NON-PATRIMONIAL EFFECTS OF DIVORCE RELATING TO RELATIONSHIPS BETWEEN PARENTS AND THEIR MINOR CHILDREN

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Abstract:
Divorce is one of the most complex legal institutions in family law, in terms of the ways in which it can be achieved, but also in terms of the implications for the relationships between spouses, but also between parents and their minor children, which has led to a constant involvement in its detailed regulation.
The article aims to analyze the legal institution of judicial divorce in relation to the non-patrimonial relationships between parents and their minor children after the dissolution of the marriage, including in relation to related aspects that are mandatory to be established in the situation where minor children resulted from the marriage relationship at the date of the divorce between their parents, namely the exercise of parental authority and the establishment of the children's residence.
At the same time, this scientific research aims to debate the importance of respecting the best interests of minors in making any decision in the divorce procedure with minor children, but also of establishing which aspects the court is obliged to rule on ex officio.
At the end of the scientific approach, it will be concluded that divorce constitutes a fundamental institution in family law, which, when spouses have minor children, determines not only the involvement of the court, but also of administrative authorities, such as the Guardianship Authority departments within the City Halls or the County General Directorates for Social Assistance and Child Protection.
Keywords: *divorce, parental authority, minor's residence, public authorities*

Introduction

The legal institution of divorce has always benefited from detailed regulation determined by the impact on the relationships between spouses, but also between them and their minor children, including from a non-patrimonial perspective.

Thus, chronologically analyzing the legal framework, we show that in the Family Code, currently repealed, art. 42 paragraph (1) mentioned that upon the pronouncement of the divorce, the court had the obligation to decide to which parent the minor children, born out of wedlock or adopted by both spouses, would be entrusted, and the parent to whom the minor children were not entrusted, had the right to have personal ties with the children and to participate in their upbringing, education and professional training, and

the parent to whom the court entrusted the minor children, exercised all rights regarding the person of the children and their property, which determined the situation in which parental rights were not exercised equally by both parents.

In order to grant custody to minor children, the court was required to take into account the possibility that the minor could be separated from his or her parents or from one of them against their will, only in the cases expressly and limitedly provided for by law, subject to judicial review and only in the event that the principle of the best interests of the minor was respected, which corresponds to the child's right to benefit from physical and moral development appropriate to his or her age, the parents retaining the right to have personal contact with the children and to supervise the way in which they are raised; another mandatory aspect on which the court had to rule was related to the parents' contribution to the expenses necessary for the raising and education of the minors, but this concerned patrimonial relations.

We note that the legislation prior to the entry into force of the current Civil Code exclusively regulated divorce by court, regardless of whether the spouses had minor children or not, or whether they agreed with the accessory claims or not, with no possibility of simplifying the procedure or establishing the responsibility of other entities to pronounce on the divorce.

With the entry into force of the current Civil Code on October 1, 2011, family relations benefited from a detailed legal regulation [1], the institution of divorce being analyzed in a more complex way than in previous normative acts, in the sense that the law enshrined divorce by administrative means, by notarial means, but also by judicial means, the last two types of dissolution of marriage being the only ones permitted by law when the spouses have minor children born or conceived during the marriage.

We note that with regard to the non-patrimonial effects of divorce regarding the relations between parents and their minor children, it is mandatory to take into account the aspects regulated by art. 396 of the Civil Code, namely the children's domicile after divorce and the exercise of parental authority, it being essential for the guardianship court to take into account the best interests of the child, the parents' consent, as well as the conclusions of the psychosocial investigation report; At the same time, in the case of minors who have reached the age of 10, the court is obliged to hear them in chamber, but

the law also provides for the possibility that minors who have not reached the age of 10 can be heard when the court considers this necessary for resolving the case.

We show that in cases where the legal situation of minors is regulated, the procedure must be carried out expeditiously, taking into account the need to respect the rights of both parents and their minor children, also taking into account the fact that the passage of time can have an impact on the relationship between the child and the parent with whom he does not live [2], the severance of the bond between them can sometimes produce an irreversible distance, and the protection of minors is a central aspect in family law legislation.

