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## FROM MATERNAL PREFERENCE TO SHARED PARENTING: CHILD'S WELL-BEING. LESSONS FROM THE USA<sup>1</sup>

**Abstract.** The article concerns parenting after divorce or separation within the context of social changes. Special attention is paid to the principle of the welfare of the child, which is the most important criterion for deciding child custody. The child's welfare is an open concept that grants a wide discretion to courts in choosing the best custodial arrangement for a child in a particular case. In this context, reference was made to the American experience on parenting after family break-up, separation or divorce. In the USA different theories were developed to explain which parenting model best fulfils the principle of the child's welfare. This article discusses the tender years doctrine, primary care-taker preference, psychological parent doctrine and approximation rule. After a divorce, a mother was usually granted custody and a father paid child-support. He was placed in the background and excluded from the daily activities of his child. Currently, the theory of mother-nurturer and father-breadwinner is coming to an end; the father is no longer the only breadwinner responsible for providing the family an adequate standard for living, and the mother is no longer primarily responsible for the duties of childrearing and household chores. The changes taking place are reflected in struggling for equal treatment in the award of custody and abandoning the stereotypical approaches based on awarding custody automatically to mothers. A significant rise in the number of parents entering into joint custody arrangements is observed.

**Keywords:** divorce, separation, custody, parenting, child's welfare

### OD FAWORYZOWANIA ROLI MATKI DO WSPÓLNEGO RODZICIELSTWA: DOBRO DZIECKA DOŚWIADCZENIA AMERYKAŃSKIE

**Streszczenie.** Przedmiotem niniejszego artykułu jest władza rodzicielska nad dzieckiem po rozwodzie lub w sytuacji rodziców żyjących w rozłączeniu w kontekście zachodzących przemian społecznych. Szczególna uwaga została poświęcona zasadzie dobra dziecka, która jest najważniejszym kryterium przy decydowaniu o wykonywaniu władzy rodzicielskiej. Dobre dziecko jest klauzulą generalną, a sądom orzekającym o władzy rodzicielskiej przysługuje szeroka swoboda

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przy wyborze najlepszego sposobu wykonywania tej władzy w świetle okoliczności sprawy. W tym kontekście za celowe uznano sięgnięcie do doświadczeń amerykańskich związanych z rozstrzygnięciem o władzy rodzicielskiej po rozwodzie lub rozstaniu rodziców. W Stanach Zjednoczonych powstawały różne teorie, które miały tłumaczyć, jaki model władzy rodzicielskiej najlepiej realizuje postulat dobra dziecka. W artykule omówiono teorię wrażliwych lat, teorię podstawowego opiekuna, teorię psychologicznego rodzica oraz tzw. *approximation rule*. Po rozwodzie zwykle to matka była powierzana władza rodzicielska, a rola ojca sprowadzała się do obowiązku alimentacji. Ojciec był traktowany jako rodzic drugoplanowy i wyłączany był ze sprawowania bieżącej pieczy nad dzieckiem. Obecnie odchodzi się od tradycyjnego modelu matki – opiekuna i ojca – żywiciela rodziny. Zachodzące zmiany mają również swoje odzwierciedlenie w walce o równouprawnienie przy decydowaniu o władzy rodzicielskiej oraz zwalczaniu stereotypów sprowadzających się do automatycznego przyznawania tej władzy matkom. Obecnie obserwuje się wzrost orzeczeń sądów rodzinnych przyznających pełnię władzy rodzicielskiej obojgu rodzicom.

