

THE NECESSITY OF ENSURING PERSONAL RELATIONSHIPS WITH THE MINOR. GUARANTEEING THE BEST INTEREST OF THE CHILD IN TERMS OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

We can not ignore, concerning the regulation of relationships between parents and children, a real assessment of the child's best interest, this being left to the courts or competent authorities' decision. An issue that needs to be clarified is the divorce situation, when the court entrusts the child to one of the parents, who prevents the other one to have contact with him. Although the legal text refers only to acts committed after the pronouncement of the sentence of entrusting custody of minor, however the judicial practice stated that it is also about those situations in which these acts are committed before pronouncement of the judicial sentence. In this regard, assessing the child's best interest is also a sensitive issue and extremely important by the fact that the court must maintain a balance between the need to ensure a child's growth and harmonious development and respect for privacy and family, as it is covered in Article 8 of the European Convention on Human Rights, even if it is about the right of the child or of one of his parents.

Keywords: *personal relationships, child's best interest, entrusting custody of minor, parents rights, ECHR*

Introduction

Taking into consideration the complexity and variety of situations wherein each child finds him/herself, the legislator intentionally allows the courts a free hand in deciding what is in the child's best interest, starting with a concrete assessment of the specific circumstances of every case. The necessity of ensuring the personal relationships with the minor is included among these desiderata. This is a sensitive and extremely important problem in terms of the fact that the court has to maintain a balance between the necessity to ensure the upbringing and harmonious development of the child and the respect for the child's right to a private life and a family, as it is stipulated by article 8 from the European Convention of Human Rights, whether it concerns the rights of the child or of either of the parents.

We are of the opinion that the best interest of the child is a criterion that must govern every decision or action of every person, public institution or authorized public institution and which involves the child directly. This is the reason why we proceed to an *in extenso* interpretation of the text of the law with direct applicability to the problems that arise in the factual reality. Precisely because the field of children's rights has substantially grown and even though the regulation of these rights is considerably evasive, we have proceeded in this study to analyse the decisions of the European Court of Human Rights, the more so as the decider does not establish by law any reference points in accordance with which the best interest of the child should be arranged.

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1. The problematics of ensuring the personal relationships with the minor in case of non-compliance with the measures concerning the custody of the minor. A premise situation.

As stipulated in the text of article 307 of the Criminal Code the keeping a minor without the consent of the other parent, may constitute the offence of non-compliance with the measures concerning the custody of the minor, if through this action the upbringing and the development of the child is jeopardised. The parent to whom the child was not entrusted retains, the non-custodial parent retains, as we have mentioned, the right to watch over the upbringing and the education of the minor. Taking the child from the custodial parent must be well-grounded, meaning that it must be determined by reasons that demonstrate that entrusting the child to that parent would have negative consequences on the child's physical and emotional development¹. Consequently, this is the situation, in which the parent granted custody can no longer ensure the conditions necessary for an appropriate development, in which case the said action no longer constitutes an offence. In the assessment of such a situation both material possibilities as well as emotional relationships formed between the minor and the non-custodial person are taken into consideration. In this instance, it has been established that the request of the parent for the return of the child from any person that keeps him/her without the right to do so shall be rejected, if the return is contrary to the interests of the child².

At the same time, the repeated prevention of the person entrusted with the minor, or of either parent from having a personal relationship with the child may present certain elements that constitute an offence as stipulated in article 307 of the Criminal Code. This is the case, in which for sound reasons the child is entrusted to another person to be brought up and educated. Such a decision may be made by the court when it judges that the parents are guilty of negligence, without constituting a grave offence or without abusing their parental rights and responsibilities, and thus still jeopardising the health and development of the child. In this situation, one must guarantee the parents the right to maintain a personal relationship with the minor, as they have the obligation to raise the child without making any decisions concerning the child's person. The duty to protect and watch over the child rests in such a case with the person entrusted with the child's upbringing and education.

Among the cases adjudicated by specialized legal bodies, situations may arise, in which the custodial parent is guilty of negligence and abuse. In this case the non-custodial parent may contact the police to investigate the danger such an attitude may cause the person of the minor. This is the ideal situation in which emergency protective measures may be taken by the social service. However, there are situations in which one intervenes on one's own authority, as we say, by giving the child to the non-custodial parent without receiving the permission of the custodial parent. This action seems completely justified, as long as it does not endanger the development of the child.

