

Joint Exercise of Parental Rights in the Context of Divorce

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Abstract

Joint exercise of parental rights is an adequate form of parental care after divorce if the parents are able to overcome mutual animosity, and resolve conflicts, that may result in the complete dissolution of the family unit. Joint custody eliminates the negative effects of the sole exercise of parental rights since former spouses still have equal legal status after divorce so that they are jointly responsible for raising a child. In joint custody, parents jointly exercise all rights and responsibilities of parenting and make agreements, whereas the physical custody of the child in most cases belongs to one parent, though there may be an option of the child's alternate residence with both parents, in which case both parents alternately have the custody of the child.

The concept of joint exercise of parental rights is based on the idea of equally important role of both parents in the proper physical and mental development of the child and on the principle of parents' equality in relation to the child. In addition, joint custody endeavors to preserve the relationship between the child and the parent with whom it does not live. Therefore, the positive effects of joint custody reflect on all participants in the relation of parental rights.

In the European legal space joint custody after divorce is exceptionally popular. However, since it was legalized in 2005, this form of parenting by divorced parents has not been sufficiently established in practice in the Republic of Serbia. Still, with the further insight into the advantages of the joint custody, it

is reasonable to expect that parents will increasingly opt for this form of care. In addition, given the evolution of the model of joint care in comparative law, it is reasonable to conclude that in due course the presumption of joint exercise of parental rights after divorce will find its place in the Serbian legal system.

Key words: *joint exercise of parental rights, divorce, parents, children, Serbian law, comparative law.*

INTRODUCTION

Traditionally, after divorce most parental rights were exercised independently by the parent who enjoyed custodial rights of the child, while the other parent kept certain rights and duties from the scope of parental rights. The concept of sole custody, however, is not in accordance with the principle of legal equality of parents in relation to the child, since it favors the parent to whom the child was entrusted, so that the decisive role in the care for the child belongs to that parent, while the position of the parent not living with the child is marginalized, and in practice it is often reduced to giving the ordered amount of financial support and the occasional visitation with the child. In this sense, divorce is not only the end of a spouses' marriage, but also the end of the real parenting role of a parent who does not exercise the custodial parental rights.

In the recent years there has been a more noticeable tendency to expand the application of joint custody both in order to eliminate the negative consequences of sole custody and to accommodate the situation where parents lead separate lives. In the context of the extreme pressure that marital instability and frequent divorces place on the traditional family model (consisting of spouses and their children)¹ and bearing in mind that marriage

¹ See more: H. D. Krause, "Marriage for the New Millennium: heterosexual, same sex – or not at all", *Deutsches und Europäisches Familienrecht*, Volume 2, Number 4/December, 2000, p. 208-221; M. Mladenović, "Da li porodica ima budućnost", *Pravni život*, no. 9/1996, pp. 545-559.

is still, despite such negative events, the primary environment in which the process of birth and raising children takes place, the possibility of continuing the joint exercise of parental rights after divorce is of essential importance, though this model of custody can also be successfully applied in other situations where parents lead separate lives.²

The concept of joint exercise of parental rights is based on the idea of the equal importance of the role of both parents in the proper physical and mental development of the child, on the principle of parents' equality in relation to the child. The idea of joint custody also endeavors to preserve the relationship between the child and the parent with whom he or she does not live at the time. Joint custody is a legal form of child care after divorce. Divorce separates the relationship between parents as spouses and their relationship as parents, whereas mere disordered relationships between spouses do not automatically mean a change in the legal relationship of the parents. Joint custody treats parenting as a specific and independent legal category, which does not depend on a change in circumstances, or a change in the legal status of the parents, the result of divorce, by which the child, not the parents, is implicitly set in the center of the parental relationship.³

Joint exercise of parental rights after divorce will inevitably be subject to some modifications in relation to the basic model applicable to the complete family unions, but in this form, compared to the sole custody, it still provides many advantages. However, in a situation of constant conflict between the parents, this form of custody makes little sense. For this reason, joint exercise of parental rights is not the only form of custody of children after divorce.

² Joint exercise of parental rights is also possible in the situations of physical dissolution of marriage, termination of cohabitation, as well as annulment of marriage in which children were born. Finally, this model of parental custody is possible also in situations where there are children born out of wedlock to *ad hoc* cohabitating relationships. In all mentioned cases the agreement of parents on joint custody is required. Since the subject of this paper is joint exercise of parental rights in the context of divorce, listed situations, where joint custody is also feasible, will not be the subject of further detailed analysis.

³ G. Kovaček-Stanić, *Uporedno porodično pravo*, Novi Sad, 2002, pp. 260-261.