Exercise of parental authority

In cases where the court is entrusted with resolving a divorce application, in which the parties have minor children, one of the heads of claim on which it is obliged to rule is the exercise of parental authority, which represents the set of rights and obligations that the parent has over his child, with reference to the person and property of the minor, and, according to art. 397 of the Civil Code, this, as a rule, will be made jointly by both parents, given that the divorce should not affect the relationship between the divorced parents and their minor children; the exercise of parental authority by both parents has as its main component the consultation of them in making important decisions regarding the upbringing and education of the children, the current decisions regarding the care and education of the child being made by the parent with whom the child lives, the other being consulted only regarding important decisions.

However, the legal provisions mention exceptions to the rule according to which parental authority is exercised jointly by both parents, namely in the case where parental authority is exercised by a single parent, but also in the situation in which it will be exercised by other persons.

For the first hypothesis presented, namely the exercise of parental authority by a single parent, the legislator requires the existence of well-founded reasons, which must be analyzed in relation to the principle of the best interests of the child, which justify one of the parents not exercising parental authority over the minor, but retaining the right to supervise the child's upbringing and education; the exercise of parental authority will be

carried out by a single parent if the court finds well-founded reasons that would affect the best interests of the child if custody were joint, being assessed on a case-by-case basis whether this is for the benefit of the child, because the law does not precisely specify the meaning of the notion of well-founded reasons.

Situations where only one parent exercises parental authority must be reported to the evidence administered, in order to guarantee that the measure is for the benefit of the minor as long as the law does not limit the cases in which the exercise of parental authority exclusively can be ordered; in addition, we point out that parents cannot agree on the exclusive exercise of parental authority by only one of them, but their eventual agreement must respect the best interests of their child, therefore, this measure can only be ordered through the court and only following the administration of evidence.

In analyzing the evidence for granting exclusive parental authority over the minor, we consider that the existence of a risk on the part of the parent to the minor must be taken into account, which most often involves disinterest in relevant aspects regarding the education, health and upbringing of the child, as well as the impossibility for the parents to discuss and make joint decisions regarding the child, exclusive authority not being perceived as a sanction for the parent against whom the court decision is issued, but rather constituting a way of protecting the child and respecting his or her best interests.

Also, the legal attribute of the court to admit a request for granting exclusive parental authority which implies preserving the parent's right to supervise the child's upbringing and education and to continue to have personal ties with him/her cannot be confused with the deprivation of a parent from the exercise of parental rights, which presupposes as a precondition the endangerment of the child's life, health or development through ill-treatment, through the consumption of alcohol or narcotics, through abusive behavior, through serious negligence in fulfilling parental obligations or through serious violation of the child's best interests. At the same time, we specify that the exercise of parental authority by one of the parents should not be confused with the situations provided for in art. 507 Civil Code, when the exercise of parental authority is done by a single parent, because the other is deceased, declared dead by court decision, placed

under interdiction, deprived of the exercise of parental rights or, for any reason, is unable to express his will.

The second hypothesis concerns the situation in which the exercise of parental authority by other persons, an exceptional measure, by which the guardianship court may decide to place the child with a relative or another family or person, with their consent or in a protective institution, they exercising the rights and duties that are incumbent on the parents with regard to the person of the child, and, with regard to the rights and obligations relating to the child's property, the court will decide whether these will be exercised by one or both parents.

The purpose of this measure is to remove the parents from exercising parental authority, the most frequent situations that may justify this measure being related to the parents' negligence towards the children, violence towards them, the parents' immorality, or other cases in which it is proven that the exercise of parental authority by both parents or by a single parent does not respect the best interests of the child.

We note that the exercise of parental authority ceases, as a rule, when the child reaches the age of 18 or upon the death of the minor, but, exceptionally, it may also cease when the 16-year-old minor has been judicially recognized as having full capacity to exercise it.

Determining the child's residence

Another mandatory aspect to be established when pronouncing divorce in the case of minors is the establishment of their residence, meaning that the guardianship court will either take note of the parents' understanding regarding this claim, if it is in the best interest of the child, or will administer evidence if the parents do not have a common point of view or do not respect the interest of the minor.

