

The alternative residence of minors with separated parents

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Abstract

The present article proposes to analyze the modality in which the alternative residence is established within the legislation of several states, as well as the modality in which the courts apply the notion of alternative residence. In addition to this, we took into consideration the views expressed by psychologists regarding this matter. In the latter part of the article we analyzed the regulations regarding the residence of minors whose parents are separated in domestic law and we submitted our conclusions regarding the advantages and the disadvantages of an alternative residence. In order to obtain the necessary information, we studied the legislation from different countries, the principles of the European Commission on Family Law, articles on this subject and case law, as well as studies conducted in several states. We were therefore able to observe that in some states, the alternative residence is explicitly provisioned by law, while in other states, even though the notion is not explicitly provisioned, the courts managed to find ways in which, through the judgments rendered, to establish it by way of fact. The study is relevant to our legal system as domestic legislation does not specify alternative residence, but nevertheless, in practice, such an arrangement could answer best the superior interest of the child.

Keywords: *alternative residence, alternative home, equal share of parental obligations, equal time spent with both parents, shared parental responsibility*

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1. Introduction

Modern legislations, during the elaboration of which jurists, sociologists and psychologists took part, try to assure the most efficient protection to the interests of children and a large scale application of the New-York 1989² International Convention on the Rights of the Child, regarding children rights in relation to both parents.

Thereby, the above mentioned legislations introduced and made possible the use of the notion of joint custody (also referred to as shared parental responsibility), viewed as an ensemble of rights and obligations referring to the legal representation of a minor, care, education and protection, medical treatment and property administration. The rule adopted is that these rights and obligations to be exercised in common by both parents – regardless if the parents are married or not – and only by exception by a sole parent.

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² Law no. 18 from the 27th of September 1990 ratifying the Convention on Childs Rights, published in the Romanian Official Bulletin no. 109 from the 28th of September 1990 and republished in the Romanian Official Bulletin no.314 from the 13th of June 2001.

A sensible subject was the one referring to the residence of the minor, due to shared views between the supporters of the sole residence (sole home), viewed as an arrangement through which the minor resides in majority with one of the parents and the alternative residence (alternative home), viewed as an arrangement through which the minor spends time in equal shares between both parents. The latter offers the parents the possibility of undertaking activities specific both to working days: school lessons, driving the minor to school/kindergarten, medic, afterschool activities and nonworking days: fieldtrips, hiking, visits, etc.

We will show in the following chapters a few specific aspects from the law systems of several states, analyzing the way in which the alternative residence of minors is provisioned and applied such as in the end we will be able to see in what measure such an arrangement could be applied in Romania and be able to formulate conclusions regarding the advantages and disadvantages of this type of arrangement.

2. Alternative residence regulations in Sweden

In the past decades in Sweden, the alternative residence of children with separated parents has become very popular. The possibility for the courts to establish alternative residence first appeared in 1998, alongside the possibility to establish joint custody against the wishes expressed by one of the parents³. According to the Swedish Parental Code, Chapter 6, Section 14a, if both parents have the custody of the child, the court can rule, at the request of one or both parents, at which parents the child will reside (including alternative residence). The decision will be made in accordance with the superior interest of the child.⁴

Beginning with this text of law, the Swedish courts ordinarily established the alternative residence of minors in cases the parents were separated and they kept joint custody.

In the following years, the way in which this type of alternative residence influences the life of the parents and children was monitored. Thus, in the year 2002, the National Council of health and welfare commissioned a study in order to establish how the alternative residence was being used in practice, which are the advantages and the disadvantages of this type of residence and how were the children with this type of residence being influenced.⁵

³ Anna Singer, *Active parenting or Solomon's justice? Alternating residence in Sweden for children with separated parents*, page 38, document available online at: <http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/URN%3ANBN%3ANL%3AUI%3A10-1-101083/64>, last viewed on the 11th of May 2015.