The existence of court decisions whereby the court entrusts the minor to another person to be raised and educated, as well as denying the parents the right to have a personal relationship with the child, within the terms set by the respective parties or by the judicial body, may be the focus of criminal investigations. Criminal investigative authorities are responsible for classifying the conditions, in which the child's upbringing and development are endangered, and for ascertaining whether such an action has been perpetrated.

In this sense, throughout the investigation, the respective authorities must keep establishing the circumstances of every case, the material and moral conditions that each parent offers, but also the best interest of the child.

¹ Trib. Mun. București, sect. a III-a civilă, Dec. nr. 826/1993, in *Culegere de practică judiciară a Tribunalului București*, (1993-1997):212-213; C.S.J., sect. civ., Dec. nr. 2448/2003, in *Buletinul jurisprudenței 1993*, (1993): 110-112.

² R. Drăghici, „În legătură cu infracțiunea de nerespectare a măsurilor privind încredințarea minorului”, in *Revista Română de Drept* nr. 6(1971):85.

2. The special situation of ensuring the personal relationship with the minor in case of divorce. The *lato sensu* interpretation of article 307 paragraph 2 of the Criminal Code

In legal practice, a special case has been recorded: when by a court decision in a divorce case a minor is entrusted to the mother to be raised and educated, with the obligation to allow the father the right to visit on predetermined dates. Despite all the father's attempts, the mother has repeatedly prevented him from making contact with the minor within the terms set through the decision of the court.

Concretely speaking, it concerns a court decision whereby the minor is entrusted to another person and the abusive violation of its terms, by preventing any contact between the child and his parents. Foreseeing such a situation is determined by the gravity of the action, whereby a minor is abusively estranged from one or both parents and which can weaken the family relationships and endanger the upbringing and education of the minor³.

A problematic situation is the one in which, in case of divorce, the court may entrust the minor to one of the parents, who then prevents the other parent from making contact with the minor. Although the legal text is concerned only with the actions of prevention perpetrated after the court entrusted the child, the judicial practice states that it concerns those situations, in which the preventative actions are perpetrated before the court rules on the matter, every time the court establishes the residence of the minor with one of the parents and before the divorce is pronounced⁴.

This text has been criticised for expressly specifying only the hypothesis of entrusting the minor through a court ruling to be raised and educated by one of the parents or by another person, and not the cases of establishing the residence of the child with one of the parents, until the divorce is settled. This means that the other parent is considered deprived of parental rights and the child is deprived of the protection of both his parents, which implies that the stipulations are interpreted in the aforementioned sense⁵.

Speaking for ourselves, we consider, along side other authors, that the text of article 307, paragraph 2 from the Criminal Code should be interpreted *lato sensu*, and with respect to the situations that may arise before the court's final ruling whereby entrusting one of the parents with the upbringing and education of the child.⁶ Consequently, in case the divorce proceedings have not concluded yet, if the court decides to temporarily establish the residence of the minor with one of his parents and this parent prevents the other from having contact with the child, then the court must ascertain, through an extensive applicability of the text of the law, the existence of the offence stipulated by article 37, paragraph 2 from the Criminal Code.

Therefore, the action of the parent, with whom the minor resides until the divorce proceedings end, to prevent repeatedly the other parent from maintaining a personal relationship with the minor, within the terms set by the court ruling, constitutes the offence of violating the terms of the custody agreement.

Throughout the criminal investigation, the judicial authorities need to ascertain to what degree the action of preventing contact with the non-custodial parent represents a danger to the child. Obviously, the parents' separation results in a change of the way their rights and obligations to the child are exercised or fulfilled⁷. The researched situations differ depending on whether the child was entrusted to one of the parents, a relative or any other person or protective institution.

³ Al. Boroi, *Infrațiuni contra unor relații de conviețuire socială*, (București: Ed. ALL Beck, 1998), 53.

⁴ T. Toader, *Drept penal român. Partea specială*, ediția a 4-a, revised and updated, (București: Ed. Hamangiu, 2009), 429.

⁵ Proc. Jud. Prahova, ord. from 28 August 1979, in case 29/II/1979, with notes by N. Pușcaci and N. Pleșan in *Revista Română de Drept* nr. 9(1980): 46.

⁶ O. Loghin, T. Toader, *Drept penal român. Partea specială*, (București: Casa de editură și presă "Șansa SRL", 1999), 518.

