Co-parenting and mediating the way to its achieve

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SUMMARY

The article investigates the problem of shared parenting as a newly introduced concept into the Bulgarian legal system, its challenges and some of questions about ways of its establishment. At the outset, it overviews the legal framework of the Bulgarian Family Code focusing on the Art. 59, Para. 1 as a legal basis for the joint custody and the role of the court in its establishment. Then, it investigates the applicable legal framework and the different methodologies about the "shared parenting" adopted by some foreign jurisdictions. In the end, a brief synthesis is offered to suggest that co-parenting in Bulgaria is a valid way of exercising parental rights whose adoption could be helped through implementing conceivably the mediation as a conflict resolution tool. Yet, it is the assertion of the author that more efforts need to be exerted for creating an instrument that *de facto would educate and stimulate the parties to refer a mediator in view of possible achieving "shared parenting" as a solution of their parental conflicts.*

KEY WORDS

Shared parenting, Joint custody, Mediation, Family Code, Divorce, Interpretative Decision No. 1/2016 of 03.07.2017 of the Civil College of the Supreme Court of Cassation.

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Introduction

Co-parenting means establishment of an open dialog and cooperation among the parents in decision-making on raising their children. In a sense the rights of the parents with respect to their children must be exercised in harmony with the best interests of the child – whether the parents live together or apart. Although the concept of co-existing rights exerted simultaneously is deeply rooted in the whole idea of parenting, its practice has often been discussed as problematic within the context of already damaged family relations. Thus, when the personal relations between the parents are subject to a transformation or restructuring of some manner, they often face the question of exercising the respective rights and obligations. Often this leads to conflicts that escalate in a highly destructive manner resulting into extremely harmful permanent effect on the children of the couple. Various jurisdictions have addressed this problem in implementing diverse mechanisms tackling the issue about the best interest of the child differently. This article pursues to outline several of the co-parenting models, finding the place of the Bulgarian model amongst them and setting out the perspective of future development in the field.

I. Definition of Co-Parenting / Shared Parenting

The shared parenting is a global movement in the prevailing number of national legal systems supporting the co-parenting as a preferred post-separation model of relations among the parents. This trend does not bypass the Bulgarian legal system, which has already recognized this new institute as a legal way for exercising parental rights after the divorce or the termination of the factual relationship among the partners. Nevertheless, no legal definition has been officialised so far to precisely define the meaning of shared parenting and the ways of its implementation. The Art. 59, Para. 1, of the Bulgarian Family Code has been amended and the Supreme Court of Cassation has made an Interpretative Decision for adoption of this new regime of parental relations. The text of the Code stipulates:

"In divorce, the spouses, by common accord, shall decide on the issues concerning the raising and bringing up of married children of

marriage in their interest. The court shall approve the agreement as per Art. 49, Para. 5."

The above provision was criticised already from its adoption for being too lenient and not to suggest a mandatory referral to Mediation as a prerequisite to the court adjudication of a parental dispute. Such conception further was supported by Tzanka Tzankova, Anna Staneva, Velina Todorova, Metodi Markov in the Commentary to the new Family Code, issue 2010[2]. Given the lack of experienced family mediators and the court referral to an expert oppinion in such cases, the adopted appoach was not too much of a surprise. On the contrary, it could be concluded that it offered a fair recap of the existing level of development of these relations.

This position is further reiterated by the fact that at the time of public discussions preceeding the adoption of the new Family code ideas like parenting plan, co-parenting and shared exercise of parental rights were not so popular and rather new to parents and the legal professionals working in the field[3]. Hence, the wording adopted in Art. 59, Para. 1 from the Family Code presents a rather holistic solution reflecting the level of social development and granting at the discretion of the separating couple the right to draft their own parenting plan. This later was reconfirmed by the Interpretative Decision No. 1/2016 of 03.07.2017 of the Civil College of the Supreme Court of Cassation (referred to as Interpretative Decision 1/2016). The judges resolved that the adoption of the joint exercise of parental rights is possible only in the cases the parents have made an out-of-court agreement. This interpretation clarified that the court only could refer to a draft parenting plan for joint custody or rather could remind the parents to solve the conflicting issues by a mediated settlement procedure. Therefore, the highest-ranking judiciary of the country left no room for shared parenting other than mutual consent of the two parties. Thus, there is no other choice for the courts but to continue ruling in case of adversarial custody dispute in favour of either of the parents, without having the actual power to order the joint custody

[2] This assertion has been additionally made in Цанкова, Ц., Марков, М., Станева, А., Тодорова, В. (2015) *Коментар на новия Семеен кодекс*, София, Труд и право, 2015, 192 и 193.

