Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No 12*, Save the Children UK, 2011, p. 5.

<sup>230</sup> This is stated explicitly in the German Constitution, in Article 6(2) of the Basic Law for the Federal Republic of Germany. But it is also derived from the nature of the right of parental responsibility as a function aiming to fulfil a specific purpose.

best fulfilled when the child has the opportunity to grow up with both parents in a joint custody parenting plan, even when the latter have separated. This idea is a product of the past decades, reflecting the broad societal and economic changes, and contrasting directly the previously well-established parent-centred regimes, which favoured one parental party over the other. Nevertheless, it is natural that there exist certain cases where joint custody does not align with the principle of the best interests of the child, notably in situations in which one of the parents poses a threat to the welfare of the child.<sup>231</sup>

More specifically, when parents do not exercise their parental rights in a way that primarily benefits their child, either by abusing these rights or by neglecting the child, public authorities have an obligation to intervene in order to protect the child. The state's control, and by extension, the protection that it must provide, has several forms. Oftentimes, the protection is provided by public organisations, such as child welfare associations, ensuring care and support for minors who temporarily cannot be maintained in their current living environment. Social security services are also engaged in this mission, aiming to protect and promote children's health and wellbeing.<sup>232</sup>

#### **A. Domestic violence and child abuse**

Obviously, domestic violence and child abuse are critical factors that render joint custody contrary to the interests of the child. Such actions constitute severe criminal behaviour, which put the child directly at risk. Therefore, these cases must be assessed extremely cautiously. A child's exposure to an abusive parent has detrimental effects on the child's personality and overall development in life, thus contrasting directly and violating the principle of the best interests of the child. In this regard, several European legal orders have included specific provisions about such abusive or violent behaviours, ensuring that joint custody is not to be granted in cases where the child might be endangered. For instance, the French Civil Code provides several provisions, allowing judges to refuse joint custody in situations involving domestic abuse. The court takes into account the impact of the violence on both the child and the non-violent parent, awarding – in most cases – sole custody to the latter, in order to safeguard the child's wellbeing.<sup>233</sup>

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<sup>231</sup> Pierre Murat, *Droit de la famille*, p. 802, n. 232.222.

<sup>232</sup> Courbe, *Droit de la famille*, p. 415, n. 1065.

<sup>233</sup> See also Articles 371-1, 373-2-2, 373-2-10, 373-2-11 of the French Civil Code.

Naturally, whether abuse be physical or emotional, it is prohibited, entailing direct breach of the principle of the best interests of the child. Emotional abuse is characterised by a person, in this case the parent, subjecting or exposing the child or the other parent, to behaviours that may result in psychological trauma, including anxiety, depression, post-traumatic stress disorder, or other psychological problems. It includes situations of neglect towards the child, as well as situations where a parent damages the other partner's relationship with the child, or when the latter are not allowed to enjoy each other and build a healthy affectionate relationship.<sup>234</sup> Naturally, as it has been analysed in this section, parents' overall behaviour has a deep impression on the evolution of the child's personality. Therefore, children must be protected and kept away from such problematic – and criminal – actions.

Moreover, opponents of shared parenting plans oftentimes voice concerns about the deep association between violence and marital separation, which becomes increasingly elevated during the separation conflicts. However, research has shown that families who choose joint custody, especially joint physical custody, are unlikely to fall under this category, seeing as violence is usually '*a carryover from marital dynamics established before the separation*'.<sup>235</sup> In addition, concerns are high about situations where, following the separation of the parental parties, children become the victims of the violence. In particular, children may be put at a higher risk of abuse, as '*the loss of one victim may lead to substitution of another*'.<sup>236</sup> It is without a doubt that such issues raise extremely valid concerns about mandated joint custody after separation. That is why, joint custody should only be the rule in principle. Every situation must be assessed *ad hoc*, ensuring that the specific interests of each child are thoroughly evaluated, in order to determine the best solution for them. Therefore, as per the disclaimer of this paper, such extremely problematic cases must not be generalised in a way that impacts legislators to not accord joint custody *in principio*.

