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Ph.D. Thesis

Exclusive parental authority

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The drafting of this paper has provided us with the opportunity to observe how parental authority emerged in the Romanian legal landscape and the influences of its division on the relationships between parents and children.

From the outset, our objective has been to decipher the meaning of the term "parental authority" and how it has "evolved," as well as to highlight and analyze diachronically the principles around which it revolves, the reasons that lead to a limitation of its exercise, and how it reverberates on issues directly affecting the child's life, including whether sanctions can arise in the event of exclusive exercise.

The first chapter is dedicated to introductory issues, also highlighting the research methods used (explanatory, exploratory, comparative).

In the second chapter, we have emphasized that the course of the institution currently referred to as "parental authority" is quite convoluted, often questioning whether we are witnessing its evolution or a return to what it was but in a disguised form.

If in the past the institution of "parental power" was seen as an absolute, sovereign right over minors, without being directed towards their interests and without an absolute balance between parents, we have observed that gradually, evolutionarily or not, it has undergone substantial changes. It has lost its quality of "absolute power" because our legislator, somewhat forced by the evolution of society as a whole, chose to regulate it under the auspices of the Family Code, under the terminology of "parental care." With the adoption of the current Civil Code, its authors preferred, contrary to the Western trend (which prefers to use the term "parental responsibility"), the term "authority," which, without a doubt, in our opinion cannot be viewed as a terminological evolution if we look at its literal meaning.

Firstly, after highlighting diachronically how the legislator addressed this legal institution and presenting the definitions outlined in both old laws (the Civil Code and the Family Code) and current legislation, analyzing the content of "parental authority," we arrived at the following definition: "that sum of rights and obligations with a single purpose – the superior interest of the child –, a legal transposition of the moral obligation to guide the child to adulthood and independence, ensuring their protection and education, by respecting their person and protecting their patrimony, which, sometimes, in case of non-compliance with legal provisions, can lead to sanctions of civil, administrative, or criminal nature for its holders (parents or, as the case may be, third parties or institutions)".

Secondly, we established that the duration of parental authority is not limited exclusively to the content of art. 484 of the Civil Code, as the exercise ends not only when the minor reaches the age of majority but also when they marry before turning 18 or when the court orders their civil emancipation or approves their adoption; however, the most painful way to end parental authority

exercise is the death of the child or the parent. Additionally, we highlighted that temporary exclusion from parental authority also occurs when so-called "capacity islands" occur, which we qualify as "occasional emancipations."

Thirdly, guided by both the definition offered by the legislator and our own, we presented chronologically the principles or rather the axis around which we call "coparenting."

More precisely, often referring to rules and old legislation, dissecting the legal provisions applicable in the matter, we observed that, in addition to the "spectacular" principle of the superior interest of the child, there are others that, in our view, should not pale in comparison to the "superior." But more than that, not agreeing with some opinions expressed in doctrine (whether national or foreign), we highlighted that we admit the public order nature of the principle of the superior interest of the child, but we cannot embrace the perspective according to which it would prevail over any other principle. However, as its very name suggests, it entails a certain superiority, but we do not accept that in its face any other general principle of law fades and becomes derisory because otherwise, there would be many situations where the interest of a single individual would be protected at the expense of the entire society. We accept its superiority, the interest of the child, but it must be appreciated within the spirit and limits of the law, never outside them.

Another important principle is that of equality in parental rights (which goes hand in hand with that of co-decision), a principle with an evolution that can be described as ingenious. Through this principle, the Romanian legislator, desiring a spectacular evolution, attempted to transpose parental responsibility into legal norms, reflecting in such a way the constitutional principle of equality. And as we have highlighted throughout the paper, even the invocation of the superiority of the principle of the child's interest is not sufficient to decide judicially on a division of parental authority and thus renounce joint parental authority.

We have often evoked the indifference of the legislator, but when it came to patrimonial independence, we step back and admit, indeed, applauding his perspective; he did not overshadow the patrimonial independence between parents and children, but rather elevated it to the rank of a principle.