**Słowa kluczowe:** rozwód, separacja, władza rodzicielska, rodzicielstwo, dobro dziecka

## 1. INTRODUCTION

The relationship between parents and children has its own characteristics. It is generally a relationship between three persons: a mother and father who should together take care of the family's interests, and a child who is not able to care for his or her own interests properly. Each parental divorce or separation affects the relationship at the partner level, but also impacts the parent-child relationship. During divorce and separation, the individual interests of the former partners often become more important than the interests of the child (Schrama 2009, 133). A relationship breakdown may involve bad feelings between the parents, which is not without significance for the parents' agreement on how to exercise parental responsibility and maintain contact with the child after the divorce. Parents who are in the middle of a high conflict divorce rarely reach a consensus over their children's custody issues. If the parents cannot agree on a custody arrangement, the judge handling the divorce will decide the matter for them. Each case is unique and the most important factor in deciding who gets custody is the welfare of the child. Moreover, even if the parents agree on the parenting arrangement, the judge should consider the parties' suggestions and wishes, but most of all, follow the principle of the child's welfare. It is the most important criterion for deciding custody, but at the same time the hardest criterion to assess legally. The welfare of the child is an open concept which grants a broad margin of discretion to the authorities and leads to arbitrary application the best solution in each individual case. The main reasons for taking up this topic were doubts about choosing the right parenting style after divorce or separation.

The article concerns the use of the principle of the child's welfare when making child custody decisions and the interpretation of the welfare of the child from a legal and cultural perspective. The concept of the child's welfare in the context of parenting after divorce keeps evolving. Therefore, it was considered

reasonable to analyse various theories to explain which parenting model best fulfils the principle of the child's welfare. The purpose of the article is to present the change in approach of legislators and courts to child custody when parents divorce. In this respect, special attention is given to joint parental responsibility, joint custody and shared parenting, and their practical application. In this article, reference was made to the American experience on parenting in postdivorce families, including both the scholarship views and the abundant jurisprudence. Taking into account that there are 50 states – each with their own legislative and judicial systems, efforts were made to choose the rulings which seem to be the most important and characteristic on this matter. What is important, the results of the study are of a universal value, and can be used in all the national legislations.

## 2. PRINCIPLE OF THE WELFARE OF THE CHILD

The majority of the states in the USA have adopted the principle of the child's welfare either statutorily or in the case law. It means that courts are required to settle custody disputes between parents on the basis of the welfare of the child. The state legislatures have also introduced a number of factors that judges consider in cases involving minor children. It should be pointed that although the notion of the welfare of the child seems to capture the essence of its represented value, the statutes of the USA are more willing to use the concept of the best interests of the child. The child's welfare is sometimes also a subcategory of the best interests of the child, but this is a kind of simplification. To illustrate this point, in California for example, in making a determination of the best interests of the child, the court should examine, inter alia, the health, safety and welfare of the child (California Family Code § 3011). However, a list of factors can be more or less extensive. For the sake of comparison, the Statutes of Pennsylvania (§ 5328) provide as many as 16 factors to consider when awarding custody. The best interests of the child factors can be helpful for the court in deciding what order to make for a child, but ultimately authority belongs to the judge who has to weigh and apply those factors in any given case.

The Supreme Court of New York in the matter of *Vann v. Vann* (789 N.Y.S.2d 261) stated that “custody determinations are ordinarily a matter of discretion for the hearing court” and that “paramount concern in a custody dispute is to determine the best interests of the child [the welfare of the child – K.K.]”. However, the application of the principle raises certain interpretation doubts. The welfare of the child is that kind of legal rule which is quite easy to state, but much more difficult to apply in practice. Some authors claim that the child's welfare is not a principle at all, but “that is merely a cloak for judicial discretion and intuition” (Miller 1979, 353). The welfare of the child is a general and comprehensive rule. Therefore, it may be affected by a subjectivity and inconsistency of judgements. Nonetheless,

relying on personal values and convictions by judges does not always have to be intentional. Due to the vagueness and ambiguity of the rule of the child's welfare, a judge is placed in the situation in which he or she has to use personal bias and values to bridge the gap of the child's welfare rule (Lapsatis 2012, 677). The content of the welfare of the child is still being fulfilled by doctrine and judicature. The notion of the child's welfare is an interpretative challenge.

In order to facilitate the implementation of the principle in matters of child custody after divorce, in the USA the theories were developed to explain what is best for the child. Among many different theories related to the principle of the child's welfare, the most important and the most frequently quoted are: the tender years doctrine (also known as the tender years presumption), the primary caretaker preference, the psychological parent doctrine and the approximation rule (also known as approximation standard or past caretaking standard). Below is a brief description of the development of the above theories as solutions adopted in American law in the context of child custody after divorce, which were to implement the principle of the child's welfare to the greatest possible extent. Moreover, the review of the historical forms of exercising parental responsibility, especially care of the person of the child, as well as custody and visiting rights will show how the law was adjusting to changing social realities.