Domestic abuse and violence are matters that directly concern the public order. In terms of EU law, Regulation Brussels IIb, which requires courts to prioritise the child's safety when determining custody arrangements, states that judgments relating to parental responsibility may be denied recognition in another Member State, if they are '*manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests*

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<sup>234</sup> Definition given by the United Nations.

<sup>235</sup> Marsha Kline Pruett, Carrie Barker, "Joint Custody: A Judicious Choice for Families – But How, When, and Why?", *The scientific basis of custody decisions*, 2<sup>nd</sup> edition, 2009, p. 19.

<sup>236</sup> Marsha Kline Pruett, Carrie Barker, *Ibid*, p. 19.

of the child'.<sup>237</sup> This can well be interpreted as including situations where a child is at risk of being abused or be a victim of domestic violence.

The European Court of Human Rights has also addressed the situation in several of its rulings. In the case of *A. against Croatia*,<sup>238</sup> the Court condemned Croatia for the violation of Article 8 of the Convention, due to the failure of national authorities to implement the protective measures ordered by the national courts, aiming to protect the applicant and her daughter from their violent husband and father accordingly.<sup>239</sup> Article 8 of the Convention states that everyone has the right to respect for his private and family life. In regard to the concept of private life, the Court has consistently held that a person's physical and psychological integrity is included in the notion of 'private life', as enshrined and protected by the ECHR. Therefore, pursuant to said provision, states have a duty to protect one's integrity from others; and must provide for an adequate legal framework affording protection against acts of violence.<sup>240</sup> In such cases, it is undoubted that, in order for the child to be safeguarded from harm, the principle of the best interests of the child requires states to not allow the violent or abusive parent to hold such crucial parental rights, such as custody, over the child.

## **B. Severe parental conflict**

Joint custody entails the equal and equitable involvement of both parents in their children's lives, as the most optimal way to serve the interests of the children. Obviously, this requires that the parental parties cooperate and strive to find commonly accepted solutions. However, because marital separations are usually non-consensual, frictions between the parental parties are an extremely common phenomenon. In this respect, some would argue that high-conflict parental relationships can have disastrous effects on a child's wellbeing.<sup>241</sup> Children oftentimes find themselves in the middle of hostile situations, which can, in turn, lead to them being severely emotionally and psychologically impacted. Essentially, in such cases there is a clash between the positive impact of coparenting alliance and the deleterious effect of coparenting conflict.<sup>242</sup>

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<sup>237</sup> Article 23 of Regulation Brussels IIb.

<sup>238</sup> *A. v. Croatia* (ECtHR), Application no. 55164/08, judgment of 14 October 2010.

<sup>239</sup> *A. v. Croatia*, paragraph 79.

<sup>240</sup> *A. v. Croatia*, paragraph 60.

<sup>241</sup> Thoroddur Bjarnason and Arsaell Arnarsson, "Joint Physical Custody and Communication with Parents: A Cross-National Study of Children in 36 Western Countries", *Journal of Comparative Family Studies*, p. 885.

<sup>242</sup> Laura Bernardi and Dimitri Mortelmans, eds., *Shared Physical Custody: Interdisciplinary Insights in Child Custody Arrangements*, 2021, p. 255.

Moreover, several EU Member States have legislated accordingly. For instance, the German Civil Code stipulates that courts are allowed to grant custody to one parent only, if joint custody would lead to excessive and constant parental conflict, that could potentially harm the child.<sup>243</sup> Children's need for stability and emotional security are of paramount importance. So, it is considered that in order to shield them from being the collateral damage in a harmful situation they have no say in, it is better to award sole custody to only one of the parents. Nonetheless, despite this approach enhancing the interests of the child in certain situations, it may not always be the case. Parental responsibility aims to fulfil an important social purpose, which is no other than the healthy upbringing of the child. In this respect, courts have an obligation to carefully evaluate whether the conflict between two parental parties can have a potentially harmful effect on the child's wellbeing. However, completely removing a parent's custodial rights, while granting the other parent full custody over the child, may not serve that purpose all too well in the long run.