Joint exercise of parental rights after divorce does not have a long tradition in the Serbian law.⁴ This model of care was legalized in 2005, so that Serbia is one of the last European countries to have accepted the idea that divorce breaks off the family union of spouses, but the people continue to have classic parental relations with the child. In addition, joint custody has still not been fully affirmed in practice. Still, given the extreme popularity and expansion of the model of joint care in comparative law, as well as the presence of the presumption of joint care after divorce in most European legal systems, it can be expected that parents will, in the future, with the comprehension of the obvious advantages of joint custody, increasingly opt for this form of care.

JOINT EXERCISE OF PARENTAL RIGHTS AFTER DIVORCE IN CONTEMPORARY SERBIAN LAW

The Serbian Family Act⁵ says that parents shall exercise parental rights jointly and in consent even when they lead separate lives (when they are divorced) if they make an agreement on joint custody and if the court deems that it is in the best interests of the child.⁶ With this agreement the parents consent to exercise jointly parental rights and responsibilities, with mutual agreement, which must be in the best interests of the child. An integral part of this consent is the agreement on the residence of the child.⁷ Since joint custody requires a high degree of cooperation of parents in raising the child, according to our current law it is based on the principle of good will.

⁴ Although the court at the time of enforcement of the Law on Marriage and Family Relations in Serbia ("*Official Gazette of the Republic of Serbia*", no. 22/1980, 11/1988, 22/1993, 25/1993, 35/1994, 46/1995 and 29/2001) could not officially decide on joint exercise of parental rights, in theory the attitude was emphasized that the law had not foreseen legal obstacles which would in practice prevent parents from reaching an agreement on this form of custody after divorce. To see more: O. Cvejić-Jančić, "Zajedničko vršenje roditeljskog prava", *Pravni život*, no. 9/1997, p. 692.

⁵ Serbian Family Act, "*Official Gazette of the Republic of Serbia*", no. 18/2005 and 72/2011.

⁶ See: Article 75 Paragraph 2 of the Serbian Family Act.

⁷ See: Article 76 of the Serbian Family Act.

In case of divorce it is desirable that parents regulate the way of exercising parental care by an agreement, where they can opt for either joint or sole custody. In this regard, if they choose divorce by consent, the parents are required to present to the court, along with the divorce proposal, an agreement on the exercise of parental rights over the minor children of the marriage, and the court will examine it and enter it in the pronouncement of the divorce judgment, if deemed to be in the best interests of the child.⁸ If the divorce proceeding is initiated by a petition, since the Serbian law recognizes both - divorce by consent and divorce initiated by lawsuit of one spouse, the authority before which mediation, as a required phase in divorce proceedings initiated by lawsuit, is conducted shall endeavor to help the in the process of settlement to reach an agreement on the exercise of parental rights.⁹ In the absence of an agreement between the parents, the court itself will regulate the issue of the custody. However, the court is limited by the inability to decide the joint custody. In addition, we should bear in mind that divorced parents even with the joint exercise of parental rights do not do it in the way they did it during the marriage.

Since it is a new institute, joint exercise of parental rights has not yet experienced the full recognition in practice.¹⁰ However, in comparative law, this form of parental care enjoys exceptional popularity.¹¹ In addition, more and more systems presume joint exercise of parental rights after divorce, so that the model of sole custody has decreased almost to the rank of

⁸ See: Article 40 and Article 225 Paragraph 1 of the Serbian Family Act.

⁹ See: Article 241 Paragraph 2 of the Serbian Family Act.

¹⁰ The results of the survey we conducted in the Municipal Court in Nish on a sample of 156 cases of divorce by mutual agreement which involve minor children legally adjudicated from 01/07/2005 to 31/12/2008, show that the option of joint exercise of parental rights was upheld in only 14 cases with minor children. We believe that such low number is mainly a consequence of parents' lack of information when it comes to institutes that have been in our country regulated for the first time by the Family Act. To see more details of the research results: T. Kitanović, *Sporazumni razvod braka u domaćem i uporednom pravu*, PhD thesis, Novi Sad, 2011, pp. 121-124.

¹¹ It should be noted, however, that even in the countries which long before us introduced joint custody, there were a lot of problems in the initial phase of its implementation, so that this form of care in time, after its advantages had been perceived, gained popularity and became the dominant form of parenting for divorced parents. More: L. Parkinson, "Child Custody Orders: A Legal Lottery?" *Family Law*, Volume 18, January 1988, pp. 26-30.

exceptions.¹² In this context, we believe that in future parents will, with the comprehension of the obvious benefits of the joint custody, more often opt for this form of care. Moreover, given the evolution of the model of joint care in comparative law, it is reasonable to conclude that in due course the presumption of joint exercise of parental rights after divorce will find its place in the Serbian legal system.