### 3. AMERICAN THEORIES ABOUT THE CHILD'S WELFARE

The tender years doctrine was broad adoption in the XIX and XX centuries and meant that mothers should be primary caretakers of children, especially toddlers and young children. Some sources say that the discussed theory was applicable to children under the age of thirteen years (<https://law.jrank.org/pages/10725/Tender-Years-Doctrine.html> (accessed: 9.05.2023)), others – the age of fourteen years (*Jb v. Ab* (242 S.E.2d 248)). The mothers were considered superior to fathers at parenting. For the first time this theory was formulated in the 1813 Pennsylvania case (*Commonwealth v. Addicks*, 5 Binn. 520; see McCall 2019, 153). There was a presumption that women do, by nature, a better job caring for a child than fathers. As the Supreme Court of New York said in *Ulman v. Ulman* (135 N.Y.S. 1080), “the child at tender age is entitled to have such care, love and discipline as only a good mother can usually give”. The Idaho Supreme Court in case of *Krieger v. Krieger* (81 P.2d 1081) admitted that the maternal presumption “needs no argument to support it because it arises out of the very nature and instincts of motherhood; nature has ordained it”. Similarly, in *Freeland v. Freeland* (92 Wash. 482) it was ruled that “mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care more than a father's”. In its adjudication *Ross v. Ross* (339 A.2d 447) the District of Columbia

Court of Appeals pointed out that “the interests of children [the welfare of children – K.K.] of tender years will be best served when they are in the custody of their mother”. Under the tender years doctrine, primary residence of the child was granted to the mother as the primary caregiver in child custody decisions.

The second theory was the primary care-taker preference under which a child custody dispute should be settled on the basis of existing model of exercising of parental responsibility. The primary care-taker was the parent who handled all or most of the daily care tasks related to the child, including grooming, dressing, eating, cleaning and household chores, shopping or managing medications. It was presumed that children develop a strong bond with the primary parent and benefit most from sole custody after a divorce. Two states, i.e. Minnesota and West Virginia adopted the primary care-taker preference. This approach was applied in subsequent case-law of the Minnesota's and West Virginia's courts. In *Marriage of Pikula v. Pikula* (374 N.W.2d 705) the Minnesota Supreme Court ruled that “when the evidence indicates that both parents would be suitable custodians, the intimacy of the relationship between the primary parent and the child should not be disrupted (...). Awarding custody to the non-primary parent without such strong reasons, when the primary parent has given the child good care, may constitute reversible error”. In the further part of the judgment the Supreme Court also made reference to the tender years doctrine, saying that

for younger children in particular, that stability is most often provided by and through the child's relationship to his or her primary caretaker – the person who provides the child with daily [nurturance – K.K.], care and support (...). Continuity of care with the primary caretaker is not only central and crucial to the best interest of the child [the welfare of children – K.K.], but is perhaps the single predicator of a child's well-being about which there is agreement, and which can be competently evaluated by judges.

There is a conclusion that courts should apply a custody presumption in favor of primary care-taker parent if he or she has the capacity to provide and care for the child.

The Supreme Court of Appeals in West Virginia applied the primary care-taker preference in *Garska v. McCoy* (278 S.E.2d 357). It is necessary to highlight two conclusions from this judgment. Firstly, the primary care-taker preference is gender neutral. Either parent can be the primary parent. The Court noted that the primary parent in most custody cases in West Virginia is still the mother, however, currently gender roles are becoming more flexible and high-income jobs are opening to women, so it is possible that primary care-taker may also be the father. The second conclusion concerns the factors that are taken into account when making the decision to award custody. In establishing which parent is the primary care-taker, the court should determine which parent has taken primary responsibility for, among others, “the performance of the following caring and nurturing duties of a parent: preparing and planning of meals, bathing, grooming

and dressing, (...), teaching elementary skills, for example, reading, writing and arithmetic.”

For some time, Minnesota and West Virginia have followed the approach of the primary parent, but both states subsequently repealed this preference. Now the Minnesota Statutes in § 518.17 states that in determining custody, the court should not prefer one parent over the other solely on the basis of the sex of the parent. The West Virginia Code’s regulations on allocation of parental responsibility (§ 48–9–206) do not expressly refer to preferences in child custody decisions, only stating that the court should allocate parental responsibility based on the child’s best interest.