By definition, parental responsibility requires parents to act in accordance with their children's interests. This is a duty that has been assigned to parents by society, and most importantly, a duty that they signed up for – by themselves – when they decided to bring a child to life. It is the parents' obligation to put their differences aside, in relation to matters that concern the upbringing of the child. Therefore, although sole custody may be more beneficial for children in extreme situations where the constant parental discord is excessively harmful for them; in most cases it should be taken only as a provisional step, until a stabilisation of the high-conflict parental situation is achieved. In this exercise, mental health experts can be helpful, by providing direct counselling, assistance or intervention to parents.<sup>244</sup>

Besides, research examining whether there has been too much emphasis given on the parents' conflict has also been conducted. More specifically, it was reviewed whether the focus should be put not on the parental relationship itself, but on the relationship that each parent builds with their child through joint custody. Joint physical custody, especially, allows for substantive and meaningful parent-child relationships to be established. Interestingly enough, it was proven that, with the exception of the most severe types of parental conflict, or situations in which the children need protection from an abusive or negligent parent, parental conflict should not be given too much weight. On the contrary, it is the quality of the parent-child relationships that

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<sup>243</sup> Article 1671 of the German Civil Code.

<sup>244</sup> Lawrence Jay Braunstein, Lyn R. Greenberg and Arnold T. Shienvold, "Role of Mental Health Professionals in Child Custody Cases", *New York Law Journal*, p. 1.

impacts the child's outcomes more. Thus, parental conflict in and of itself should not be the most decisive factor for courts in child custody decisions.<sup>245</sup>

### **C. Parental mental health and incapacities**

#### **1. Mental illness and substance abuse**

Mental health plays a vital role in one's behaviour and personality. Minor children especially, as individuals without a fully developed emotional intelligence or maturity, are heavily influenced by what they observe and experience at home. Parents' emotional state plays a significant role in the way they raise their children, which is then projected by children in their own behaviour or personality. In this respect, in order for a healthy and substantive relationship to be built between a parent and their child, parents must be able to provide them with safety and stability.

Nevertheless, there are cases where a parent is unable to provide their child with the requisite safety and stability, due to the fact that they are struggling with mental health problems, or substance abuse issues. Inevitably, this directly impacts the child, who can be detrimentally affected, or even be put at risk, seeing as they are oftentimes experiencing these situations at first hand. Therefore, it is without question that in custody proceedings, such events must be very carefully considered by the courts. Whilst many parents with mental illnesses or drug addictions can still be involved in their children's lives, and play an important role in them, they may not be suitable to make decisions about their lives. Consequently, in such cases joint custody must not be granted, as it could directly harm the children, and thus flagrantly violate the principle of the best interests of the child.

Ultimately, however, the removal of custody of their child from a parent suffering from mental health problems or substance abuse, cannot be seen as anything more than a perfunctory solution in the absence of any better. It must not be forgotten that such issues are usually developed due to mental illnesses, which are in need of treatment. Likewise, substance use is oftentimes a result of various mental disorders needing therapy or rehabilitation. Certainly, the interests of the child are of the utmost importance, and in order for the children's wellbeing to be guaranteed, they must not be exposed to such unstable conditions at home. Yet, the mere removal of custody and parental rights from a parent does not promote the child's interests in the long run, seeing as children who grow up being deprived of one of their parents are more

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<sup>245</sup> Linda Nielsen, "Re-examining the Research on Parental Conflict, Coparenting, and Custody Arrangements", *Psychology, Public Policy, and Law*, 23(2), 2017, p. 228.



likely to develop psychological problems themselves, as has been detailed above. Instead, this solution almost seems as a way to penalise the parent – and by extension the children – for being mentally ill.

Moreover, the state, while performing its obligation of protecting minor children, by watching over parents in their performance of their parental rights, must ensure that adequate and appropriate social services, such as psychological therapy and rehabilitation facilities are offered to parents who need it. The removal of custody rights from mentally ill parents must only be the initial and provisional step. During that time, access and communication rights with their child must be granted to them, whilst simultaneously and most importantly, providing them with the necessary support to treat their illnesses.