Also, it should not be forgotten, even if it is not a "new" principle, the principle of non-discrimination based on the child's status.

Chapter three began with a presentation of what coparenting represents. First and foremost, we highlighted the fact that the Romanian legislator has, to some extent, transformed the institution found under the dome of the Family Code. More precisely, we pointed out that the legislator's purpose was to reform the institution of parental care by establishing coparenting as a general rule. But is coparenting always in the best interest of the child? Undoubtedly, the family represents the foundation and engine of a child's harmonious development, but when this engine becomes

defective and causes damage to the entire system, we must respond by saying that it is preferable to abandon coparenting. This coparenting is, of course, a right of the child, which cannot be deprived unless there are compelling reasons.

But we must note that what was once the rule has now become the exception. However, in practice, the exception tends to be requalified as the rule. Parents often resort to court intervention to determine how parental authority should be exercised, invoking various reasons that may or may not lead to a division.

We have noticed that both part of the doctrine and judicial practice (especially immediately after the Civil Code came into force) referred to Article 507 of the Civil Code when discussing the exclusive exercise of parental authority. Somewhat, this is not to be condemned strictly because the indifference of the legislator has also been felt in this area. For a long time, the burden of qualifying the reasons leading to exclusive parental authority fell on the shoulders of judges (and, let's admit, it still does).

Bringing up Article 507 of the Civil Code, we have signaled interesting opinions in specialized doctrine, opinions that we have analyzed, embraced, or dismantled. Indeed, we would be tempted to mention that Article 507 of the Civil Code would ope legis determine the exclusive exercise of parental authority without resorting to court intervention. We have not fully embraced this opinion expressed in doctrine because, in our view, only the first four reasons highlighted by the legislator lead directly and without the court's intervention to exclusivity. When "any reason" is invoked, it is mandatory to appeal to the wisdom of the judges to analyze the reasons invoked and thus decide to respect the child's superior interest, without forgetting about the parental rights recognized by the Constitution.

This statement emphasizes that the phrase "any reason" should not be interpreted to automatically allow for the exclusive establishment of parental authority. Various parental behaviors have been discussed in doctrine that could be considered reasons for granting exclusive parental authority, such as the existence of conflicting interests between parent and child or the disappearance of one of the parents. However, these reasons should rather lead to the establishment of other measures to protect the child, rather than automatically granting exclusive parental authority. Additionally, it is mentioned that there are other legal institutions that can be appealed to for the protection of the child's interests, without resorting to the exclusivity of parental authority.

We all know that being a parent is the most precious gift from providence; parental authority has its roots in filiation. We cannot relinquish what providence has given us, specifically, we cannot renounce the role of being a parent. Even when parents request the exclusive exercise of parental authority, the court will not directly grant such a request. However, the legislator, being anchored in reality, has created a loophole and regulated the possibility of "delegating" parental

authority in certain circumstances. Specifically, when parents or the parent with whom the child resides move abroad for work, the court may order a transfer of parental authority (or, as the case may be, certain elements of it) to a third party. As I have highlighted in my work, unfortunately, there is a practice among notaries public with which we do not agree, namely, the delegation of certain responsibilities from the sphere of parental authority to third parties through notarial acts (declarations, powers of attorney, etc.).

After reviewing these issues, I dedicated the fourth chapter to analyzing the reasons that lead to the exclusivity of parental authority. First and foremost, I highlighted the "battle" waged by the Civil Code and Law no. 272/2004 regarding what constitutes "valid reasons," and then proceeded to analyze each reason indicated by the legislator in Article 36 paragraph (7) of Law no. 272/2004. Undoubtedly, all the reasons invoked must relate to the best interests of the child through a thorough, rigorous analysis of the assessment criteria: age, parents' conduct, material conditions, concrete possibilities of taking care of the child's upbringing and education, aspects that cannot be determinative in themselves.