⁴ Swedish Parental Code, Section 14 a. *If both parents have custody of a child, the court may, on the application of one or both of them, decide with which of the parents (including both parents alternately) the child is to live. The best interests of the child shall be the decisive consideration*, document available online at <http://ceflonline.net/wp-content/uploads/Sweden-Parental-Responsibilities-Legislation.pdf> and <http://www.government.se/content/1/c6/02/76/55/12308db5.pdf>, last viewed on the 11th of May 2015.

⁵ Anna Singer, *cited work*, pp. 41-42.

The conclusions of the study show the following: the parents who opted for this type of residence were satisfied, unlike the parents who were obliged by the courts to this type of residence. The children were satisfied that they were given the chance to develop a close relationship with the parents. It was proven to be important that the parents live close to each other in order for the minor to attend the same school and be able to keep his friends. Also, it was established that, after the court ruling, the alternative residence was being put into practice only in one out of two cases, the residence often remaining only a theoretical arrangement, never applied.

After the study, a governmental commission was tasked with evaluating a legislative reform regarding custody in 1998, and in its final report, established the prior conditions that need to be fulfilled in order to decide the alternative residence, stating that this type of residence must take into consideration certain requirements, such as:

The opinion of the child, requirement which presents a high importance. The weight of this opinion in the ruling of the courts differs with the age and maturity of the child, and in the case of older children, it is decisive.

The opinion of the parents, it is also a requirement that needs to be taken into account, as the establishment of an alternative residence against the wishes of a parent does not represent a way to force that parent to cooperate on matters regarding the child. Studies show that in the case in which the parents cannot cooperate or a powerful conflict exists, there is a risk that this situation may affect the conditions in which the alternative residence can be established.

The age of the child, considering that in order for the alternative residence to be taken into review, the child must be at least 3 years old.

The parents must live close to each other and not have difficulties in cooperating, because, otherwise, the misunderstandings between them could affect the functioning of the alternative residence and the child will be the one to suffer the most.⁶

Starting from these criteria, the Swedish courts establish alternative residence, ruling that in many cases, it suits best the needs and the superior interest of the minor.

3. Alternative residence regulations in France

According to the French Civil Code, Title 9, Chapter 1, First section, article 373-2-9, when applying the mentioned articles, the residence of the child may be established alternatively at both parents, or at one of them. At the request of one of the parents or when there is a misunderstanding between them regarding the residence of the child, the court may establish, provisionally, alternative residence mentioning the duration of the measure. When the duration is over, the

⁶ Anna Singer, *cited work*, pp. 42-43.

court establishes definitively the residence of the child, which could be alternative between both parents or at one of them.⁷

This option was introduced through the Law of 4th of March 2002, regarding parental authority. From the law's entrance into force, the number of cases where the French courts established the alternative residence increased significantly, from 8,8% to 14.9% between 2003 and 2012 and in over 95% of the cases the ruling was pronounced as a result of the agreement between the parents.⁸

However, even in the case the parents do not agree regarding the alternative residence, the French judge has the possibility to establish such an arrangement, after first hearing the parent who opposes this variant and taking into account the superior interest of the child. Therefore, it results that the French legislation- respectively the French Civil Code – encourages the parents to reach at an understanding regarding the alternative residence and gives the power to the judge to impose on the parents such an arrangement, even if one of them is opposing it.⁹

The criteria taken into account by the French judge are: the interest of the parents regarding the child, the age of the child, the principle that brothers are not to be separated, the distance between parental homes, the learning and emotional capacity of the parents, the capacity of the child to adapt to two residences, etc.

Nevertheless, numerous voices, especially from the medical world, claim that if this principle will be generalized, the children will, in the future, become disorganized.¹⁰

Note that the alternative residence in France is not viewed as the equal share of time spent with each parent, but a way for the parents to collaborate that suits both the needs of the child and the availability of the parents.