The tender years doctrine and the primary care-taker preference favoured the mother in custody cases. The opponents of these theories say that there is no evidence that women have a maternal instinct – a natural, automatic, built in or hard-wired set of skills that provides better preparation for exercising care over the child. A mother’s predispositions for taking care of a child are acquired through experience and learning, not through instinct. The same reasoning applies for fathers (Nielsen 2015, 123–124). This is also confirmed by the jurisdiction of American courts of the ‘70s of XX century. The District of Columbia Court of Appeals in *Bazemore v. Davis* (394 A.2d 1377) rejected the tender years doctrine that small children are better off with their mother, referring to the opinion of eminent child psychiatrists who have demonstrated that “what a child needs is not a mother, but someone who can provide «mothering».”

A social revolution in the 1960s forced the tender years doctrine to more gender-neutral custody theories (DiFonzo 2015, 1006). J. Goldstein, A. Freud and A. Solnit claimed that the well-being of the child requires to award custody to one parent, i.e. a custodial parent. They recommended that only one parent should have exclusively custody and the second parent (non-custodial parent), surprisingly, should have not any legal rights to visit the child. The custodial parent decides if visitations by the non-custodial parent are desirable. Goldstein, Freud and Solnit initiated the psychological parent theory in the book *Beyond the Best Interests of the Child* (Goldstein et al. 1979, 37–38). They also said that joint custody, particularly joint physical custody, disrupts the relationship with both parents if the child developed the attachment bond with either parent. No one wins in joint custody and it is better to sacrifice one relationship than to lose two (Bratt 1978–1979, 299). The “psychological parent”, from which the name of the theory comes, is the person with whom the child was most closely associated (Mason, Quirk 1997, 456–457). Theoretically the sex of the parents was not being considered at all when deciding on child custody, but in practice, that person was usually a mother. The psychological parent theory was seemingly gender neutral approach to exercising parental responsibility after a divorce, but its application by courts had the same effect as the tender years doctrine and the primary care-taker preference. As it has turned out, stereotypes die hard.

#### 4. AMERICAN LAW INSTITUTE AND ITS PRINCIPLES

In 2000 the American Law Institute (ALI) – the leading independent organisation in the USA producing scholarly work to improve all the major branches of law – adopted their *Principles of the Law Family Dissolution: Analysis and Recommendation*. The authors of the Principles proposed a new child custody theory known as the approximation rule. Despite this, it was originally formulated by E.S. Scott in her law review article from the year 1992 (Scott 1992, 615). The approximation rule means that custodial time between parents should approximate the share of caretaking each of them performed for the child before divorce. The approximation rule focuses on how the child was cared for previously, reflecting the existing model of family. According to the theory, allocation of custody should also reflect the roles that parents assumed prior to their divorce. In other words, a parent who has been the primary caretaker of the child should remain so, and that parents who had co-equal roles before divorce should also retain those roles (<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1038&context=djglp> (accessed: 9.05.2023)). The Principles introduce an objective presumption that the court should award custody according to the allocation of past caretaking. Under the Principles, this serves the child's welfare because it promotes stability and continuity in his or her life. On the other hand, critics of this approach say that child-rearing decisions which parents made in the past cannot forever determine their future relationships with the child. The decisions were made when the marriage was intact and the parties could agree. However, the child's needs, as well as each parent's needs change after divorce. Pre-divorce childcare arrangement may not reflect the current situation. It is more important to maintain the quality of a parent-child relationship than an exact representation of the quantity of time spent together before a divorce (Sanders 2010, 17–18, 21).