Secondly, I emphasized that the reasons highlighted by the legislator in the aforementioned legal text do not automatically lead to the exclusive exercise of parental authority. It is mandatory to ensure a reasonable proportionality between exclusive parental authority, the manner of ensuring the child's best interests, and child protection. Ideally, the court should restrict the exercise of parental authority by partially limiting certain rights and/or obligations, proportionate to the seriousness of the reason or reasons. Thus, our proposal for future legislation was to establish a "partial, gradual exclusivity" that would affect only certain rights or duties, precisely to underline once again what was actually intended by the establishment of co-parenting, namely that "parental authority" still represents a means of protecting the child; a means of protection that usually comes into existence with the birth of the child.

The fifth chapter, dedicated to the repercussions of the exclusive exercise of parental authority, aims to illustrate how exclusivity interferes with certain important elements of its content. As previously emphasized, the joint exercise of parental authority is more of a right of the child rather than the parents, and this must be taken into account when the court pronounces on this matter.

The most significant elements that will feel the effects of how parental authority is exercised are the residence of the child, the manner in which the non-resident parent and the child will maintain personal ties, as well as how the respective parent will fulfill their duty to support the child.

The residence of the child can indeed be considered the ultimate goal in parental disputes. However, as highlighted in the body of the work, in doctrine and, worse, in

practice, the presence of "shared residence" has been noted. In our view, this shared residence is the greatest illusion of family law. It does not demonstrate anything other than the extent to which parents, blinded by their own interests, choose to go. This shared residence can be seen as giving rise to the concept of the "child with a backpack." We have always emphasized that we are not proponents of this arrangement. In addition to the separation of parents, subjecting the child to constant movements with a backpack from one home to another will only demonstrate the indifference of adults and their lack of empathy. The battle fought by parents will ultimately disregard what is supposed to be the paramount interest of the child

In another vein, we highlighted that, in addition to residence, the manner in which parental authority is exercised also influences how the non-resident parent maintains personal ties with the child. We can classify this right as the most crucial right-obligation for both parties involved. Remaining closely connected with someone whom you consider your universe only adds to development, whether we are talking about parents or children.

Certainly, being a parent is not an easy task, but we must admit that it is an incredibly beautiful one. However, when harmful elements arise in the exercise of parental authority, when doubts arise about how parents fulfill their role given by providence, certain sanctions may come into play, including forfeiture of parental rights or tort liability for the harmful acts of the child, aspects analyzed in the sixth chapter.

Regarding the first sanction mentioned, I have expressed the opinion that this forfeiture of parental rights should be seen more as a measure to protect the child rather than a punishment imposed on the parents, and the legislator should reconsider the institution in terms of reforming it. Furthermore, I have considered it appropriate for the name of this measure to be changed from "forfeiture" to "withdrawal."

However, not always does "forfeiture" occur for the defective exercise of parental authority; instead, civil liability may arise for the harmful act of the child, because, as we well know, it would be inconceivable for a child to cause harm while the parents remain indifferent. Children are the greatest joy in parents' lives, but with the acquisition of this role, responsibilities, worries, etc., make their presence felt. In our view, the fact that only one parent exercises parental authority exclusively does not absolve the other parent from responsibility.

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Certainly, it will take a long time before this institution is thoroughly rethought and reformed. However, all of us must be attentive to the wave coming from beyond the borders of our country, a wave that can be classified as phantasmagoric. Before revolutionizing family law and

aligning ourselves with legal institutions that sound interesting and provocative just to be in line with the West, we should first look at how they will actually impact what we know, the family, in the event of implementation. Furthermore, we must not innovate law by invoking the "principle of the best interests of the child" anytime and anyhow; the superiority implied in the name should not negate any other general principle of law or serve as the foundation for revolutions.

What I aim to emphasize through this work is that the judicial courts should have the necessary tools to establish the exclusivity of parental authority gradually and proportionally, implying a partial limitation of parental authority. Thus, if there is indeed a push for a reform of parental responsibility, we should abandon the notion of exclusivity of the two poles: joint and exclusive.

Keywords: parental authority; sole parental authority; child's home; maintenance of contact programme; sanctions; civil liability.