## 2. Intellectual incapacity

Lastly, based on a decision of the European Court of Human Rights, it must be clarified that the existence of a more beneficial environment for a child's upbringing does not justify the total removal of a parent's parental rights. In the case of *Kutzner against Germany*,<sup>246</sup> the Court examined whether parental incapacity could lead to the withdrawal of parental responsibility. More specifically, the applicants, who had some intellectual shortcomings of their own, had given birth to two daughters who had a late physical and mental development. Following a social worker's report about their home situation, the local authorities became concerned about the girls' development, who received educational assistance and attended a school for children with special needs. Emphasis was given in the report, on the applicants' lack of intellectual capacity to provide adequate and proper care for their daughters.<sup>247</sup>

As a result, the German courts withdrew the applicants' parental rights and placed their daughters in foster homes. It was clarified that the parents were not at fault, but they were unable to cater to their children's necessary needs, such as help them develop their personalities, or understand them well. Moreover, it was noted that the applicants were opposed to receiving any support from social services. During the time that the girls were in foster care, the applicants were not allowed to see them for 6 months, whilst later they were allowed hour-long visits in the presence of social workers.<sup>248</sup>

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<sup>246</sup> *Kutzner v. Germany* (ECtHR), Application no. 46544/99, judgment of 26 February 2002.

<sup>247</sup> *Kutzner v. Germany*, paragraphs 10-22.

<sup>248</sup> *Kutzner v. Germany*, paragraphs 20-21, 27, 32-47.

The German courts did not consider any alternative measures before ordering the children to enter the foster care system, and thus depriving them all of each other. This practice comes in direct violation of the established case-law of the ECtHR, according to which, the mutual enjoyment between parents and children is a fundamental aspect of the concept of family life, within the meaning of Article 8 of the Convention.<sup>249</sup> Such a measure constitutes, undoubtedly, an interference with the right to family life, pursuant to paragraph 2 of the same Article. This interference entails a violation of Article 8, unless it is in accordance with the law, it pursues a legitimate aim and it is ‘necessary in a democratic society’, taking into account the principle of proportionality.

Axiomatically, the protection of children’s interests is the ultimate social purpose of parental care. Although the German authorities took these measures to promote the applicants’ daughters’ development, they (as all Contracting States) have an obligation to preserve the ties between parents and their children.<sup>250</sup> From the facts of the case, it is evident that no such considerations were made. In this respect, the Court ruled that there must be specific reasons pointing to the necessity of the separation of a parent with their child. This requirement is not fulfilled simply by the mere supposition that another, more beneficial environment could be found for the child.<sup>251</sup> The applicants, in this case, were not neglectful towards their children. In contrast, they ensured that their daughters received the educational support that they needed. Additionally, the various psychology experts’ reports were not in agreement with each other, with some of them maintaining that the girls should be returned to their parents.<sup>252</sup>

Moreover, especially considering the children’s very young age, the Court held that such strict limitations on the parents’ visiting rights could easily lead to the children’s alienation from their parents. Consequently, the interference by the domestic authorities with the applicants’ right to family life was not sufficiently justified, resulting in a violation of Article 8 of the ECHR.<sup>253</sup>

In essence, the case of *Kutzner against Germany* highlights the importance of balancing child protection measures with the parents’ right to family life. An *ad hoc* assessment of all circumstances is all the more imperative in such situations, as the unnecessary separation of a child from their parents can have detrimental effects to all parties. Ultimately, through the way that the specific situation was handled, one may reasonably wonder whether the intent was to

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<sup>249</sup> *Kutzner v. Germany*, paragraph 58.

<sup>250</sup> *Kutzner v. Germany*, paragraphs 60-62 and 65.

<sup>251</sup> *Kutzner v. Germany*, paragraph 69.

<sup>252</sup> *Kutzner v. Germany*, paragraphs 71-74.

