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IS THE DUAL RESIDENCE AN APPROPRIATE ARRANGEMENT FOR THE MINOR WITH SEPARATED PARENTS? NATIONAL EXPERIENCES AND EUROPEAN RECOMMENDATIONS

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Abstract: *The divorce of a child's parents should be managed in such a way that the minor is affected as little as possible. In order to minimize the impact of the parents' separation on the child, the question arises as to whether the establishment of an alternative home may, in certain cases, be the appropriate solution to ensure that the child retains a status as close as possible to that previously enjoyed. In order to provide an answer in this regard, we have referred to recommendations that have been put forward at European level, based on specialist studies, to models of good practice in other European countries and we have also provided examples from recent judicial practice in Romania.*

Key words: *divorce, alternative residence, shared parental authority.*

1. Preliminary Remarks

The parent-child relationship is the basis for the harmonious development of the future adult, which means that any measure concerning the minor must take into account the fact that he/she needs both parents in his/her life.

As suggestively expressed in the literature (Nicolescu, 2020, p.159), even ex-spouses, from their position as parents, are called upon to establish a mature relationship, bearing in mind an undeniable reality: the parental couple must survive the conjugal one.

From this perspective, many legislations, including the Romanian one, have undergone important paradigm shifts, making both parents responsible for being actively involved in the upbringing and education of their children.

If principles, such as the joint exercise of parental authority, have been implemented in our legislation, however, in the case of establishing an alternating residence of the minor after the divorce of his parents, the Romanian legislator has chosen to keep "a complicit silence", in the sense that, although it does not regulate this solution, it does

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not prohibit it (Mocanu and Avram, 2019,p.51).

Understood as a post-divorce arrangement whereby children spend up to half of their time in each parent's home (Berman&Daneback, 2022, p.1448), the dual residence reflects the changes that have taken place in recent years in the way family and private life are organised (Avram, 2022, p.450). From this point of view, the solution is more common in countries where gender equality, mothers increasingly being part of the labour force and the growing conscience about fathers' responsability are natural (Berman&Daneback, 2022, p.1449).

Even in states that have adopted this controversial solution, where the situation between ex-spouses is tense and therefore still conflictual, caution should be exercised, so as not to harm the minor (Berman&Daneback, 2022, p.1453).

2. Examples of Legislations that Implement this Arrangement. European recommendations

Sweden is an example of a country where the establishment of alternative residence is a solution that courts have been applying since 1998 (Barbur, 2015, p.141). The criteria used, to decide such a solution, include: the child's opinion, i.e. his/her age, the parents' opinion, their involvement and willingness to cooperate, the reasonable distance between the two residences.

French law also encourages this arrangement, as it is explicitly provided for in the Civil Code, in art.373-2-9. The criteria considered by the French magistrates are among those listed above, to which is added the child's capacity to adapt, and principles such as that siblings will not be separated (Barbur, 2015, p.143).

At the international level, the role of certain documents is recognised, which, although issued as recommendations, can nevertheless be invoked for the flexible interpretation and application of existing domestic provisions (Avram, 2022, p.450).

In this respect, Principle 3.20 of the Principles of European Family Law on Parental Authority, drawn up by the European Commission on Family Law, states: *„(1) If parental responsibilities are exercised jointly the holders of parental responsibilities who are living apart should agree upon with whom the child resides.*

(2) The child may reside on an alternate basis with the holders of parental responsibilities upon either an agreement approved by a competent authority or a decision by a competent authority. The competent authority should take into consideration factors such as: (a) the age and opinion of the child; (b) the ability and willingness of the holders of parental responsibilities to cooperate with each other in matters concerning the child, as well as their personal situation; (c) the distance between the residences of the holders of the parental responsibilities and to the child's school".

Equally important to mention is the Resolution 2079 (2015) adopted by the Parliamentary Assembly of the Council of Europe - Equality and shared parental responsibility: the role of fathers, which in point 5.5. calls on Member States to introduce "*into their laws the principle of shared residence following a separation, limiting any exceptions to cases of child abuse or neglect, or domestic violence, with the*

amount of time for which the child lives with each parent being adjusted according to the child's needs and interests".

3. Interpretations according to Romanian law. Case-studies

As we have shown above, the Romanian legislator's option was not to expressly regulate the solution of alternating the minor's residence. However, part of the doctrine, as well as of the case law, supports this compromise formula with relevant arguments.

Thus, according to Mocanu and Avram (2019,p.61), a first legal argument would be the *per a contrario* interpretation of Article 400 of the Romanian Civil Code, which substantiates the conclusion that whenever there is an agreement between the parents and the court considers that this agreement is in the best interest of the child, it can accept, for the minor, the formula of the dual residence.