In the domestic scientific and professional public there is currently a great interest in the idea of equal treatment of parents, regardless of their status. In this regard, there has been an increase in demands to provide more rights to divorced parents who do not live with their children, in order to stimulate parents to actively take part in their children's lives, to regularly maintain personal relationships and to fulfill their obligations towards the children. The assumption of joint exercise of parental rights in any situations where parents live separately is an indicator of legal equality of parents in their relationship with children. In this regard, the Commission¹³, which is working on the codification of Serbian civil law, in the Third book of the Pre-draft Civil Code¹⁴, dedicated to family relations and presented to the public in June 2011, along with the present legal solution which assumes a written consent between the parents on joint care, proposes an alternative solution according to which parents will exercise parental rights jointly and by an agreement, just as when living together, and now in the case of leading separate lives.¹⁵ According to the proposal of the Commission, parents would automatically resume joint custody after divorce, while in the case of misunderstanding between parents on the exercise of parental rights upon the completion of the divorce proceedings, the court shall intervene by its decision, taking into account the best interests of the child.¹⁶ One might conclude at first glance that this has made a way for the court to decide on

¹² For example, the assumption of joint custody of divorced parents exists in Germany, Sweden, France, Belgium, the Netherlands and in some states of the USA.

¹³ Recognizing the need for codification of Civil Law, in 2006 the Government of the Republic of Serbia established a Commission, composed of distinguished academics and renowned experts in the field of civil rights, for drafting the Civil Code. See the Decision on forming the Commission for drafting the Civil Code, "*Official Gazette of the Republic of Serbia*", no. 104/06, 110/06 and 85/09.

¹⁴ Pre-Draft of Serbian Civil Code, <http://arhiva.mpravde.gov.rs/lt/articles/zakonodavna-aktivnost/gradjanski-zakonik>, access 18 May 2014.

¹⁵ See: Article 93 of the Pre-Draft of Serbian Civil Code.

¹⁶ See: Article 94 of the Pre-Draft of Serbian Civil Code.

joint custody even in the event of a dispute between parents about the form of parental care, if it is in the interest of the child. However, in Paragraph 2 of the same Article it is foreseen that until the court has reached the decision on the exercise of parental rights, the parent with whom the child lives, exercises parental rights independently, which indicates the crucial importance of the parents' agreement on joint exercise of parental rights, so much so that the absence of this agreement excludes the possibility of awarding the joint custody by the court.

Although the marriage has failed, the child must not lose the family, because it is the most important pillar in the life of every child. The child depends on the parental love and attention whether in order to develop enough self-confidence, so as to be successful in the process of education as well as in sports activities, and whether they will be able to establish a stable family of their own. In this regard, it is particularly important for the parents to endeavor and continue with joint custody after divorce. Yet, the literature states that the construction of joint custody encourages a partly illusory idea that the divorce is in this way more bearable for the child, because both parents are close role models, in contact with the child.¹⁷ However, this is often not in accordance with reality, even to the extent that there is a danger that with divorce a child may lose contact with one parent.¹⁸

Joint exercise of parental rights has two forms in practice: joint legal custody and physical joint custody. Joint legal custody encompasses mutual agreement of parents on all matters essential to the child, whereas physical joint custody means that both parents take part in the daily care of the child. This concept of joint exercise of parental rights gives parents an opportunity to adjust the way of exercising joint custody to their own life situations. Thus, former spouses resolve the issue who the child will live with by an agreement. They can choose the option of a permanent residence of a child in the home of a parent, or the version in which the child alternately lives with the mother for a certain period, and then with the father. However, in the interest of legal certainty and undisturbed legal transactions, it is necessary to reach an agreement on the residence of the child. Yet, in practice, the residence of the child is the indicator of physical custody of the child. The parent with whom the child does not reside essentially loses the right to look after the child, giving the right to the other parent to care for the child, whereas the parent with whom the child resides receives a decisive role not

¹⁷ D. Schwab, *Familienrecht*, Verlag, C. H. Beck, München, 2008, p. 155.

¹⁸ *Ibid.*

only in terms of child care, but also in the exercise of other rights related to parental rights.¹⁹ The option of alternating residence of the child with both parents is not so common in practice, and can be successful only in specific situations.²⁰ Similarly, the parents agree on child support, as well as on maintaining personal relationships, which in practice should lead to more frequent contacts between the child and the parent with whom he or she does not live, i.e. contacts that is not so strictly defined in terms of their arrangement, frequency and duration.²¹

Since the population of Serbia is not characterized by excessive mobility, i.e. changes of residence are not so frequent, the model of joint exercise of parental rights is becoming more frequent, although at this point the parents rarely opt for this form of custody. Also, the feasibility of both legal joint custody and physical joint custody depends on a particular situation in life. If the spouses live in the same city, there are likely to be fewer major obstacles to joint exercise of parental rights. Moreover, due to

¹⁹ G. Kovaček-Stanić, *Porodično pravo: partnersko, dečje i starateljsko pravo*, Novi Sad, 2007, p. 315.