The aim of the Principles was to eliminate sex-based preference and ideology in which the best option for the child is always granting sole custody to the mother. The idea was to treat mothers and fathers equally without looking back at cultural stereotypes. Like the psychological parent theory, the approximation rule is gender neutral at first sight. However, the reality is that a mother is still the primary caregiver in most intact families, doing the majority of the childcare in the home. The approximation rule requires the judge to approximate the proportion of time each parent was engaged in parenting during the marriage and then give a judgment respectively. In practice these proportions are rarely equal. And that is why some authors name this rule “a maternal preference «in disguise»” (Mnookin 2014, 262). Contrary to expectation, the approximation rule did not revolutionise the American child custody law. The only jurisdiction which enacted the ALI's Principles in full by legislation, including the approximation rule, was West Virginia. However, the courts in other states have also referenced this rule, including: the Supreme

Court of Iowa in *Hansen v. Hansen* (733 N.W.2d 683), the Supreme Judicial Court of Massachusetts in *Custody of Kali* (792 N.E.2d 635) and the District Court of Appeal of Florida in *Young v. Hector* (740 So. 2d 1153). It can be concluded that the ALI's works in the field of family law have made a significant contribution to the improvement of children's and parents' protection. Therefore, these works should not be overlooked in legal research.

It should be added that also under the influence of the Principles, most states now require the court to determine custody only on the basis of the child's welfare, regardless of the parent's gender. The California Family Code, for example, expressly provides in § 3011 that in making a determination, the court should not consider the sex of a parent. And pursuant to section 14-10-124 (3) of the Colorado Revised Statutes, in determining parenting time or decision-making responsibilities, the court should not presume that any parent is better able to serve the best interests of the child because of that parent's sex. While it can be true that the factors in a given case favor one parent, the laws do not give a consent to favor one parent over the other parent solely because of his or her sex in deciding child custody. Moreover, in this context, the parents have equal status regardless of whether they have ever been married or a couple, are divorced or separated, or with which of them the child permanently lives.

Until recently, it was believed that the child's welfare requires sole custody granted to a mother. However, a growing number of fathers fight to gain more time with the child after a divorce. Judges are encouraged to grant each divorced parent a substantial amounts of time with their child. Joint custody is not a new arrangement for children in a divorce, because courts in the USA have experimented with such custody in one form to another for a long time. However, regulations on this field have been enacted since 1979 and most of the scientific papers have been written since then (Hawkins 1982, 99). A presumption of joint custody carries the message that neither the mother nor the father is inherently superior to the other. Since the beginning of the 1980s joint custody has been preferred as a solution of allowing a child to see both parents after a divorce. In 2019, 15 states had a presumption of joint custody (Forman 2019, 588). It has become the new standard of what was considered "the child's welfare" (Mason, Quirk 1997, 453).

## 5. JOINT PARENTAL RESPONSIBILITY AND JOINT CUSTODY

The starting point for further considerations is parental responsibility which means legal rights and duties that parents have towards their children. Nowadays the concept of "parental responsibility" is gradually replacing the concept of "parental authority". Parental responsibility and parental authority are, however, very often synonymous. In general parental responsibility should belong to each

parent whether they are married or not. The relationship between parents concerns themselves and the breakdown also involves a man and a woman. Nonetheless, a court can deprive a parent of his or her rights towards the child if the child's welfare requires to do so, usually due to the parent's misconduct.

Another concept, i.e. "custody" is often used in the context of parental responsibility. It is also presumed that custody over the minor child should belong to both parents. There are two categories of joint custody: joint legal custody and joint physical custody. In joint legal custody both parents have full responsibility to make major decisions regarding the child, for example, non-emergency health care, education and religion. The example is also the place of the child's residence. In important matters the parents should act jointly. If the parents cannot agree on the child's important matter, they may bring their dispute before a court. The court ruling replaces parents' agreement. Most parents now share joint legal custody. Under joint physical custody both parents make day-to-day decisions, such as what and when to eat, when to do chores, when to go to bed. Those decisions do not require joint action and each parent can act alone in daily matters. Joint physical custody involves minor and major decisions made by both parents (Miller 1979, 360). Moreover, joint physical custody is characterised by alternating between parents at consistent periods, for example three days long, a week long or two weeks long depending on the specific needs and circumstances of the family (<https://www.itsovereasy.com/insights/child-custody-schedules-by-age> (accessed: 9.05.2023)). Many joint physical custody laws require "significant" or "substantial" periods time with each parent, but what does that mean exactly? In California joint physical custody means a parenting-time schedule where the child has significant periods of time with each parent that "assure[s] a child of frequent and continuing contact with both parents" (California Family Code § 3004, § 3020(b); see McCall 2019, 145).