Another legal basis, which is also promoted by the Romanian judicial practice, concerns the right of each parent to have personal ties with the minor, even extended ties, which can be materialized through the modality of alternating residence, starting from the provisions of Art.18 para.1 lit. c) of Law 272/2004 on the protection of the rights of the child, according to which personal relations may be achieved when the child is hosted for a fixed period by the parent with whom the child does not habitually live, with or without supervision of the manner in which the personal relations are maintained, depending on the best interests of the child.

In the view of other authors (Neamț, 2021,p.335), the minor's home is an element of stability which, in case of separation, is established only with one of the parents, therefore not being possible to have the home alternately with both parents. The considerations on which this thesis is based are linked to the grammatical interpretation of Articles 400, 496 and 497 of the Civil Code and of Article 21(1) of Law No 272/2004, which use the singular "child's home".

Beyond these doctrinal debates, we intend, by means of this study, to carry out an examination of Romanian case law, in order to take into account recent court practice.

Thus, starting from the consideration that Romanian law does not provide for the possibility of establishing the dual residence of a minor, there are courts that reject as inadmissible the claim for the establishment, even provisionally, of such alternative housing.

One such example is Decision no.882/09.12.2020 issued by the Teleorman Tribunal. This court points out, at the beginning of its reasoning, that the sanction of inadmissibility arises as a result of disregarding the prohibition imposed by the legal texts, in relation to the legal proceedings. On this line of reasoning, whenever the claimant initiates legal proceedings which are not available to him, his application will be rejected as inadmissible.

The Teleorman Court held that the new Romanian Civil Code did not introduce the notion of joint custody, which may also include the notion of alternating residence, but that of parental authority, the meaning of the two notions being distinct, both from a theoretical point of view and in terms of the practical consequences that the application of the two notions entails.

This court's assessment was that the child's contacts, in the context of his or her parent's visitation schedule, are not appropriate by systematically moving the child between the two parents' homes.

Other courts (Bucharest Tribunal, through Decision no.1088/06.05.2021) have ruled inadmissible the establishment of an alternative home for the child, in the urgent procedure of the presidential order.

In this regard, we recall that, according to Article 997 paragraph 1 of the Romanian Code of Civil Procedure, the court, having established that the plaintiff has an appearance of entitlement, may order provisional measures in urgent cases, for the preservation of a right that would be prejudiced by delay, for the prevention of imminent damage that cannot be repaired, and for the removal of obstacles that may arise in the course of enforcement. Also, pursuant to Article 997 paragraph 5 of the Code of Civil Procedure, by means of a presidential order, no measures may be ordered to resolve the dispute on the merits, nor measures whose execution would make it impossible to restore the factual situation.

Thus, with regard to the provisional determination of a child's place of residence, in the procedure for a presidential order, the urgency derives from the need to regulate, on a temporary basis, the legal situation of that child, pending the judgment in the main proceedings, i.e. until the divorce is settled. The urgency of the measure also means that the courts must confine themselves to examining the conditions of admissibility, that is to say, to examining the evidence at the level of the appearance of the right, without ruling on matters relating to the very substance of the issues in dispute between the parties.

In the civil case before the Bucharest Court, which was settled by the above-mentioned decision, it was found that the child had been living with her mother since May 2020, and no elements contrary to the child's best interests were found in the assessment possibilities under a presidential order, which would require a change of the child's residence.

With regard to the establishment of an alternative residence, the Bucharest Court held that such a measure substantially alters the child's life, representing an issue that cannot be sufficiently assessed in the presidential order procedure.

By reference to the Recommendations of the European Commission on Family Law, i.e. the factors taken into account in the court's examination to establish an alternative residence, the Bucharest Court concluded that this analysis exceeds the procedure of a presidential order.

Without denying the need for each parent's involvement in his or her child's growth and education, the court held that the father's proposal produces an excessive fragmentation of the child's life schedule. However, given that the essence of a presidential order is the adoption of interim measures, they cannot take the form of major changes to the child's life.

Another important aspect that formed the conviction of the court, in such a direction, was that, at the level of the appearance of right, there was a disagreement between the parties regarding their involvement, on the grounds that they had different parenting styles.

Diametrically opposed is a solution of the Carei Court (Judgment no.1491/15.12.2023) which was confirmed on appeal by the Satu Mare Court (Judgment no.44/25.01.2023).

First of all, in its considerations, the Carei court of first instance underlined the need for a modern interpretation of the feeling of stability and belonging that a minor must have, namely it considered that this feeling is rather related to the quality of the relationships that the child develops with his parents, the solution of alternating residence being apt, in the view of this court, to allow the child's interaction with each of the two parents to be fluid, without any syncopation and without too many transfers of parental authority from one parent to the other.