<sup>253</sup> *Kutzner v. Germany*, paragraphs 79, 81 and 82.

penalise individuals with mental disabilities by depriving them of their children, whilst simultaneously violating the principle of the best interests of the child, as the maintenance of a parent-child relationship is generally in the child's best interest.

## CONCLUDING THOUGHTS

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In light of the above, joint custody provides the most balanced approach to promoting the best interests of the child, following the parents' separation. The principle of the best interests of the child is the cornerstone of parent-child relationships and the primary criterion to be taken into account in child custody matters. It depicts the paedocentric nature of family law and requires that the interests of the child prevail over everything else.

From the above analysis, it is clear that the concept of child custody – and parental rights in general – have evolved dramatically, especially over the course of the past decades. Parental powers have been replaced by the concept of parental responsibility, which constitutes both a right *and* an obligation of a parent to care and provide for their child. This depicts an obvious departure from the old authoritarian rule that parents used to hold over their children. In contrast, today, children's needs and interests have been 'upgraded' from the limelight to the forefront.

It is common knowledge that children require interaction and caring from each parent to lay the foundations of a solid and healthy parent-child relationship, which greatly contributes to their harmonious development. It is also common knowledge that parental separations are a complex issue that can heavily scar and impact children, who may feel like the collateral damage of a situation they had no part in. In that regard, joint custody ensures the involvement of both parents in their child's life. Furthermore, it provides stability, by ensuring that no parent is reduced to being a mere visitor in their child's life and mitigating separation-related stress about a potential loss of a parent. Thus, child custody is deeply interconnected with psychological factors. Extensive research has shown that children who grow up with both their parents, despite them having separated, are better emotionally adjusted than those who live in sole custody parenting plans with limited contact with the other parent. Moreover, great importance should be accorded to the fundamental right of the child to be heard. Depending on their age and overall maturity, children must be given the opportunity to express their own views and opinions, as custody is a matter that primarily concerns them.

Obviously, there exist circumstances, which heavily impair the children's wellbeing. These circumstances include domestic violence, any kind of abuse by one of the parental parties towards their (former) partner or the child and heavy neglectful parental behaviour. Evidently, such cases depart significantly from the norm. They must be treated with the utmost care and caution, in order to ascertain that the child's interests will be protected at all costs. However, due to the exceptional nature of those behaviours, they must not be taken as a basis for the legislator to decide *if* joint custody should be provided by the law. Nonetheless, appropriate measures must be taken to tackle these situations and ensure the protection of the children concerned.

In conclusion, despite joint custody not being the perfect instrument to regulate child custody in *all* cases, it is the fairest and most appropriate way to effectively safeguard children's interests, which are the paramount consideration in any custody decision. It ensures that, despite the parental separation, children continue to receive the care and support they need from both their parents. Therefore, the view supported in this paper is that there should be a presumption in favour of joint custody, whilst legislators and courts enforce a substantive and thorough *ad hoc* assessment of each individual case. Namely, the assessment must not be merely procedural and formal, but rather be based on the specific circumstances of each case and ensure that the necessary safeguards are put in place, in order to protect the children and their interests, in accordance with the principle of the best interests of the child.