It implies an intelligent distribution of parental roles, communication regarding education and daily organizing, negotiation in the spirit of cooperation

⁷ Original text: *En application des deux articles précédents, la résidence de l'enfant peut être fixée en alternance au domicile de chacun des parents ou au domicile de l'un d'eux. A la demande de l'un des parents ou en cas de désaccord entre eux sur le mode de résidence de l'enfant, le juge peut ordonner à titre provisoire une résidence en alternance dont il détermine la durée. Au terme de celle-ci, le juge statue définitivement sur la résidence de l'enfant en alternance au domicile de chacun des parents ou au domicile de l'un d'eux. Lorsque la résidence de l'enfant est fixée au domicile de l'un des parents, le juge aux affaires familiales statue sur les modalités du droit de visite de l'autre parent. Ce droit de visite, lorsque l'intérêt de l'enfant le commande, peut être exercé dans un espace de rencontre désigné par le juge*, document available online at: <http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000022469777&cidTexte=LEGITEXT000006070721>, last viewed on the 12th of May 2015.

⁸ Anthony Bem, *La priorité de la résidence alternée de l'enfant en cas de séparation des parents*, document available online at: <http://www.legavox.fr/blog/maitre-anthony-bem/priorite-residence-alternee-enfant-separation-12737.htm#.VueaXfmqkqk>, last viewed on the 11th of May 2015.

⁹ Edward Kruk, *Child custody, personal relations and parental responsibility – Searching for a just and equitable standard*, page 47-48, document available online at: <https://docs.google.com/file/d/0B-iOqOKLc35PVmdpjNPWGIQT0E/edit>, last viewed on the 11th of May 2015.

¹⁰ Anthony Bem, *cited work*.

and accepting differences as well as the involvement of both parents in problem solving.¹¹

4. Alternative residence regulations in Canada

In Canada, according to the guidelines regarding child support, established in 1997, the federal government defined joint custody as that when a child resides in two homes and spent at least 40% of the time in the second home. Joint custody with alternative residence is established in accordance with several criteria.

The first criterion regards the capacity of the parents: both are equally suited to the physical, material, emotional and spiritual needs of the child in addition to the social and learning needs.

The second criterion regards the existence of a functional communication between parents, and their availability and wish to establish joint custody. The parents are capable of maintaining a stable environment, including the reconstructed family and relations with the extended family: grandparents, uncles, aunts, cousins.

The third criterion takes into consideration the distance between parental homes. The parental homes must be close to each other, in order for the minor to attend the same school and have the same group of friends.

It was proven that many parents prefer custody with alternative residence in order to avoid paying child support and psychologists recommend alternative residence in order to avoid indisposition, discontent and feelings of injustice with the parents.¹²

5. Recommendations of the European Commission on Family Law

The European Commission on Family Law, established in 2001, purposed to harmonize family law in Europe, introduced a series of European family law principles, in between which the one referring to the residence of the child, expressly mentioning the alternative residence.

Principle 3:20 Residence of the child

(1) in case of joint custody, the rights holders, if they are living separately, should agree on the person with who the child will reside.

(2) The child may reside alternatively with the custody rights holders, either following an agreement approved by the competent authority, either following a decision undertaken by the competent authority. The competent authority must take into consideration factors such as:

¹¹ Marianne Souque and Corinne Benkemoun, *Un accompagnement de choix pour la mise en place d'un residence en alternance*, page 5, document available online at : <http://www.mariannesouquet.com/wp-content/uploads/2011/09/3.articleAIFIVraifinal.pdf>, last viewed on the 11th of May 2015.

¹² L. Fernandez De Sierra, *Recommander la garde legale conjointe*, document available online at: <https://docs.google.com/file/d/0B-iOqOKLc35Pb3JCMmNtUHhIZm8/edit>, last viewed on the 11th of May 2015.

- (a) the age and opinion of the child
- (b) the capacity and wishes of the custody rights holders to collaborate with each other regarding the child related aspects and their personal situation
- (c) distance between the parental homes and the school attended by the child.¹³

Because the purpose for creating this Commission was to harmonize the European legislations on family law, we believe that the principles established could and must be taken into account by the European law makers when developing and modifying legislation regarding family law.