[3] As exemplified by the publications followed the Round table, held by the Institue for legal studies by the Bulgarian Academy of Sciences in collaboration with the Human righst and religion commission by the National Assembly and the conducted-on 10-11 November 2018 in the National Assembly to discuss in detail the proposed Family Code.

over the children. Interpretative decision 1/2016 does suggest that the mediation is a potential method to achieve co-parenting and shared custody. However, the very referral to an alternative dispute resolution procedure is only made in the context of reconfirming the court understanding that the manner of exercise the parental rights shall be fully at the parents' discretion. Their agreement eventually is subject to the final confirmation of the presiding judge. Moreover, the entire Decision mentions the word "mediation" merely once in the context of the obligations of the court to encourage the spouses to overcome their differences. The fact that the current development of the specific Bulgarian social structure often assigns the different genders with specific social roles could explain additionally the above interpretation. Nonetheless, once again the Court of Cassation reconfirmed that the burden on the judges to assess the best interest of the child (as the prevailing and predominant) should be respected in all the cases. Its role as a guidance in administering the parental rights' conflicts is exquisitely reiterated in the Interpretative Decision 1/2016. Thus, it may be concluded that by its stance the highest ranking judicial authority of the state has limited itself only to the stipulation that judges are bound to make a decision granting only one of the parents with the right of custody without any title for ordering the "shared parenting". Parenting plans and co-parenting, although recognized as a valid way to exercise the parental rights after the separation, have not been yet legislated and only have been "legalized" implicitly through the backdoor of the judicial interpretation.

II. Co-Parenting / Shared Parenting in Other Jurisdictions

The above recent Bulgarian developments rather differ from the trends in other jurisdictions that recognize shared parenting as a legitimate outcome of adversarial court proceedings. An example of such legislative and judicial preferences is the Canadian system whereby statistics indicate that 44 % of the court-determined custody cases within the divorce context end with a court order stipulating for shared parenting between the ex-spouses. This number has doubled over merely 10 years and quadrupled since 80s[4]. It is estimated that

[4] STATISTICS CANADA, SOCIAL AND ABORIGINAL STATISTICS DIVISION (2006) *Women in Canada: A gender Based statistical report, 5th ed.*, Ottawa, Minister of Industry, 2006.

the number of shared-custody court orders is constantly rising and currently assumed to be even higher than 60 %. However, the lack of empirical research in the field makes it hard to evaluate the exact numbers available today. Separate to this is the fact that the statistics do not include what is also known in Canada as the paternal contract whereby primarily the ex-partners arrange for a prime residence preference with one of the parents, while engaging the other one actively in the day-to-day care. The latter is in all senses of the word shared parenting that has to be acknowledged and accounted for in the statistics for co-parenting as a model for the exercise of parental rights. Despite the apparent embrace of shared parenting, also popular in other jurisdictions like the US, Australia and England, critiques caution against adopting a "one size fits all". Experts in the field warn of the potential negative effects that court-ordered shared parenting may trigger should there be zero or little cooperation amongst parents[5]. To gain better understanding of what this may imply though, an in-depth analysis of the actual definition of "Parenting plan" is needed. It a nutshell this means a document that states when the child will be with each parent and how decisions will be made. The parenting plan may be developed by the parent on their own or with the help of a professional such as a mediator, an attorney, or a judge. The suggested definition is not a legal term and is not a well-known concept of the Bulgarian legal system. No resemblance could be made to a contractual relationship or other type of relation governed under contract law. However, western jurisdictions oftern refer to it within the context of establishing shared parenting and regulating the relations of ex-spouses with their child. It is an established fact though that regardless of whether joint custody shall be ordered by the court or achieved with the mutual understanding of the parties, a pre-condition for it is the positive climate of parental cooperation, meaning an environment where children's needs and interests are prioritized and attended to. Research shows that the existing positive relations between parents shall serve as a condition precedent for co-parenting and would separately be evaluated by the court as a leading factor