Overall, there are three types of physical custody arrangements: sole physical custody, asymmetric joint physical custody and symmetric joint physical custody. In sole physical custody the child spends from 71% to 100% his or her time in the mother's or father's home. Asymmetric joint physical custody means that the child lives from 51% to 70% time with one parent. Under symmetric joint physical custody the child has no main residence due to the fact that he or she is living 50% with one parent and 50% with the second parent (Steinbach et al. 2020, 4). It is assumed that joint physical custody is when children spend at least 30% of their time during a two-week period. More practical tips on the application of joint physical custody arrangements can be found on the Alabama Family Rights Association's website. Some equal time schedules are examples: alternating weeks; alternating weeks with an evening overnight; alternating 4-4 day with each parent; a 2-2-3 day rotation; a 3-3-4-4 day rotation; a 2-2-5-5 day routine; a 3-4-4-3 day routine; 50%-50% alternating custody: parents alternate months of custody or years of custody. Importantly, the authors of the

sample custody arrangements show the advantages and disadvantages of each type of arrangement. It may be particularly helpful in drawing up parenting plans that will meet the needs of both parents and children involved.

There can be a fine line between joint physical custody, on the one hand, and joint legal custody and sole physical custody with liberal visitation rights on the other. This is reflected in case of *Wilhelm v. Wilhelm* (504 S.W.2d 699) where the Court of Appeals of Kentucky awarded custody of the children to the mother and the father was granted very liberal visitation, i.e. two afternoons a week from noon until 5 p.m., alternate weekends from Friday evening until 5 p.m. on Sundays and two weeks in the summer. Such parenting time schedule resembles joint physical custody, but theoretically there is one residential parent, i.e. mother, with primary physical custody, while the father is the non-residential parent. Moreover, some courts do not seem to notice the difference between sole custody with liberal visitation rights and joint legal custody with sole physical custody. The Court of Appeals of Kansas in *Larsen v. Larsen* (5 Kan. App. 2d 284) stated that the same result is obtained by giving formal custody to the mother with visitation rights in the father for the same period specified as his custody period in the court's order. Nevertheless, it is necessary to remember that only with joint legal custody there is an active, shared involvement and decision-making between parents, regardless of the child's place of residence (Bratton 1984, 629).

## 6. WHEN SHARED PARENTING WORKS

Shared parenting after divorce has its supporters and opponents. Courts are currently inclined to grant joint legal custody of the child. One should not, however, interpret a ruling of joint legal custody as an indication that the court is likely to also retain joint physical custody. In the USA courts are still careful when it comes to shared residence arrangement. The Supreme Court in New York County pointed out that shared residence requires that "shuttling back and forth" of the child which must inevitably lead to the lack of stability in home environment that children need (*Dodd v. Dodd*, 93 Misc. 2d 641). The Court of Appeals of New York expressed the view that children need a home base and joint physical custody may be the insecurity and resultant pain frequently experienced by children (*Braiman v. Braiman*, 44 N.Y.2d 584).

Shared parenting is not appropriate where there is unresolved, continued and ongoing conflict between parents. High interparental conflict leads to the fact that parents are wholly unable to communicate or make decisions regarding the child. The New York Court of Appeals in *Braiman v. Braiman* (378 N.E.2d 1019) rejected joint custody because the parties were in bitter conflict and did not agree on this arrangement: "joint custody is encouraged primarily as a voluntary alternative

for relatively stable, amicable parents behaving in mature civilized fashion.” The Indiana Court of Appeals in *Carmichael v. Siegel* (754 N.E.2d 619) concluded that “the issue in determining whether joint legal custody is appropriate is not the parties’ respective parenting skills, but their ability to work together for the best interests of their children.” Similarly, the Minnesota Court of Appeals in *Wopata v. Wopata* (498 N.W.2d 478) found that the fact that parents are equally qualified to raise the children does not mean that they are qualified to raise them jointly. It is worth considering that failure to comply with a parenting plan – even in a written form and confirmed by a court – does not meet with any direct sanction. Nevertheless, the non-compliance with the provisions of parenting plan can lead to indirect consequences. If one of the parents does not follow the rules on certain issues related to the child’s care, joint physical custody order can be made illusory and such case will go to a court for reconsideration.