6. Alternative residence regulations in Romania:

According to article 496 Civil Code – which establishes the residence of the minor – *the minor child resides with his parents. If the parents do not live together, the guardianship court rules, taking into consideration the conclusions of the psycho-social report and hearing the parents and the child, if he is at least 10 years old. (...) The parent with whom the child does not live permanently has the right to have personal ties with the minor, at his residence.*

From the analysis of the above mentioned text, we can determine that the residence of the minor is established at one of the parents, either as the result of an agreement between them, either following a ruling taken by the guardianship court. Subsequently, the parent with whom the minor does not reside usually, will have the right to keep ties with him, respectively will have the right to a visitation schedule. In most cases, the parent may have personal ties with the minor every second weekend and approximately half of the school breaks. Thus, this means approximately 75% time spent with one parent and 25% time spent with the other.¹⁴ Some specialists, like Robert Bauseman, American psychologist at the Health and Forensics department of the University of Baltimore, Maryland, claim that if a child spends less than 25% of the time with one parent, we cannot talk about real joint custody, this being more the case of exclusive custody.¹⁵

The text does not provide the possibility of establishing an alternative residence at both parents, however in spite of this, in the case law there have been

¹³ European Commission on Family Law Recommendation, document available online at: <http://ceflonline.net>, last viewed on the 12th of May 2015.

¹⁴ http://ro.wikipedia.org/wiki/Re%C8%99edin%C8%9Ba_minorului#cite_note-6https://docs.google.com/file/d/0B-iOqOKLc35PV_mdpdjNPWGIQT0E/edit, last viewed on the 12th of May 2015.

¹⁵ R. Bauseman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, "Journal of Family Psychology", 2002, Vol. 16, No. 1, pag 93 document available online at: http://www.canadiancrc.com/Fatherlessness/fam_16191.pdf, last viewed on the 12th of May 2015 and Vittorio Vezzetti, *European Children and the divorce of their parents*, page 21, document available online at: http://www.figlipersempre.com/res/site39917/res666721_europeanchildren2.pdf, last viewed on the 12th of May 2015.

rulings by which the guardianship court established that a minor will reside alternatively, one week with each parent.¹⁶

Taking into account that, in the present, our legislation expressly shows that the residence of the minor will be established at one of the parents, the courts are obliged to formally establish the residence at one parent, but on the other side establish a visitation program that in fact represents an alternative residence : for example, the court will establish the residence at the mother, but give the father the right to a visitation program of at least 40% of the time, like the case of the above mentioned ruling.

Note the fact that this type of arrangement may begin to be applied by the courts even in the case where it is not the result of an agreement between the parents. Thus, in a recent ruling¹⁷, the Cluj-Napoca Court established, provisionally, the residence of three minors at the mother, but gave the father the right to personal ties with them with the following schedule: the first and third week of the month from 18.00 hours Thursday until 18.00 hours Sunday, the second and fourth week of the month, from 18.00 hours Sunday until 18.00 hours Tuesday, and in school brakes: 4 weeks in the summer break, 7 days in the winter break and 3 days in the Easter break.

This is an extremely generous schedule in favor of the father, considering that most of the time, fathers are given a much more reduced schedule, in general one weekend every two weeks.

The reasons for such a ruling were in fact that the parents lived close to each other, on the same street, the fact that the minors wished to be taken to and from school and kindergarten also by the father and that the father developed, even after the separation, an extremely close relationship with the children.

Considering that the alternative residence of minors presumes at least 40% of the time spent with one parent, we believe that the above mentioned ruling could be included in the category of rulings that establish an alternative residence and, if this kind of ruling best serves the superior interest of the minors, they should be more often encountered in our practice.

7. Conclusions

An alternative residence may very well represent an advantage for the minor with separated parents. It is because this, the opinion we embrace is that this type of residence appears to be a solution worthy to be considered by our case law, as the model includes not only one parent (prevalent) as the permanent point of reference of the child, who covers all the child needs, who takes all decisions and is entrusted with the care of the child, while the other parent is forced only to pay

¹⁶ Sentence from 20.04.2012 file no. 2154/300/2012, Bucharest Sector 2 Court, document available online at: http://portal.just.ro/300/SitePages/Dosar.aspx?id_dosar=30000000000201744&id_inst=300, last viewed on the 12th of May 2015.