[5] Anh P. Haa Kathleen N. Bergmana Patrick T. Davies E. Mark Cummings, Recent Advances in Understanding Conflict and Development Parental Postconflict Explanations: Implications for Children's Adjustment Outcomes, *Family Court Review*, 2 (56) (2018) [online] available at https://onlinelibrary.wiley.com/toc/17441617/56/2 [Accessed on 05.10.2018].

when determining the way for parental rights exercise[6]. Moreover, when discussing shared parenting one should not necessarily think within the concepts of equal division of the time spent with each of the parents. On the contrary, the scope of possible arrangements amongst which the parents choose is diverse and joint custody would be considered as having been achieved even in cases when the parenting time of one of the parents is as little as 30 % from the time of the other one[7]. The aforementioned approach into putting a strong emphasis and high preferrance on to shared parenting time has developed as the starting decision-making point in many jurisdictions.

Moreover, the above has led to changes in perspective in the way judges treat the unsupportive parents of joint custody. A movement centring the parents who are favouring joint custody is on the rise leaving aside all the parents who attempt resisting the joint custody arrangements. Those developments, although supported by the judiciary, has left the question open as to whether they look indeed into the interests of the individual child at the heart of the dispute. Many critiques now claim that there is no empirical research showing a clear linear relationship between shared time and improving children's outcomes[8]. Separately, evidence show that changing the law to encourage shared time does not equal more families entering into co-parenting plans, let alone "workable" arrangements that are proper for the children's needs. The above has led to a gradual, but steady shift towards a culture where judges (as well as lawyers and law schools) are urged into adopting an early negotiated settlement approach facilitated through the use of mediation.

Stemming from the above, mediation in the family context is defined as a cooperative process for resolving conflict with the assistance of a neutral third party, whose role is to facilitate communication, help define issues and assist the parties in identifying and negotiating fair solutions that are mutually agreeable[9]. The research evidence on

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[6] Hughes, E. (2003) The Language and Ideology of Shared Parenting in Family Law Reform: A Critical Analysis, *Can. Fam. L. Quarterly l.*, 21 (2003).

[7] Trinder, L. (2010) Shared residence: a review of recent research evidence, *Child and Family Law Quarterly*, 22 (4) (2010), 475-498

[8] Shaffer, M. (2007) Joint Custody, Parental Conflict and Children's Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us, *Can Faro LQ*, 26 (2007), 297-98

[9] *Child custody litigation* (IICLE, 2010, Supp. 2013) [online] Available at https://www.iicle.com/iicleonline/detail/30014 [Accessed on 30.07.2018] (IICLE - Illinois Institute for Continuing Legal Education)

shared care arrangements suggests that for such arrangements to work well, parents must be highly cooperative and child focus (Fehlberg et al. 2011; Neale et al. 2003, Trinder 2010). The research evidence also suggests that shared care arrangements in situations of parental conflict can result in poorer outcomes for children as they are more exposed to that conflict and its detrimental effects.

III. The Process of Mediation as Means Through Which Shared Parenting Could Be Achieved

All the above suggests that a mediated procedure in the course of which some workable parental arrangements are discussed is the preferred way through which co-parenting could be established. Such position, although merely implicit, may be considered to have further been supported by the Bulgarian Supreme court of cassation in hereinabove quoted Interpretative Decision 1/2016 whereby the way to shared parenting is only achievable through the mutual consent of the parents without the court having a discretion to order it. Thus, the future of joint parenting is left in the hands of parents and mediators whose role is to design a process that facilitate for a conversation whose ultimate goal is to arrive into a parenting plan that focuses and prioritizes the child's best interests.