In confirming the decision of the first instance, the Satu Mare Tribunal rejected the argument made in the appeal that dual residence could not be ordered as a provisional measure, justifying its approach by stating that, regardless of whether the measure is definitive or, on the contrary, provisional, what must always be considered is the best interest of the child.

Even the arguments put forward by the mother, such as the father's inability to take care of the two minor children, did not change the court's orientation, being considered as mere speculations, due to outdated concepts, according to which the father's role is insignificant, concepts that are refuted by the new psychological, social and family realities.

In another civil case, the decision of the first instance to establish an extended programme of personal ties with the father, based mainly on the fact that the best interest of the child is that the change in the family paradigm occurs gradually, was overturned on appeal by the Ilfov Court, by Decision no.4534/02.11.2022.

The court found that the child is at a young age and should enjoy a climate characterised by stability, so frequent moves from one parent to another are likely to create a state of insecurity and confusion, given that each parent has a different set of rules that they apply in raising and educating their child.

Moreover, another court, also on appeal – Bihor Tribunal, in its Decision no.884/07.11.2023, has shown that among the factors to be taken into account in such cases is the willingness and ability of the holders of parental responsibility to cooperate with each other.

4. Concluding Remarks

The lack of a regulatory framework on the establishment of dual residence for children with separated parents is likely to lead to a non-uniform judicial practice.

In view of the European guidelines, the Romanian legislator must also take into account such a normative solution, which arises in an evolving context. As it is also necessary to lean on more innovative solutions, such as *birdnesting*, an approach that has been considered to be primarily child-oriented, as it implies that the minor remains in the family home, the parents being the ones who rotate, to live one by one with their child (Irinescu, 2021, p.186).

In order for the minor to enjoy the advantages of these novel solutions, it is necessary for the legislator to provide practitioners with a minimum set of conditions, which, if respected, can make these arrangements work for the welfare of children. From the case law

developed so far, in the light of the specific features of each individual case, the legislator can draw up a generous set of criteria that will serve the best interests of the child.

References

Avram, M. (2022). *Drept civil. Familia.* ediția a 3-a revizuită și adăugită [Civil Law. The Family, the third edition]. Bucharest:Hamangiu.

Avram, M., Mocanu, C.I. (2019). De la Ana la Caiafa: Interogații și soluții privind locuința alternantă a minorului [From Pillar to Post:Interrogations and solutions regarding the alternating residence of the minor child]. *Revista de Dreptul Familiei* no.1-2, 50-71

Barbur, F. (2015). The alternative residence of minors with separated parents. *Juridical Tribune.* volume 5, issue 1, 140-149

Berman, R. & Daneback, K. (2022). Children in dual-residence arrangements: a literature review. *Journal of Family Studies*, 28:4, 1448-1465, DOI: 10.1080/13229400.2020.1838317

Irinescu, L. (2021). Birdnesting-o nouă abordare a divorțului și despre cum putem adapta prevederile art.400 din Codul civil [Birdnesting-A new approach to divorce and how we can adapt the provisions of Article 400 of the Civil Code]. *Revista de Dreptul Familiei* no.1, 171-190

Neamț, I.I. (2021). Locuința alternantă. Sau când „interesele superioare ale părinților" sunt mascate sub forma interesului superior al copilului. O analiză critică [The alternating home. Or when the best interests of the parents are disguised as the best interests of the child. A critical analysis]. *Revista de Dreptul Familiei* no.1,325-373

Nicolescu, C. (2020). *Dreptul familiei* [Family Law]. Bucharest: Solomon

Bihor Tribunal, Decision no.884/07.11.2023, retrieved from www.rejust.ro

Bucharest Tribunal, Decision no.1088/06.05.2021, retrieved from www.rejust.ro

Carei Court of first instance, Judgment no.1491/15.12.2023, retrieved from www.rejust.ro

Ilfov Tribunal, Decision no.4534/02.11.2022, retrieved from www.rejust.ro

Law no.272/2004 on the protection of child republished in the Official Gazette no. 159/05.03.2014, as subsequently amended and supplemented

Principles of European Family Law on Parental Authority, drawn up by the European Commission on Family Law, retrieved from https://ceflonline.net/wp-content/uploads/Principles-PR-English.pdf

Resolution 2079 (2015) adopted by Parliamentary Assembly of Council of Europe - Equality and shared parental responsibility: the role of fathers, retrieved from: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22220

Satu Mare Tribunal, Decision no.44/25.01.2023, retrieved from www.rejust.ro

Teleorman Tribunal, Decision no.882/09.12.2020, retrieved from www.rejust.ro

Romanian Civil Code

Romanian Civil Procedure Code

French Civil Code