²⁰ Psychologists advise that the child should have one home, with occasional visits to the other parent's home. The need to live in one home is caused by the desire for stability. On the other hand, despite the widespread belief that living in two homes will be stressful to the child, the experience of Sweden, one of the pioneers in the field of introducing the joint custody, denies it. More: G. Kovaček-Stanić, "O roditeljskom pravu u teoriji i praksi Švedske", *Anali Pravnog fakulteta u Beogradu*, no. 1-2/1990, p. 123.

²¹ The study of J. Wallerstein and S.B. Corbin points to some of the difficulties children are faced with when parents have joint physical custody. Namely, the children want to be fair and equally dedicated to both parents. Hence, they are often in a dilemma when they have to make a choice or a decision, they find life in two homes difficult, impractical and sometimes very hard. Some children over the age of 10 feel anxious and confused, because they do not know where their real place is. In addition, teenagers are engaged in activities that make them less dependent on their parents, so that their circulation from one parental home to the other is too strenuous. At the same time, whether this form of care will be acceptable depends on many factors, such as temperament of the child, its age, distance between homes where the parents live, etc. Also, the needs and priorities of the child may change with its maturing, i.e. the child's needs may evolve, so that they are no longer identical to those at the time of the divorce, which requires a change in the form of parental care. See: J. Wallerstein, S. B. Corbin, "Father – Child Relationships after Divorce: Child Support and Educational Opportunity", *Family Law Quarterly*, 1986, 20 (2), p. 30.

difficult economic circumstances, divorced spouses are often unable to adequately resolve the housing problem, so that they continue to live in a shared flat or house even after the divorce. As there is no spatial distance between children and parents in this situation, organizing a family life does not suffer significant changes, so that parents can freely continue to care for their children together.

The possibility of a mutual and consensual decision-making on issues of crucial importance for the child brings along the risk of conflict between the parents, who will not always have the same view of the matter, considering that during the marriage cases of disagreement between spouses are not rare, and this risk is more present, with divorced spouses whose relationship is characterized by less willingness to engage in dialogue, a lower level of tolerance, reduced flexibility and unwillingness to accept the view of the other side, which may be more realistic and better for the child. Although conflicts can be very intense and at first glance unsolvable, mediated by appropriate professionals and agencies, they can be resolved by finding a solution that is acceptable to both parents.

However, domestic law does not explicitly foresee the option of going to the competent authority (the authority of guardianship, marital or family counseling or other institution specialized in mediation in family affairs), which will mediate between the parents in order to settle the conflict. In this situation, the only option is to request that the court should resolve the conflict, i.e. that in the proceeding for the exercise of parental rights the court should decide the question of the custody and care of the child.²² On the other hand, the Commission gave an alternative proposal in the Pre-Draft, according to, in case of disagreement between the parents on certain issues related to joint exercise of the rights, the decision should be made by the Guardianship authority or the court.²³

Imposing solutions, regardless of the fact of whether it is done by the guardianship authority or court, may cause dissatisfaction on the part of the parents and deepen the conflict that exists between them, while reducing the possibilities of a dialogue. It is also debatable whether the parents would be able to continue with successful joint custody of the child in such circumstances, so that filing a petition to the court to transform the joint exercise of parental rights into the independent one seems realistic. On the

²² See: Article 261-273 of the Serbian Family Act.

²³ See: Article 97 of the Pre-Draft of Serbian Civil Code.

other hand, with this form of care, a parent who is not trusted with the child has the right to work with the other parent in making decisions on issues of crucial importance to the child, so that the transformation of joint custody into sole custody does not contribute to solving the problem, i.e. it does not alleviate the process of making decisions on issues of crucial importance to the child. Sole custody, however, strongly favors the reduction of the closeness between the child and the parent with whom she or he does not live, and often results in the complete marginalization of the latter parent.

Bearing in mind the delicacy of the situation, as well as the danger of escalating the conflict between the parents, which may result in failure to fulfill obligations to the child, which makes the application of family sanction of deprivation of parental rights²⁴ reasonable, we believe that it would be desirable, in later changes in the current legislation, to explicitly standardize the mechanisms and procedures for overcoming conflict between parents in order to reach an agreement on issues of great importance to the child. In this sense, there could be a foreseen compulsion to refer to the guardianship authority, which would mediate between the parents in order to find the best solution, while referring to the court with a request to remedy the conflict would be possible only if efforts in the field of resolving disputes between parents do not result in a constructive solution.

JOINT EXERCISE OF PARENTAL RIGHTS AFTER DIVORCE IN CONTEMPORARY COMPARATIVE LAW

Many European legal systems are acquainted with the joint exercise of parental rights after divorce, though it is regulated in different ways. In fact, in some legislations there is already legal precedence of joint custody, i.e. it is presumed that joint custody is in the best interest of the child, so that the court shall decide on the form of care and award sole custody only if a parent requests it, while in other jurisdictions joint custody is conditioned by the agreement between the parents, so that in the absence of the agreement the court cannot order joint custody.