## REFERENCES

### BOOKS

---

- Bernardi Laura and Mortelmans Dimitri, eds., *Shared Physical Custody: Interdisciplinary Insights in Child Custody Arrangements*, 2021
- Courbe Patrick, *Droit de la famille*, 2<sup>nd</sup> edition, 2001
- Georgiadis Apostolos, *Οικογενειακό Δίκαιο [Family Law]*, 3<sup>rd</sup> edition, 2022
- Georgiadis Apostolos, *Εγχειρίδιο Οικογενειακού Δικαίου [Manual in Family Law]*, 3<sup>rd</sup> edition, 2023
- Howe Nina, Recchia Holly, Kinsley Christine, *Sibling Relations and Their Impact on Children's Development*, 2<sup>nd</sup> edition, 2023
- Lansdown Gerison, *Every Child's Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No 12*, Save the Children UK, 2011
- Lekkas Georgios, *Η επιμέλεια του παιδιού κατά τον Αστικό Κώδικα - Μετά τον Ν. 4800/2021 [Custody of the child according to the Civil Code - After Law 4800/2021]*, 2021
- Malaurie Philippe, Fulchiron Hugues, *Droit de la famille*, 7<sup>th</sup> edition, 2020
- Massager Nathalie, *Droit familial de l'enfance*, 2009
- Massager Nathalie, De Buck Carine, *Être parents et se séparer : Regards croisés d'une avocate et d'une pédopsychiatre*, 2007
- Murat Pierre, *Droit de la famille*, 5<sup>th</sup> edition, 2010
- Pical Daniel, "L'autorité parentale dans le code civil", *Le Journal des psychologues*, 2014
- Sáez Jéscica Delgado, *Plurality and Diversity of Family Relations in Europe*, 1<sup>st</sup> edition, 2019
- Spyridakis Ioannis, *Οικογενειακό Δίκαιο [Family Law]*, 3<sup>rd</sup> edition, 2020
- Valmantonis Ioannis, *Συνεπιμέλεια και βέλτιστο συμφέρον τέκνου [Joint custody and best interests of the child]*, 2022

### JOURNALS & ARTICLES

---

- Allen Sarah M., Daly Kerry J., *The Effects of Father Involvement: An Updated Research Summary of the Evidence*, 2007
- Amato Paul R., "Life-Span Adjustment of Children to Their Parents' Divorce", *Children and Divorce, The Future of Children*, 4(1), 1994

- Amato Paul R., Keith Bruce, "Parental Divorce and the Well-Being of Children: A Meta-Analysis", *Psychological Bulletin*, 1991
- Bannis Casimir, *Impact of Parental Separation Preceded By Parental Conflict On the Propensity for Youth Criminality*, 2012  
<https://epublications.regis.edu/cgi/viewcontent.cgi?article=1671&context=theses>
- Berman Rakel and Daneback Kristian, "Children in Dual-Residence Arrangements: A Literature Review", *Journal of Family Studies* 28(4), 2020
- Bjarnason Thoroddur and Arnarsson Arsaell M., "Joint Physical Custody and Communication with Parents: A Cross-National Study of Children in 36 Western Countries", *Journal of Comparative Family Studies*, 42(6), 2011
- Braunstein Lawrence Jay, Greenberg Lyn R. and Shienvold Arnold T., "Role of Mental Health Professionals in Child Custody Cases", *New York Law Journal*  
[https://www.bzesqs.com/storage/app/media/Outside\\_Counsel.pdf](https://www.bzesqs.com/storage/app/media/Outside_Counsel.pdf)
- Bream Victoria, Buchanan Ann, "Distress among Children Whose Separated or Divorced Parents Cannot Agree Arrangements for Them." *The British Journal of Social Work*, 33(2), 2003
- Brinig Margaret F., Buckley Frank H., "Joint Custody: Bonding and Monitoring Theories", *Indiana Law Journal*, 73(2), 1998
- Burger Jarod, "The role of paterfamilias in Roman Law: An exegesis on Roman traditionalism, and traditionalist critique", 2019
- Clemente Miguel, Padilla-Racero Dolores, "The effects of the justice system on mental health", *Psychiatry, Psychology and Law*, 27(5), 2020
- Griffiths Lucy Jane et al., "Anxiety and depression among children and young people involved in family justice court proceedings: longitudinal national data linkage study", *BJPsych Open*, 2022
- Gustavsen Geir, "Effects of Parental Divorce on Teenage Children's Risk Behaviors: Incidence and Persistence", *Journal of Family and Economic Issues*, 37(3), 2015
- Johnson Emma, "Patriarchal Power in the Roman Republic: Ideologies and Realities of the Paterfamilias", 2007
- Kelly Joan B., "The Determination of Child Custody", *Children and Divorce, The Future of Children*, 4(1), 1994
- Kelly B. Joan, Michael Lamb, "Using child development research to make appropriate custody and access decisions", *Family Court Review*, 2005