As the aforementioned developments focus on and include mediation as the most fit procedure through which joint parenting could be achieved, some more light shall be shed on the actual process that is to be followed. A suggested way to trigger the procedure for engaging in a dialogue seeking to establish joint custody is through a lawyer sending a detailed letter to the client preparing the latter for mediation. This notion has crystallized in the theory as a client-lawyer conference prior to the mediation process at which the goals of mediation and options available are discussed. It is the author's principled view that the procedure thus described resembles a couching processes in the course of which the client is versed into the principled school of negotiation as illustrated in Roger Fisher et al., Getting to Yes: Negotiating agreement without giving in (2d ed. 1991) and its application into the context of shared parenting. The above could be deemed as a condition precedent to increasing and facilitating for a subsequent conversation of high quality ultimately serving the goals of the process in finding an amicable solution. To prepare the client

to focus on options and urge the latter away from fixed positions, a preparation and an in-depth discussion is needed as to the parenting plans considered, their feasibility and options for settlement not yet having been contemplated by the parent. The same sourt of routine in debriefing the discussion held during the separate mediation sessions and the potential for settlement following its closure in the course of a next session seem crucial factors contributing to the success of the mediation.

Separate to the client-lawyer preparation for the mediation process on discussing co-parenting, various jurisdictions have developed different standards that need separate education programs for parents to be set and attended to prior to engaging into a mediation process to establish co-parenting. Such programs are usually organized by the mediation centres affiliated at the corresponding courts and at minimum include instruction related to all the following:

1. The emotional, psychological, financial, physical, and other short-term and long-term effects of divorce on adults and children.
2. Options available as alternatives to divorce.
3. Resources available to improve or strengthen marriage.
4. The legal process of divorce and options available for mediation.
5. Resources available after divorce.
6. Common reactions by children and parents to divorce and separation.
7. Helpful and harmful parent behaviors.
8. Communication and co-parenting skills.
9. Harmful effects on children from parental conflict, including domestic violence.
10. Children's reactions to divorce and separation at different developmental stages and warning signs of serious problems.
11. Responsibility of parents to provide emotional support and financial support to children.
12. Factors which contribute to healthy adjustment for children including the value of parenting plans.
13. Basic family court procedures.
14. Issues surrounding continued access to maternal and paternal relatives.

All the above has been deemed to present what is known as issues of substance that need to be attended to by the parents and addressed by the mediator in the course of the procedure seeking to

establish the shared parenting. Drawing a line of comparison with the constitutional basis of parental rights as regulated in the Bulgarian Constitution, the above listed items may well be perceived as a detailed subdivision of Art. 47, Para. 1 from the Constitution promulgating that raising of children is both parents' right and obligation. Thus, it may as well be concluded that the legal basis for conducting mediation for settling custody and parenting is the Constitution that sets out the principled approach for the process to be followed.

At the same time, and for the sake of completeness of the present article, the mediation procedure and its peculiarities with reference to parental disputes should be clearly outlined as a specific process with its own peculiarities. As is the case, the mediation procedure, whether dealing with a family or other dispute, is a confidential process in which two or more parties attempt voluntarily to find a solution to a problem that has arisen between them. When talking about shared parenting, it is good to keep in mind that the conflict is most often connected to the relationship between the partners and their aggravation, which is also the main reason for the lack of agreement on how to raise and educate their children post separation. Namely, in the course of the conflict process, children are victims of the deteriorated communication between their parents, whose natural culmination is the lack of understanding and the opportunity to implement co-parenting and shared custody. Hence, the importance of the mediator's participation as a third party to the process, who does not bear the emotional charge of the given situation, is to support the discussion and establish an environment where the process on reflection of the best interest of the child could be exercised in an acceptable manner facilitating for a solution. The mediator's leading role in such a process can be systemised by the following actions which the mediator undertakes as part of his involvement in the procedure:

i. Exploring all the facts relevant to revealing the interest of the child – i.e. all those circumstances that characterize the child/children's personality, preferences, emotional connection, including affection for one or the other of the parents. To this should also be taken into consideration the individual factors and information that the mediator should gather from the parties, namely:

- years and stages of development of the child;
- the specific needs of the child;
- the relationship of the child with each parent individually;

- the relationship of the child with his / her siblings, grandparents and other relatives;
- way of bringing up the child to date and sharing roles;
- parental capacity of each parent;
- the ability of each parent to cooperate with the other parent in terms of joint childcare;
- the wishes and preferences of the child;
- the child's cultural, linguistic, religious and other specifics;

ii. Outlining the issues on which the parties agree and on which there is no conflict;

iii. Identifying the issues on which parties do not share joint understanding;

iv. Determining the interests of each party and how the latter would be reconciled to the interest of the child;

v. Generating a set of potential solutions jointly with the mediator to be subject to a common assessment;

vi. Choosing an option deemed equally acceptable by both parties and assessing it with the mediator's assistance as to whether it responds to the interests of the child and respects the imperative norms of the law.