⁷ G. Raymond, *Droit de l'enfance et de l'adolescence*, 5-e édition, (Paris: Litec, 2006), 161; Ș. Cocoș, *Dreptul familiei*, vol. II, (București: Ed. Lumina Lex, 2001), 167.

Therefore, even in case of a divorce, the rights of the parents remain, the non-custodial parent retains the right to exercise his/her rights as he/she is still responsible for the child's upbringing⁸. In other words, the non-custodial parent will continue to exercise the parental rights acknowledged by law (the right to watch over the child's upbringing and education and the right to guide the child in all respects). We must also mention that the non-custodial parent has not been assimilated by the parent deprived of parental rights. The law recognizes and grants the former, in virtue of his / her quality, a series of rights with regard to the child's person, rights that practically represent a guarantee to respect the constitutional right to a family and a private life.

3. Concrete ways of exercising the right to have a personal relationship with the minor

Pursuant to article 43 of the Family Code, the non-custodial parent is guaranteed the right to have a personal relationship with the minor, as well as to watch over his/her upbringing, education, teaching, and professional training, retaining also the right and the duty to contribute to raising the child. In case this parent is prevented by the custodial parent from exercising this right, the former is granted the possibility to address the court, which will establish the practical ways of exercising this right, which the custodial parent must honour. Therefore, only the court has the power to decide whether the personal relationship with the minor poses a danger to the child. Consequently, the court has the possibility, as expressly regulated by law, to limit or prohibit the non-custodial parent from maintaining a personal relationship with the minor, if there are justifiable causes that endanger the physical, mental, emotional, moral and social development of the child.

With regards to the ways in which the parent's right to have a personal relationship with the child, these are extremely diversified and involve any form of contact with the child, and namely⁹: meetings between the child and the non-custodial parent, visiting the child at his/her home; living with the non-custodial parent, for a predetermined period of time; correspondence or any other form of communication with the child; sending the child updates about the non-custodial parent; sending the non-custodial parent updates about the child, including recent photographs, medical or school evaluations; also visiting the parent at their home or visiting the child at their school etc.

According to legal practices, the right of the parent to have personal relationships with the child may not be limited except if that right was abusively exercised. If this is not proven, the exercise of this right cannot be disturbed by the mandatory presence of the other parent, communication between the non-custodial parent and the child shall take place in a natural manner, without any restrictions¹⁰. Therefore, only in special cases, when it is ascertained that exercising this right by the non-custodial parent is not in the child's interest, the court may prohibit visitation. This right may be removed for serious reasons, for example, anything that could severely trouble the child (alcoholism, inappropriate conduct towards a child)¹¹.

We must also mention the fact that, in case the parents cannot come to an understanding concerning the way, in which the parental rights and obligations are to be exercised or fulfilled, the court has the authority to decide on the conditions whereby ensuring the parents' right to have a personal relationship with the child¹². The child has a right to know his/her parents and to be raised by them, therefore it is necessary that personal relationships be formed and maintained between the child and the non-custodial parent, in case the child cannot benefit equally from the protection of both parents. The best interest of the child must be observed twofold in this case. Firstly, the court must establish whether the interest of the child dictates that this right be acknowledged or whether it

⁸ Bucuresti Court of Appeal, Sect. I pen., Dec. no. 391/1996 (unpublished)

⁹ Art. 15 alin. 4 of Law no.272/2004 on the protection and promotion of the rights of the child, published in Monitorul Oficial al României, part I, no. 557 from 23 June 2004

¹⁰ Sect. III civ., Decision nr.560/8.04.1994 (unpublished).

¹¹ R. A. Garder, *Les enfants et le divorce*, (Paris : Éd. Le Hennin et Éd. Ramsaz, 1980), 244.

¹² G. Raymond, *Droit de l'enfance et de l'adolescence*, 5-e édition, (Paris: Litec, 2006), 161.

prohibits such a relationship, following the fact that there are clear and well-grounded reasons for this: the life and physical and mental health of the minor are jeopardised by the parent's condemnable behaviour. Secondly, the court must decide not only on the matter of granting custody of the child, but also on more precise aspects concerning the exercise of this right, as it is necessary to find the best practical means of maintaining the parent – child relationship.

4. The Jurisprudence of the European Court of Human Rights in matters of ensuring the personal relationships with the minor

It is obvious, that after the divorce, the child can no longer live with both parents. The law thus grants one parent the chance to exercise their parental rights. The law must find a balance between the parents' desire for freedom and the exercise of their parental responsibilities. Notwithstanding all of these, every law, every court ruling remains without effect, thus depriving the child of his/her parent's love¹³. According to the European Court of Human Rights, the court rulings concerning the custody of the child must keep in mind aspects pertaining to equality.