- Lehtme Rafaela and Toros Karmen, “Bird's nest parenting as a child-centered solution in the context of shared parenting”, *The Child Welfare System: Perspective, Challenges and Future Directions*, 2019
- Letsas George, *The Truth in Autonomous Concepts: How To Interpret the ECHR*, *European Journal of International Law*, 15(2), 2004
- Lowe Nigel, “A study into the rights and legal status of children being brought up in various forms of marital and non-marital partnerships and cohabitation”, Europe Council, 2008
- Lücker-Babel Marie-Françoise, “The Right of the Child to Express Views and to Be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child”, *The International Journal of Children's Rights*, 3(3-4), 1995
- Millard Éric, “Le droit constitutionnel de la famille”, *Code civil et constitution*, 2007  
<https://shs.hal.science/halshs-00126007v1/document>
- Mnookin Robert H., “Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy”, *Law and Contemporary Problems*, 39(3), 1975
- Mohanty Madhu S. & Ullah Aman, “Why Does Growing up in an Intact Family during Childhood Lead to Higher Earnings during Adulthood in the United States?”, *American Journal of Economics and Sociology*, 71(3), 2012
- Nielsen Linda, “Parenting Plans for Infants, Toddlers, and Preschoolers: Research and Issues”, *Journal of Divorce and Remarriage*, 55(4), 2014
- Pruett Marsha Kline, Barker Carrie, “Joint Custody: A Judicious Choice for Families – But How, When, and Why?”, *The scientific basis of custody decisions*, 2<sup>nd</sup> edition, 2009  
[https://www.researchgate.net/publication/274708203\\_Joint\\_Custody\\_A\\_Judicious\\_Choice\\_for\\_Families\\_-\\_But\\_How\\_When\\_and\\_Why](https://www.researchgate.net/publication/274708203_Joint_Custody_A_Judicious_Choice_for_Families_-_But_How_When_and_Why)
- Pearl Mok et al., “Experience of Child-Parent Separation and Later Risk of Violent Criminality,” *American Journal of Preventive Medicine*, 55(2), 2018
- Roth Allan, “The Tender Years Presumption in Child Custody Disputes”, *Journal of Family Law*, 1976-1977
- Saitakis Kimon, *Τα πρώτα νομολογιακά πορίσματα σε σχέση με τη νέα ΑΚ 1520 (δικαίωμα επικοινωνίας του γονέα)*, [The first jurisprudential findings in relation to the new Article 1520 of the Civil Code (a parent's right of communication)], 2022 <https://www.nb.org/blog/post/ypdik-ta-prwta-nomologiaka-porismata-ak-1520>

- Vanassche Sofie et al., “Alternating Residence for Children After Parental Separation: Recent Findings from Belgium”, *Family Court Review*, 55(4), 2017
- Wadsby Marie, Priebe Gisela & Svedin Carl Göran, “Adolescents With Alternating Residence After Parental Divorce: A Comparison With Adolescents Living With Both Parents or With a Single Parent”, *Journal of Child Custody*, 11(3), 2014
- Warshak Richard A., “Social Science and Parenting Plans for Young Children: A Consensus Report”, *Psychology, Public Policy, and Law*, 20(1), 201
- Zamperini Rachele, “Establishing Parenthood through Adoption and Surrogacy: A Test Case for the ECtHR Use of the Best Interests of the Child Principle”, *Family & Law*, 2024. <https://www.familyandlaw.eu/tijdschrift/fenr/2024/03/FENR-D-23-00014.pdf>

## CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

---

- A. v. Croatia* (ECtHR), Application no. 55164/08, judgment of 14 October 2010
- Buchs v. Switzerland* (ECtHR), Application no. 9929/12, judgment of 27 May 2014
- C. v. Croatia* (ECtHR), Application no. 80117/17, judgment of 8 October 2020
- Cernecki v. Austria* (ECtHR), Application no. 31061/96, decision of 11 July 2000
- Diamante and Pelliccioni v. San Marino* (ECtHR), Application no. 32250/08, judgment of 27 September 2011
- Giorgioni v. Italy* (ECtHR), Application no. 43299/12, judgment of 15 September 2016
- Hokkanen v. Finland* (ECtHR), Application no. 19823/92, judgment of 23 September 1994
- Johansen v. Norway* (ECtHR), Application no. 17383/90, judgment of 27 June 1996
- K. and T. v. Finland* (ECtHR), Application no. 25702/94, judgment of 12 July 2001
- Karadzic v. Croatia* (ECtHR), Application no. 35030/04, judgment of 15 March 2006
- Kosmopoulou v. Greece* (ECtHR), Application no. 60457/00, judgment of 5 February 2004
- Kutzner v. Germany* (ECtHR), Application no. 46544/99, judgment of 26 February 2002
- M. and M. v. Croatia* (ECtHR), Application no. 10161/13, judgment of 3 December 2015
- Maumousseau and Washington v. France* (ECtHR), Application no. 39388/05, judgment of 6 December 2007
- Mustafa and Armağan Akin v. Turkey* (ECtHR), Application no. 4694/03, judgment of 6 April 2010
- N.Ts. and Others v. Georgia* (ECtHR), Application no. 71776/12, judgment of 2 May 2016



*Olsson v. Sweden (No. 1)* (ECtHR), Application no. 10465/83, judgment of 24 March 1988

*Peřilová v. the Czech Republic* (ECtHR), Application no. 14889/19, judgment of 8 December 2022

*Petrov and X v. Russia* (ECtHR), Application no. 23608/16, judgment of 23 October 2018

*R.M. v. Latvia* (ECtHR), Application no. 53487/13, judgment of 4 April 2022

*R.W and C. T.G.-W. v. Austria* (ECtHR), Application no. 36222/97, decision of 22 November 2001

*Salguiero da Silva Mouta v. Portugal* (ECtHR), Application no. 33290/96, judgment of 21 December 1999

*Sahin v. Germany* (ECtHR), Application no. 30943/96, judgment of 8 July 2003

*Sommerfeld v. Germany* (ECtHR), Application no. 31871/96, judgment of 8 July 2003

*Strumia v. Italy* (ECtHR), Application no. 53377/13, judgment of 23 September 2016

*Zaunegger v. Germany* (ECtHR), Application no. 22028/04, judgment of 3 December 2009

## LEGAL TEXTS & LEGISLATION

---

Belgium: *Civil Code (Code Civil)*

Belgium: *Judicial Code (Code Judiciaire)*

Belgium: *Law of 18 July 2006*

European Union, *Charter of Fundamental Rights of the European Union*, C 303/1, 14 December 2007

European Union, *Consolidated version of the Treaty on the European Union*, OJ C 115/13, 24 December 2002, 7 February 1992

European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, OJ C 326/47, 26 October 2012

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950

Council of Europe, *Convention on Contact Concerning Children*, 15 May 2003

Council of Europe, *European Convention on the Exercise of Children's Rights*, 25 January 1996

Council of Europe, *Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 22 November 1984

Council of Europe and the Committee of Ministers, *Recommendation No. R (84) 4 on Parental Responsibilities*, 28 February 1984

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

France: *Civil Code (Code Civil)*

France: *Code of Civil Procedure*

France: *Law No. 87-570 of 22 July 1987*

Germany: *Basic Law for the Federal Republic of Germany*

Germany: *Civil Code (Bürgerliches Gesetzbuch)*

Greece: *Constitution*

Greece: *Civil Code*

Hague Convention on *Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, 19 October 1996

Ireland: *Constitution*

Italy: *Constitution*

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989

## **COURT OF JUSTICE OF THE EUROPEAN UNION & NATIONAL COURTS**

---

European Union, Court of Justice of the European Union, *Opinion 2/13 pursuant to Article 218(11) TFEU*, 18 December 2014

Court of Justice of the European Union, *Slowakische Republik v Achmea BV*, C-284/16

Greece: *Judgment No. 255/2011* of the Greek Supreme Court [*Areios Pagos*], Civil department

Greece: *Judgment No. 3827/2023* of the Single Member Court of First Instance of Athens