The abovementioned procedure is quite often accompanied by a private meeting with the mediator in the course of which parents are prepared for their general meeting. Often such preparation involves budgeting on the amount of probable future needs to be secured, indicating the total assets and their valuation, determining how to exercise parental rights, etc. However, it is very often in the process of mediating the exercise of parental rights, that is established that the parent's vision of what prioritize as best for their child/children is deeply rooted in the parents' own needs and does not correspond with the actual interest of the child. Thus, while adhering to the procedure, the mediator is in a situation in which he/she constantly has to paraphraze the outlining propositions submitted by each of the parents and subject them to a reality test as to whether they indeed reflect the actual best interests of the child. Overall, the procedure for settling shared parental rights stems from and is centered around the idea and pursuit of the best interest of the child – a fact that can often be forgotten by the disputing parents during the process. At the same time, losing the focus and diverting the attention from the best interest of the child is facilitated often also because of the fact

that children do not participate in mediation, and in practice their interests can only be indirectly assessed based on the information provided by the two parents. The latter can hardly be accepted as objective form of information that is devoid of the emotional nuances that greatly impede the proper perception and reflection of information. Moreover, parents enter the process with different strategies and knowledge from various sources and their overlapping divergent positions may differ from what indeed is best for the child.

To address the above, the theory has developed several tools and ways to address the latter, including:

§ Involvement and private meeting with the child as part of the mediation process, within which the same rules of confidentiality and neutrality apply;

§ Detailed and in-depth study of the interests of each parent and determination of their degree of polarization;

§ Providing or directing additional therapies or preparatory courses required by the parties before the formal initiation of a mediation procedure to establish a form of shared parenting;

§ Deferring the parents' focus on their principle assertions, usually based on a given theoretical statement, and directing them to the specificity of the actual needs of their children;

§ Enhanced use of the mediation reality test technique on the basis of which an objective assessment of the different options for finding a solution between the parties generated in the process is given.

It should be noted separately that each of the above procedures is carried out with parallel „monitoring" of the possible existence of domestic violence that affects one or the other party and whose effect may influence the decision making, including and the negative psychological effect that such a circumstance would have on the child. Attention should be paid here to cases of domestic violence and as a result, one of the parties is in danger (physical or psychological from the other partner) to accept conditions that would otherwise be unacceptable to the latter. The latter is of particular research interest in jurisdictions where mediation is a prerequisite for the consideration of a case concerning the exercise of parental rights, and the latter contains the potential to contribute to the continuation of violence by the abusive partner under changed circumstances.

Furthermore, in addition to monitoring for signs of domestic violence, the mediator should also take into account any manifestations of dependence whether in the form of drug abuse, alcohol dependence or misuse of other prohibited substances. Any mental illness or other mental health problems for which the mediator should monitor, and report should also be addressed. This should be taken into account and integrated into any agreement that may be reached between the parties.

As noted, in case the mediation process is concluded with a settlement agreement, the latter may be granted for approval to the competent district court pursuant to Art. 18 of the Mediation Act in connection with Art. 123 of the Family code. This can in essence grant the parenting plan or co-parenting agreement the *res iudicata force* and serve as a claim preclusion. Accordingly, the court's approval of the shared parenting after assessing whether the latter complies with the imperative norms of the law and is in the interest of the child confers on the latter the burden of allowing the latter to be compulsorily enforced.

Conclusion

In conclusion, shared parenting, although not explicitly regulated in Bulgarian legislation, indirectly finds its way in the legal framework on family law. However, it has been left merely as an option at the disposal of parents wishing to regulate their rights and obligations that could be pursued only by mutual consent of the parties, without the court having the right to order its implementation by force and by order established in a courtroom. The latter, in turn, opens the possibility of a mediation procedure, in which all issues relevant to the upbringing and raising of the child are discussed in a confidential and neutral process and a single solution is reached.

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