When determining the children's residence, courts usually consider as criteria the age and gender of the child, the attachment to the parents and the parents to them, the material and housing possibilities of the parents, their moral conduct, keeping siblings together, and legal criteria [3] are also established, namely the willingness of one parent to involve the other in decisions regarding the child and to respect the latter's parental rights, the willingness to allow the other parent to maintain personal relationships, the

housing situation of each parent in the last 3 years, the history of parental violence against the child or other persons, the distance between each parent's home and the institution that provides education to the child.

The guardianship court establishes the child's residence either with one of the parents, if the child lived with both parents until the divorce, or with the parent with whom the minor lives permanently, if the child did not live with both parents until the divorce, or, in a special way and with respect for the principle of the child's best interests, with relatives or other persons with their consent or with a protective institution.

As an exception, in the situation where the exercise of parental authority is vested in a third person, through the placement measure, the child's residence is with the institution, family or persons to whom the child was placed in placement [4].

The reason why the legislator regulates the permanent establishment of the minor's residence with one of the parents stems from the need for organization in the child's schedule, predictability, and balance, it being essential for him to have a reference point of stability, in order not to be further emotionally affected, also taking into account the fact that the separation of the parents inevitably affects minors and can directly cause a regression in their normal development; therefore, the legislator is oriented towards establishing a single domicile, which does not automatically imply the severance of the child's relations with the other parent, but which ensures stability for the minor that must be achieved in compliance with the principle of his best interests, but also with guaranteeing his possibility of normal development in the future, including through the prism of emotional balance.

In recent years, the concept of alternative housing for minors has crystallized in the doctrine, which assumes the lack of a single domicile for the child after the separation of the parents and the child living equally with both parents in order to respect the principle of equality, which is closely connected with non-discrimination [5], which is prohibited by Romanian legislation in various forms [6], and to develop the relationship between the child and both parents, trying to overcome the classic conception that divorce between spouses inevitably leads to the child distancing himself from the parent with whom he will no longer live permanently.

However, we believe that the lack of a single domicile for the minor can have much more serious effects on him/her, taking into account that he/she will live in two different environments, each with its own rules, different family activities, different parental standards, and the discomfort of moving weekly or bimonthly, which does not ensure that the minor has a stable schedule, which can also affect school performance and the possibility of getting involved in extracurricular activities, the child being forever concerned about moving between two homes, without actually having a space of his/her own.

Although the main reason for which the establishment of an alternative residence in favor of the minor is invoked in the courts is related to respecting the minor's interest in having equal ties with both parents, but also to the right of the parents to be equally involved in the upbringing and education of their child [7], in reality this is often related to the parents' pride, without really taking into account the negative effects of this decision on their child.

However, we appreciate that at this point in the way of regulating the institution of the minor's domicile in Romanian legislation, there is no clearly established possibility of establishing an alternative residence for the minor, the internal legal norms outlining the idea of the existence of a single domicile, which is to be established either with one of the parents, or with other persons, in exceptional cases, the practice not unanimously agreeing with the admissibility of a request to establish an alternative residence [8] , especially due to the lack of explicit legal regulation, although the possibility of its application could result from the analysis of art. 8 of the European Convention on Human Rights regarding respect for family life.

In addition, we believe that a good relationship between the child and the non-resident parent can also be maintained by providing a more extensive personal contact program, but which does not imply residential instability, which can cause multiple practical and psychological problems in terms of the obligation for the minor to constantly adapt to changes, which could constitute a disruptive factor in his or her normal development and may diminish his or her school performance.

We note that a distinction must be made between the exercise of parental authority exclusively by one parent and the establishment of the minor's residence with that parent,

on the one hand, and the situation in which parental authority is exercised jointly by both parents, but the child's residence is established with relatives, grandparents or other persons or with a protective institution to ensure optimal upbringing and education of the minor, respecting his or her best interests, on the other hand; however, although the exercise of parental authority and the establishment of the child's residence are two separate legal institutions, they are closely connected, the establishment of the minor's residence having an indirect effect on the exercise of the parents' rights with regard to the child, given that decisions regarding current aspects related to the upbringing and education of the child will be made by the parent with whom the minor resides.

