

Parental responsibilities in a European perspective

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Sources for a common frame and convergence

- Council of Europe conventions, resolutions and recommendations
- Hague Conference & EU instruments of private international law
- Case law of international courts (ECtHR, ECJ)
- Soft law and academic work (White Paper 2002 & Draft CM/Rec 2011; CEFL Principles Regarding Parental Responsibilities 2007)

Terminology and scope

Principle 3:1 *Concept of PR*

“PR are a collection of rights and duties aimed at promoting and safeguarding the welfare of the child. They encompass in particular:

- a) care, protection and education;*
- b) maintenance of personal relationships;*
- c) determination of residence;*
- d) administration of property, and*
- e) legal representation.”*

- Useful in private international law
- Enhances the value of all forms of affective, social or legal parenting, regardless of intensity
- Its normative value is limited and does not obviate the need to lay down rules for assigning and coordinating powers and duties of very different functionality and extent

The attribution of PR

Principle 3:8 *Parents*

“Parents, whose legal parentage has been established, should have parental responsibilities for the child”.

SYSTEMS THAT ATTRIBUTE PR TO BOTH PARENTS ONCE PARENTAGE HAS BEEN ESTABLISHED

- Parents are in principle considered suitable for assuming parental roles
- Holding PR does not imply immediate and full exercise
- A “passive holder” of PR may have some powers and duties and holds an expectation of assuming the full exercise of PR

SYSTEMS THAT DISTINGUISH PARENTS OF CHILDREN BORN IN AND OUT OF WEDLOCK

- Unmarried fathers acquire PR only with the mother’s endorsement (agreement; marriage; father’s name being recorded on the birth certificate) or by means of an act of authority

Third persons holding and exercising PR

Principle 3:9 *Third persons*
“*Parental responsibilities may in whole or in part also be attributed to a person other than a parent*”

Principle 3:17 *Exercise in addition to or instead of the parents*

“*A person other than a parent may exercise some or all parental responsibilities in addition to or instead of the parents*”

- Persons exercising contact or access rights
- Persons *in loco parentis* (guardianship and equivalents)
- Foster carers
- Parent's spouse or partner

Third persons holding and exercising PR

Principle 3:18 *Decisions in daily matters*

“The parent’s partner living with the child may take part in decisions with respect to daily matters unless the other parent having parental responsibilities objects”

SYSTEMS THAT ATTRIBUTE PARTICIPATION IN DAILY MATTERS

(Germany, Switzerland, Czech Rep., Catalonia, ...)

SYSTEMS THAT ALLOW ASSUMPTION OF FULL PR

(Denmark, England & Wales, Austria, Finland, ...)

- ❑ Different legal basis:
 - ✓ By operation of the law
 - ✓ By agreement
 - ✓ By an act of authority
- ❑ Different scope:
 - ✓ In addition to parents
 - ✓ Instead of parents

Residence

Principle 3:20 *Residence*

“(1) ... the holders of PR who are living apart should agree upon with whom the child resides.

(2) The child may reside on an alternate basis with the holders of PR upon either an agreement approved by a competent authority or a decision by a competent authority. [...]

- ❑ **Principle of coparenting** (joint exercise of PR) as a default rule after a family breakdown, and determination of the child’s residence as a PR decision made by agreement between the PR holders or, failing this, as a judicial or administrative decision
- ❑ **Alternating residence as an available option** based on a parental agreement, but also on a decision by the competent authority, in the light of several factors to be taken into consideration

Alternating residence: from an option to a principle?

Resolution 2079 (2015), Parliamentary Assembly Council of Europe

"5. (...), the Assembly calls on the member States to:

5.5. introduce into their laws the principle of shared residence following a separation, limiting any exceptions to cases of child abuse or neglect, or domestic violence, with the amount of time for which the child lives with each parent being adjusted according to the child's needs and interests"

- Comparative law shows a **great variety of regulations**, but its practice is increasing
- Need to consider several relevant factors (family dynamics; factual circumstances; child's opinion) makes undesirable a "principle" or a "priority model" approach

Private autonomy

- ❑ Parents are allowed to **reach agreements** concerning the exercise of PR (3:13), residence (3.20) and relocation (3:21), and also to agree with other persons on contact (3:37).
 - Agreements are subject to the best interests of the child
 - They may be subject to judicial or administrative scrutiny
- ❑ In some areas, private autonomy is **less consolidated** (attribution or delegation of responsibilities to third parties; appointment of surrogate holders of PR in anticipation of death or incapacity; agreements in anticipation of a family breakdown)

Termination

Principle 3:30 *Termination*

“(1) PR should be terminated in the case of the child:

- (a) reaching majority;*
 - (b) entering into a marriage or registered partnership;*
 - (c) being adopted;*
 - (d) dying.”*
- (2) [...]*

Principle 3:32 *Discharge of PR*

“ The competent authority should discharge the holder of parental responsibilities, wholly or in part, where his or her behaviour or neglect causes a serious risk to the person or the property of the child”

- Emancipation and extension of PR beyond the age of majority remain out of the European common core
- Removal or discharge of PR as a preventive or protective measure, not to be applied as a punishment, and subject to substantive standards and procedural safeguards (ECTHR)
- Restoration of PR is possible, but it rarely comes about

Subsequent allocation of PR in cases of early termination

Principle 3:31 *Death of the parents*

“ (1) If parents have joint PR and one of them dies the PR should belong to the surviving parent.

(2) If a parent having sole PR dies, responsibilities should be attributed to the surviving parent or a third person upon a decision by the competent authority.

(3) On the death of both parents, of whom at least one parent had PR, the competent authority should take protective measures in respect of the person and the property of the child”

- If there is a surviving parent, attribution of PR depends on its being holder of PR or not. If not, allocation to a third person upon a judicial or administrative decision is the general rule in Europe.
- Guardianship of minors is still an institution out of the main focus of analysis

Final remarks

- A complex institution, still highly heterogeneous
- Child-centered normative design
- Allocation of PR based on the parents' equal treatment
 - Gender-neutral
 - Increasingly independent from family status
 - Independent from the parents' living together
- In the process of adjusting to new family models
- Functional breaking up into bundles of duties and powers of varying content and intensity

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