²⁴ More: M. Draškić, "Obavezno lišenje roditeljskog prava prilikom odlučivanja suda o vršenju roditeljskog prava - sporno stanovište Vrhovnog suda Srbije", *Analiti Pravnog fakulteta u Beogradu*, no. 1/2012, pp. 366-381.

Switzerland has long resisted the trend of expanding joint exercise of parental rights upon termination of marriage by divorce. However, the evident advantages of this form of care, as well as the constant demands for its legalization, have resulted in the introduction of joint parental authority in the legal system of Switzerland. Joint custody was first present in case law, and later became legal form by the legislative reform in 1998, by which Switzerland joined the ranks of the last European countries to adopt the idea that divorce breaks the marital union of spouses, but that the two parents continue their parental relationships with the child.²⁵ The Swiss Civil Code²⁶ does not contain a presumption of joint parental authority, but the court can award this form of care if the spouses ask for it, if they have reached an agreement on all aspects of future care (distribution of child care and the division of costs for child maintenance), and if the court determines that joint parental authority is in the best interests of the child.²⁷ When deciding on the form of parental care, the court shall take into account the joint request of the parents, and the child's opinion on this matter.

Joint custody, as a regular model of parental authority after divorce, was introduced into the legal system of the French Civil Code²⁸ reform in 1993, while the Act on parental authority from 4 March, 2002 defined it as a common way of exercising parental authority by divorced spouses, so that today sole custody can be determined only in exceptional cases, i.e. when joint custody is not in the best interests of the child.²⁹ Parents should reach an agreement on the residence of the child (*residence habituelle*), and if the agreement is not possible, or if it is not in the interest of the child, the court itself shall determine the child's residence, where there is also a possibility

²⁵ In practice of the Swiss courts before the reforms in 1998, despite the explicit and unambiguous statutory provision which foresaw only sole parental authority, there were decisions made on joint parental authority after divorce, which caused the reaction of the Federal Court to stop this practice. In addition, parents, on the advice of their lawyers, often resorted to compiling non-legal agreements on joint parental authority, indicating the great interest of the former spouses in this form of child care. See: H. Hausheer, T. Geiser, R. E. Aebi-Müller, *Das Familienrecht des Schweizerischen Zivilgesetzbuches*, Stämpfli Verlag AG Bern, 2007, p. 152.

²⁶ Swiss Civil Code (*Zivilgesetzbuch*), <http://www.admin.ch/opc/de/classified-compilation/19070042/index.html>, access 18 May 2014.

²⁷ See: Article 133 of the Swiss Civil Code.

²⁸ French Civil Code (*Code civil*), <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>, access 18 May 2014.

²⁹ See: Article 373-2 and Article 373-2-1 of the French Civil Code.

that the child alternately lives with the father and the mother, when, virtually, both parents have the physical custody of the child.³⁰

Joint custody after divorce in Germany was explicitly forbidden until the revision of the German Civil Code³¹ in 1998. However, in case law, especially after the intervention of the Federal Constitutional Court in 1982, the courts awarded joint custody, although rarely and with caution. By positive German legislation, parents continue to jointly exercise parental rights after divorce, but each parent may request the family court to award him or her sole custody, where the court must accept the request if, in this regard, there is the consent of the other parent and child is over 14 years old, and if the constitution of sole custody by the applicant is in the best interest of the child.³² If divorced parents are awarded joint custody, they are obliged to reach an agreement on issues of great importance to the child and to speak out on these issues together in the legal system, while everyday decisions shall be made by the parent with whom the child lives, i.e. who provides the residence for the child.³³ According to statistics in Germany, joint custody of divorced parents enjoys great popularity in practice.³⁴

In the Netherlands, since there has been the rule that parents jointly exercise parental rights after divorce, because it is assumed that this form of care is in the best interests of the child. Before the reform of the Dutch Civil Code³⁵ the court determined the joint custody at the parents' petition, and this possibility was legalized in 1993, whereas earlier the Dutch courts had awarded joint custody by direct application of Article 8 of the Convention for

³⁰ See: Article 373-2-9 of the French Civil Code.

³¹ German Civil Code (*Bürgerliches Gesetzbuch*), <http://www.gesetze-im-internet.de/bgb/index.html#BJNR001950896BJNE009902377>, access 18 May 2014.

³² See: § 1671 of the German Civil Code.

³³ See: § 1687/I/1 of the German Civil Code.

³⁴ For example, in 2000 joint exercise of parental rights was awarded in 75.54% divorce cases with minor children. In addition, parents reached an agreement on this form of care in 69.35% of cases, while in 6.19% of cases, joint custody was awarded by the court. That same year, sole custody was awarded in 23.14% of cases, while the mother was entrusted in 21.62% of cases, and the father in just 1.52% of divorce cases. Cited by: N. Dethloff, D. Martiny, *Parental Responsibilities, National Report, Germany*, pp. 22-23, <http://ceflonline.net/wp-content/uploads/Germany-Parental-Responsibilities.pdf>, access 15 May 2014.