Not even in the case of entrusting the child during divorce proceedings, does the ascertaining of the child's best interest have any legal criteria, and thus the courts decide on this matter. We consider that in the court ruling, whereby the child is entrusted to either parent, the right of the child to maintain their relationship with the other parent as well as a visitation schedule and the practical ways of exercising this right must be well established. Therefore, in case of divorce, article 8 stipulates the right of the non-custodial parent to visit, in order to maintain contact with the minor¹⁴, if the child's best interests do not prohibit it. Such being the case, any parent that does not live with their child has the right to maintain contact with the child. The European judges condemn any difference of treatment with regard to the right of divorced fathers or fathers of children born out of wedlock to visit their children. In this situation, the state has a positive obligation not to impede the father from forming a personal bond with the child, as long as both of them want to.

With regards to the carrying out a court ruling whereby a child is entrusted to either parent after the divorce, the court has decided that the obligation of the national authorities to take certain steps to reunite the child with the non-custodial parent, in case the child resides with the other parent¹⁵. The national authorities must make every effort to maintain cooperation among all the persons and institutions involved, in order to reunite the child with his/her parent, and the right of these authorities to resort to coercive measures is limited by the rights and the interests of all the persons involved and especially the best interest of the child. Therefore, in case contact with the parents would risk to threaten these interests or to encroach upon the child's rights, the national authorities have the duty to ensure an equitable balance of all interests¹⁶.

Taking into consideration the best interest of the child, the case of *Sahin v. Germany*, the European Court of Human Rights has established that the refusal of national jurisdictions to grant the claimant the right to visit his/her child, born out of wedlock, was completely justified by the serious tensions between the parents, which have constituted pertinent reasons for this ruling. The Court admitted that the rulings in question were made in the child's best interest, as there is a risk that the respective parental visits may affect the child's normal development within the family, with which the child resides, especially if the agreement between the parents to have family therapy had failed. With regards to the possibility of establishing contact between the child and the claimant, the Court decided that subsequent psychological expertise in this case is at the discretion of the national

¹³ H. Fulchiron, *Autorité parentale et parents désunis*, (Éd. du Centre National de la Recherche Scientifique, 1985), 31.

¹⁴ European Court of Human Rights, *Hendriks v The Netherlands*, Decision from 8 March 1982

¹⁵ C. Bârsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, (București : Ed. All Beck, 2005), 630.

¹⁶ European Court of Human Rights, *Ignaccolo – Zenide v Romania*, decision from 26 June 2003.

courts¹⁷. Therefore, we do not consider it crucially necessary to request the advice of a psychologist in the matter of granting the non-custodial parent the right to visit, keeping in mind in this point every circumstance of the case.

Not carrying out the rulings of the court with regard to visitation and the custody of the child may pose certain problems, in applying article 8 of the European Convention of Human Rights, as proved also by the ruling in the case of *Ignaccolo-Zenide v. Romania*¹⁸. The criterion consists in knowing whether the authorities have taken all the necessary measures that could be reasonably taken in the circumstances of the respective case in order to carry out the terms of the ruling. By underlining the fact that coercive measures are generally undesirable in cases involving children, the Court has accepted that resorting to sanctions is allowed in such a case, where the behaviour of the custodial parent is illegal.

Conclusions

An interesting issue which really affects the future of education and raising a child in case of divorce is related to child custody to one of the parents. The problem of ensuring personal relationships with the minor can not be treated otherwise than in accordance with the principle of best interests of the child, providing the exercise of conventional fundamental rights. The court must once again consider the best interests of the child, without benefit of legal criteria. It must decide not only on child custody, but also about practical matters related to the exercise of this right, in order to find the best practical means of maintaining these relationships. We believe that the judicial decision of custody should determine the child's right to maintain personal relationships with the other parent, but also the program of visiting and the concrete ways of exercising this right. It should be borne in mind in this respect, for a better functioning of the legal system in Romania, an interweaving of national jurisprudence with ECHR jurisprudence in which concerns the assessment of child's best interest in custody matters.

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¹⁷ European Court of Human Rights, *Sommerfeld v Germany*, decision from 8 July 2003.

¹⁸ European Court of Human Rights decision, 25 ianuarie 2000 in the case of *Ignaccolo-Zenide v Romania*.