Joint physical custody works when parents live close to each other and are sufficiently cooperative. They must cooperate with each other not for themselves, but for the child’s welfare and development. According to A. Opie, this cooperation concerns various spheres of contact between parents, including: adherence to agreements, being flexible and willing to change custody schedule where it is needed, the exchange of information about the child in his or her presence and the fair division of the costs of children (Opie 1993, 319). Cooperating effectively also means respecting each other’s private life. Children cannot be used to take revenge on ex-spouse, even though a spouse committed adultery, left to live with another man or woman and they had a child together. On the other hand, H. Sünderhauf says that it need not be active cooperation in which parents jointly plan for and coordinate their child’s schedule. The opposite of co-parenting is parallel-parenting which means passive cooperation characterised by low-level conflict and also poor communication between parents. Parallel-parenting is not as favorable from the standpoint of the child as co-parenting, but it is sufficient to make shared residence feasible (Sünderhauf 2013, 294). The point is whether the parents can separate their conflicts from being parents to their children. If they can, they are able to cooperate on bringing up children although the residual anger and hurt did not just disappear. According to experts, it is also not necessary that parent in shared residence arrangement agree on everything. Even happily married parents do not always agree in matters of raising their own child (Trout 1984, 639).

Bearing in mind the above, it would be probably easier for divorcing parents to prepare a shared parenting plan for court during the mediation process. This is one of the methods of alternative dispute resolution which conduces reduction in the level of negative emotions and understanding the needs of the child and the second parent. Mediation reduces psychological stress associated with conflict situations between spouses and allows them to focus on parenting after their own relationship has ended. And interestingly, the move towards shared custody has been accompanied by the introduction of a mediation regulations. Mediation has become

an alternative a custody litigation in courts – recognised and encouraged by the law. For instance, California was the first American family law where implemented joint custody presumption in 1979 and two years later, in 1981, introduced there mandatory mediation for custody disputes (Kurki-Suonio 2000, 188). In any event, both mediator and judge should hear the child in proceedings regarding the divorce of his or her parents, taking into account the child's age. Children's wishes and feelings about shared parenting after divorce should be analysed during mediation and trial. This applies in particular to shared residence, since the only person moving between the different homes is the child.

## 7. CONCLUSIONS

To sum up, the welfare of the child is the most important rule in family law. This rule may be associated with the risk of subjectivity, inconsistency and unpredictability of judgments. So far, it was not invented another, a better standard. However, a court applies the welfare of the child's rule, taking into account various factors set forth in the laws. As guardian of the general child's interest, the judge should have ultimately authority to weigh and choose those factors that are relevant to the case. It is true that removing discretion would inevitably lead to a less worked out decision-making process and less appropriate outcomes (Forman 2019, 618).

One of the main lessons from the above considerations is that there is no one-size-fits all approach when deciding what custodial arrangement is ideal for the child. Deciding custody on the basis of principle of the child's welfare means that courts have to settle custody disputes effectively and fairly, making case-by-case determinations. A judge is the ultimate arbiter of what custody arrangement is in line with the principle of welfare of the child. There seems to be a certain cultural consensus about the best custody arrangement. Previously it was thought that the child's welfare is best-served by remaining with one parent who has both physical and legal custody. The custody of the child was typically granted to the mothers (maternal preference). Recently the approach to custody of children has changed as many parents benefit from shared parenting. Moreover, many courts today favor joint custody arrangements. The preference for sole custody – bringing to order the child's residence with one of his or her parents and contact for the other – was replaced with the preference for joint custody. There is a close relationship between law and culture (Kurki-Suonio 2000, 183–184). However, none of these arrangements for the exercise of custody is in principle better than the other in any case.

The purpose of the final custody order is to provide the child with necessary strong, continuing and stress-free relationships with both parents. The fundamental criterion of the child's well-being can be fulfilled through joint custody, but also

through sole custody with liberal visitation rights. Child custody and visitation should serve the child's welfare in the best way. Although in shared parenting, particularly shared residence, equal amount of time in each parent's home after divorce is emphasised, the meaningful relationship is far more important. It seems that quality of relationships with both parents can be reached by any parent who is available and interested about the child in any care arrangement serves the child's welfare (Atwell et al. 1984, 156).

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