³⁵ Dutch Civil Code (*Burgerlijk Wetboek*), <http://www.wetboek=online.nl/wet/BW1.html>, access 18 May 2014.

the Protection of Human Rights and Fundamental Freedoms.³⁶³⁷ Sole custody shall be awarded if the parents so request, wherein the request for the transfer of parental care has to be explained, so that the court could be assured that sole custody in the given case is in the best interests of the child.³⁸ The principle of minimal intervention shall be applied to the exercise of parental rights, so that the court shall decide on the form of care only if the spouses require so, wherein the parents' agreement on physical custody of the children, their support, and the manners of maintaining personal contacts shall be entered in the court's decision on divorce of marriage with minimal checking on the protection of the interests of children.³⁹

Family Code of Russia⁴⁰ promotes the principle of equality of parents in relation to children, so that parents jointly exercise parental rights and duties regardless of whether they live with children in the union or not.⁴¹ Parents are primarily responsible for the upbringing, education and development of their children, whether they live together or separately, so that the parental responsibility of divorced parents formally remains the same. However, parents should first decide with whom the child will reside, and then to regulate the manner of maintaining personal relationship with the parent the child will not live with and the contribution of support that will be required from the parent who the child does not live with. The Russian legislature, therefore, has paid special attention to the legal position of the parent who does not live with the child, where the parent is given the right to retain the personal relationship with the child, the right to participate in the upbringing of the child and the right to participate in decision-making about the child's education.⁴² Moreover, the parent has the right to receive all relevant information about the child from certain subjects. When deciding on the child's residence the parents are obliged to act in the best interests of the

³⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 005), <http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=18/05/2014>.

³⁷ More: C. Forder, "Re-thinking Marriage, Parenthood and Adoption", *The International Survey of Family Law*, A. Bainham (ed.), The Hague, Boston, London, Martinus Nijhoff Publishers, 1995, pp. 368-370.

³⁸ See: Article 251/2/I of the Dutch Civil Code.

³⁹ C. Forder, "Re-thinking Marriage, Parenthood and Adoption", *op. cit.*, p. 368.

⁴⁰ Family Code of Russia (*Семейный кодекс Российской Федерации*), <http://www.zakonrf.info/sk/>, access 18 May 2014.

⁴¹ See: Article 61 of the Family Code of Russia.

⁴² See: Article 66 of the Family Code of Russia.

child, taking into account his or her wishes, and the same criteria will guide the judge in the examination of the parents on this issue. If parents are unable to reach an agreement on the manner of the implementation of parental care, as well as if the reached agreement is not in the interests of the child, the decision on this matter shall be made by the court.⁴³ In practice, there is a noticeable tendency for judges to require the parents' consents on the practical implementation of parental care to marginal tests or accept them without any verification.⁴⁴ The judge assumes that parents, as biological creators of the child, know best which solution is in the interest of their child. Therefore, the agreement between the parents on the exercise of parental rights is entered into the judgment of divorce without a detailed analysis of whether the chosen model of parental care in this particular case really is in the best interest of the child. When it comes to the options of the child's residence, judges should treat both parents equally. However, in reality, in more than 90% of cases, the child lives with the mother after divorce.⁴⁵

The Swedish Parents and Children Code⁴⁶ includes the assumption of joint parental care after divorce, but in practice it may be necessary to award the sole custody.⁴⁷ The court shall in its decision on divorce remind the parents that they retain joint custody of the children. The decree to terminate joint custody and determining the sole custody, can be made after careful and comprehensive scrutiny of the circumstances of the case⁴⁸, if joint custody is apparently not in the best interest of the child.⁴⁹ It is desirable for the parents to conclude a written agreement on all aspects of parental care, which should

⁴³ See: Article 24 of the Family Code of Russia.

⁴⁴ M. Antokolskaia, *Grounds for Divorce and Maintenance Between Former Spouses, National Report Russia*, p. 17, <http://ceflonline.net/wp-content/uploads/Russia-Divorce.pdf>, access 15 May 2014.

⁴⁵ M. Antokolskaia, *Parental Responsibilities, National Report, Russia*, p. 15, <http://ceflonline.net/wp-content/uploads/Russia-Parental-Responsibilities.pdf>, access 15 May 2014.

⁴⁶ The Parents and Children Code (SFS 1949:381), <http://www.government.se/sb/d/3926/a/27655>, access 18 May 2014.

⁴⁷ See: Part VI, Article 3, Paragraph 2 of the Swedish Parents and Children Code.