¹⁷ Sentence no. 4524/ 07.05.2015 pronounced by the Cluj-Napoca Court in file no. 5183/211/2015, not published.

child support and has rare contacts with him, not suited to what the child needs. [...] The ensemble of child care must include the presence of both parents (with different point of views and residences) who can guarantee best the impartiality of the learning and child development process. The factor to be considered is if, in terms of child health, is better to sacrifice a short time needed for the transfer from one home to another in order to spent time at both parental home, rather than not have the opportunity to have both parents as a reference point.¹⁸

The possibility that an alternative residence be established or accepted by the courts should, firstly, be expressly permitted by law. In the absence of such a provision, the courts have to find artificial ways to reach this end, respectively to establish residence at one parent and give an extended visitation schedule to the other. The idea is not new, as it can be encountered in Danish law. In this sense, the notion of alternative residence does not represent a legal concept in Danish law. The general term used in Danish law to describe the agreement between parents regarding the alternative residence is that of “shared time agreement” - *daleordning*. Generally, the term describes an agreement between parents by which the children spent equal time with them, for example by way of alternating the residence every 7 days.¹⁹

For an alternative residence to be considered an arrangement with a long term success rate, several conditions must be fulfilled, which we synthesized as follows:

➤ **the parents must reside close to each other**, in order for the minors to go to the same learning institution and to be able to maintain the same group of friends; In order to define this rather abstract notion, we embrace the opinion that the parent reside close to each other if the distance is covered in not more than 15 minutes and the distance could be walked or traveled by public transportation.²⁰

➤ **the wish of the parents to embrace such an arrangement** or, at least a lack of opposition from their part;

➤ **the parents must support each other and are willing to not implicate the children in discussions and possible disagreements between them**

➤ **age** and, by case, **the opinion of the children**; such an arrangement is not wise if the children are too young and dependent on the mother – for example, while they are breastfeed.

Alongside these criteria, the courts may take into account secondary facts, like: if the parents have similar parenting styles, they were involved equally in raising and educating the children prior to the separation and the fathers agree to

¹⁸ Vittorio Viezzetti, *Joint Custody: the interest of the child in different family structures*, “*Official Journal of the Italian Society of Preventive and Social Pediatrics*” - 3. 2012, document available online at: https://docs.google.com/file/d/0B-iOqOK.Lc35PSUVw_ZThrYW5Nbms/edit, last viewed on the 12th of May 2015.

¹⁹ C. G. Jeppesen de Boer, *Joint Parental Authority-Chapter 6-Residence*, page 13, document available online at: <https://docs.google.com/file/d/0B-iOqOKLc35PTGFIWnVIN202Tm8/edit>, last viewed on the 12th of May 2015.

²⁰ Vittorio Vezzetti, *cited work (European Children...)*, page 18.

receive advice and support about child raising from the mothers in cases of very young children.

A major study commissioned by Poussin-Martin involving 3000 French children from middle-school concluded that those children who, because of an alternative residence, live with both parents have developed a higher level of self-respect and define themselves as being more confident in comparison to those who reside with a single parent.²¹ It is obvious that the alternative residence cannot and must not be established in any situation, especially in the cases where the conflicts between parents are so strong, that they will affect the superior interest of the children. Nevertheless, in our opinion, the alternative residence should be encountered in many more cases because, most of the times, only if it exists we can consider a true jointly exercised custody.

In countries like Canada, France or in California, the judge must give numerous arguments in order to provide an exception from the rule of joint custody or alternative residence.

For a harmonious development of the children and for raising their self-respect it is in the interest of every child to be able to relate to two parental figures of equal importance. For this reason, the joint custody and alternative residence represent the highest standard towards which not only the parents must aspire, but the courts as well.

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²¹ Vittorio Viezzetti, *cited work (Joint Custody...)*, p. 4, 6, document available online at: <https://docs.google.com/file/d/0B-iOqOKLc35PSUVwZThrYW5Nbms/edit>, last viewed on the 12th of May 2015.

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