Also, parents who do not live with their children retain the right to have personal ties with minors, to oversee their education, upbringing, teaching and professional training, these rights being analyzed in correlation with the provisions of art. 8 of the European Convention on Human Rights and Fundamental Freedoms, as part of the right to family life, the state authorities having the positive obligation to take measures so that these rights are effective and can be applied in practice, and the parent with whom the child lives being obliged to encourage and support the existence of relationships between his child and the other parent, in order to contribute to the normal socio-emotional development of the minor; we show that the limitation of personal ties between parents and their minor children can be achieved only in exceptional cases, proven with ample evidence, situations such as mental illness of a parent not being able to justify a different treatment compared to other parents [9] who benefit from the right to have personal ties with their children.

Involvement of public authorities in the judicial procedure for regulating relations between parents and their minor children

In cases involving divorce in which the parties have minor children, the involvement of public authorities is mandatory, their contribution being essential in guaranteeing respect for the rights of parents and children, the role of specialized personnel within public authorities being to protect the child's interest [10].

Thus, the most important public authorities involved in this procedure are the General Directorates of Social Assistance and Child Protection and the guardianship

authorities within city halls, each with clearly determined responsibilities that aim to respect the best interests of the minor.

Regarding the General Directorates of Social Assistance and Child Protection, we note, as a novelty, that Law No. 123/2024 [11] established the obligation to hear minors only in the presence of a psychologist from this institution, who writes a report of findings that will be attached to the case file, the hearing of minors being carried out imperatively as the last act in the judicial investigation, the minor's point of view having the value of a relative presumption; This aspect determined the change from the previous judicial practice in which the hearing of minors was carried out as the first act in the judicial investigation and in which it was not necessary for the hearing of minors to take place in the presence of a psychologist except in exceptional cases, but we mention that in the doctrine [12] it was shown that by participating in this procedure exclusively by psychologists from the DGASPC, the cases could be delayed, taking into account the lack of personnel and the multitude of files in the field of minors and family in which the hearing of the minor child is a mandatory procedure.

However, the court is obliged to go through the procedure of hearing minors under the conditions established by the provisions of Law No. 123/2024, but it is not obliged to take into account only the aspects related by the minor, but will pronounce a solution based on the corroboration of all the evidence administered in the case in order to have a complex vision of the factual situation and the relationships that exist between children and their parents, so that the ruling pronounced respects the best interests of the minors.

Also in order to respect the best interests of the minor, in procedures involving minors it is mandatory to carry out a psychosocial investigation, a task that falls to the guardianship authority department within the City Halls, in relation to the provision of art. 229, paragraph 1, letter b) of Law no. 71/2011 implementing the Civil Code, transitional regulation until the establishment of the guardianship court; this investigation must contain relevant aspects regarding the psychological, economic and social situation of the minor, as well as his/her family, including the extended one, if they live with the child, also involving field trips to the minor's home to verify his/her living conditions and the possibility that they will provide him/her with the ability for normal physical and emotional development, it being mandatory that the minor can grow up in a suitable environment,

this aspect being to be established by the court of law not only on the basis of the investigation carried out, but also on the basis of the rest of the evidence administered.

In this context, the involvement of public authorities, namely the General Directorates of Social Assistance and Child Protection operating at county level and the guardianship authorities within the city halls in divorce procedures guarantees compliance with the principle of the best interests of the minor, which implies placing children first, respecting their needs and interests [13], as well as their right to have the decision-making process concerning them and their housing regulated after the separation of the parents.

Conclusions

The principle of the best interests of the minor constitutes a cornerstone of family law, being the main benchmark according to which court decisions are made that aim to regulate the legal situation of children, in the case of divorce between their parents, being a complex concept that must be analyzed in an interdisciplinary manner, not only from a legal perspective, but also from a psychological one.

The divorce process between spouses when they have minor children can be a difficult one from the perspective of how to manage the relationships between the partners, with reference both to the reasons that led to their separation, and to making the best decisions regarding the children, in order not to affect their normal psycho-emotional development and not to transfer onto them the dissatisfactions from the couple's relationship.

In this context, the regulation of the non-patrimonial effects of divorce in the relationship between parents and their minor children must be analyzed in relation to the rights of minors, the exercise of parental authority over children and the establishment of their residence being aspects on which the court rules ex officio, even if the parties have not mentioned them distinctly, as grounds for the claim, and scientific research has revealed the essential involvement of public authorities in this procedure to complete the evidence in the file, so that the decision rendered respects the best interests of the minor.

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