⁴⁸ Parliament of Sweden has expressed the opinion that joint custody after divorce can be transformed into sole custody at the request of a parent if the other parent is of violent behavior, i.e. the other parent takes action of harassment or other improper behaviour to the members of the family. See: The report of the Swedish Ministry of Justice no. Ju 98.02e, December 1998, internet presentation on: www.regeringen.se, access 20 April 2014.

⁴⁹ See: Part VI, Article 5, Paragraph 3 of the Swedish Parents and Children Code.

be approved by the Municipal Council of Social Welfare. The agreement between the parents is necessary to determine the form of parental care, the child's residence, the amount of contributions for child support and a manner of maintaining personal relationships of the child and the parent with whom the child will not live. A special consideration is given to the needs of the child to preserve contact with both parents after the divorce, which is enabled by adequate arrangements on the ways of maintaining personal relationships. Given the existing presumption of joint custody, the court shall decide on the parental authority if there is an evident request on this matter, which implies the absence of parents' consent on joint custody. Initially, the court could not determine joint custody against the will of a parent, but with the legal amendments in 1998 it was allowed, although this option is rarely used.⁵⁰ Joint custody enjoys great popularity in Swedish divorce practice, so that sole custody is reduced to the rank of exceptions.⁵¹

In the Children Act⁵² of 1989, the United Kingdom created a specific concept of parenting - joint independent parenting, which allows both parents to retain parental authority of the child after divorce, with the fact that their physical position is different, depending on the type of the court decision that was made in this particular case. The court may issue four types of orders: the order on contact, the order concerning the residence, the order to prohibit taking measures and the order on specific issues. The physical custody of the child is awarded to the parent in whose favor the decision was made concerning the residence of the child, while the parent with whom the child does not live, retains parental responsibility, with the exception of daily care as a component of parental responsibility. A residence order can also be made in favor of persons who do not live together (joint residence orders), with the precise period during which the child will reside with each of them,

⁵⁰ More on parental rights in theory and practice in Sweden G. Kovaček-Stanić, *Uporedno porodično pravo, op. cit.*, pp. 232-237.

⁵¹ According to statistics in Sweden in 2002 parents jointly exercise parental rights over 23512 children (97%), mothers have sole custody of 759 children (3%), and fathers independently exercise this right over 104 children (0.4%). Despite great popularity of joint custody, children live alternately with both parents in only 17% of cases, due to the fact that physical custody of children usually belongs to mothers (83%) Cited by: M. Jäntherä-Jareborg, A. Singer, C. Sörgjerd, *Parental Responsibilities, National Report, Sweden*, p. 14, <http://ceflonline.net/wp-content/uploads/Sweden-Parental-Responsibilities.pdf>, access 15 May 2014.

⁵² The Children Act (1989), www.statutelaw.gov.uk, access 18 May 2014.

which stimulates the courts to legalize the practice of sharing time, i.e. alternating residence of the child with both parents.⁵³

CONCLUSION

Joint exercise of parental rights is an adequate form of parental care after divorce if parents are able to overcome mutual animosity, and to resolve conflicts that exist between them, which resulted in divorce. It eliminates the negative effects of sole custody, since former spouses after divorce have equal legal status so that they are together responsible for raising a child. With joint custody, the parents jointly and in mutual consent exercise all the rights and duties from the content of parental rights, while physical custody of the child in most cases belongs to one parent, although the option of alternating residence of the child with both parents is also possible, when both parents have the immediate care of the child.

The positive effects of joint exercise of parental rights are reflected on all participants in legal parenting relations. A parent who does not live with a child after divorce, as a rule, fears that the spatial distance will lead to the loss of the child. In that context, joint custody will have a positive psychological effect on this parent, it will encourage them to participate intensively in the life of the child and will motivate them to conscientiously carry out all the obligations to the child. At the same time, the child retains a close relationship with both parents with joint custody, which contributes to his or her belief that he or she has a special place in the lives of both parents and that is equally loved by both parents. Finally, parents are more evenly burdened by responsibilities of raising a child, which is of particular importance for the parent with whom the child lives.

Joint custody after divorce enjoys exceptional popularity in the European legal space. In addition, there are more and more systems with a presumption of joint exercise of parental authority, so that the model of sole custody has been reduced almost to the rank of exceptions. On the other hand, this form of parenting of divorced parents, since it has only been recently legalized in Serbia, has not been sufficiently established in practice. However, with realization of the significant advantages of the joint custody, it is reasonable to expect that parents will increasingly opt for this form of

⁵³ K. Standley, *Family Law*, Palgrave Macmillan, 2008, pp. 278-282.

care. Moreover, given the evolution of the model of joint custody in comparative law, it is reasonable to conclude that in due course the presumption of joint exercise of parental rights after divorce will find its place in the Serbian legal system as well.

Bibliography

Antokolskaia, M., *Parental Responsibilities, National Report, Russia*, <http://ceflonline.net/wp-content/uploads/Russia-Parental-Responsibiliti-es.pdf>, access 15 May 2014.

Antokolskaia, M., *Grounds for Divorce and Maintenance Between Former Spouses, National Report, Russia*, <http://ceflonline.net/wp-content/uploads/Russia-Divorce.pdf>, access 15 May 2014.

Burgerlijk Wetboek (Dutch Civil Code), <http://www.wetboek=online.nl/wet/BW1.html>, access 18 May 2014.

Bürgerliches Gesetzbuch (German Civil Code), <http://bundesrecht.juris.de/bundesrecht/bgb>, access 18 May 2014.

Code civil (French Civil Code), <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>, access 18 May 2014.

Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 005), <http://www.conventions.coe.int/Treaty/Commun/QueVoulez Vous.asp?NT=005&CM=8&DF=18/05/2014>.

Cvejić-Jančić, O., *Zajedničko vršenje roditeljskog prava*, *Pravni život*, no. 9/1997.

Dethloff, N., Martiny, D., *Parental Responsibilities, National Report, Germany*, <http://ceflonline.net/wp-content/uploads/Germany-Parental-Responsibilities.pdf>, access 15 May 2014.

- Draškić, M., "Obavezno lišenje roditeljskog prava prilikom odlučivanja suda o vršenju roditeljskog prava - sporno stanovište Vrhovnog suda Srbije", *Anali Pravnog fakulteta u Beogradu*, no. 1/2012.
- Forder, C., Re-thinking Marriage, Parenthood and Adoption, *The International Survey of Family Law*, A. Bainham (ed.), The Hague, Boston, London, Martinus Nijhoff Publishers, 1995.
- Hausheer, H., Geiser, T., Aebi-Müller, R. E., *Das Familienrecht des Schweizerischen Zivilgesetzbuches*, Stämpfli Verlag AG Bern, 2007.
- Jänterä-Jareborg, M., Singer, A., Sörgjerd, C., *Parental Responsibilities, National Report, Sweden*, <http://ceflonline.net/wp-content/uploads/Sweden-Parental-Responsibilities.pdf>, access 15 May 2014.
- Kitanović, T., *Sporazumni razvod braka u domaćem i uporednom pravu*, PhD thesis, Novi Sad, 2011.
- Kovaček-Stanić, G., O roditeljskom pravu u teoriji i praksi Švedske, *Anali Pravnog fakulteta u Beogradu*, no. 1-2/1990.
- Kovaček-Stanić, G., *Uporedno porodično pravo*, Novi Sad, 2002.
- Kovaček-Stanić, G., *Porodično pravo: partnersko, dečje i starateljsko pravo*, Novi Sad, 2007.
- Krause, H. D., Marriage for the New Millennium: heterosexual, same sex – or not at all, *Deutsches und Europäisches Familienrecht*, Volume 2, Number 4/December, 2000.
- Mladenović, M., Da li porodica ima budućnost, *Pravni život*, no. 9/1996.
- Parkinson, L., Child Custody Orders: A Legal Lottery? *Family Law*, Volume 18, January 1988.
- Porodični zakon Srbije, "Službeni glasnik Republike Srbije", br. 18/2005 i 72/2011 (Serbian Family Act, "Official Gazette of the Republic of Serbia", no. 18/2005 and 72/2011).

Prednacrt Građanskog zakonika Srbije (Pre-Draft of Serbian Civil Code), <http://arhiva.mpravde.gov.rs/lt/articles/zakonodavna-aktivnost/gradjanski-zakonik>, access 18 May 2014.

Schwab, D., *Familienrecht*, Verlag, C. H. Beck, München, 2008.

Семейный кодекс Российской Федерации (Family Code of Russia), <http://www.zakonrf.info/sk/>, access 18 May 2014.

Standley, K., *Family Law*, Palgrave Macmillan, 2008.

The Children and Parents Code (SFS 1949:381), <http://www.government.se/sb/d/3926/a/27655>, access 18 May 2014.

The Children Act (1989), www.statutelaw.gov.uk, access 18 May 2014.

Wallerstein, J., Corbin, S. B., *Father – Child Relationships after Divorce: Child Support and Educational Opportunity*, *Family Law Quarterly*, 1986, 20 (2).

Zakon o braku i porodičnim odnosima Srbije, "Službeni glasnik Republike Srbije", br. 22/1980, 11/1988, 22/1993, 25/1993, 35/1994, 46/1995 i 29/2001 (Law on Marriage and Family Relations of Serbia "Official Gazette of the Republic of Serbia ", no. 22/1980, 11/1988, 22/1993, 25/1993, 35/1994, 46/1995 and 29/2001).

Zivilgesetzbuch (Swiss Civil Code), <http://www.admin.ch/opc/de/classified-compilation/19070042/index.html>, access 18 May 2014.

