

Private Law



Reflections on Parental Authority

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Abstract: The movement in the European Union territory of the family members de jure or de facto - parents married or not, on the one hand, and their children, on the other hand, the birth of litigation related to the content, exercising or limiting the parental authority in the event at least one holder of parental authority is in a Member State other than where the minor child is, and the interest of achieving a good administration of justice within the European Union, led to the development of Community instruments in the area of parental authority, which has provisions on conflicts of jurisdiction, conflict of laws, recognition and enforceability, enforcement, legal aid and cooperation between central authorities, designating the applicable law. In the first part of the study we have analyzed the rules of jurisdiction by establishing the jurisdiction of the court hearing with an application for parental responsibility, whether there are pending divorce proceeding or not. In the second part of the study, we have limited the analysis to the rules applicable to the law causes that have as object parental authority.

Keywords: jurisdiction; prorogation of jurisdiction; Transferred competence; Regulation (EC) no. 2201/2003; The Hague Convention of 19 October 1996

1. Details on the Legal Framework

The courts called upon to rule in a case which concerns the attribution, exercise, total or partial restriction of parental authority with an element of extraneity, that determine the application of the following legal instruments:

- *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial*

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matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000¹ (hereinafter named “Regulation”), which contains uniform rules for determining the rules of jurisdiction between Member States and that facilitate the free movement of judgments in the Union, of the authentic document and agreements, establishing provisions on the recognition and enforceability (*exequatur*) in another Member State.

- *Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, adopted in Hague on 19 October 1996²* containing rules of conflict governing successively the protection measures, parental responsibility by operation of law and the protection of third parties.

2. The Identification of the Competent Court

Form the analysis of the depositions of the Regulation, it results that a court in Romania invested with a request (main or ancillary) relating to parental authority (according to Art. 1, par. 2 of the Regulation, attribution, exercise, delegation, restriction or termination of parental responsibility shall include the following aspects: custody and visiting rights; guardianship, curatorship and similar institutions; the designation and attributions of any person or body having charge of the person or property of the child, to represent or assist him; placing the child in a foster family or in an orphanage; measures to protect the child relating to the administration, preservation or disposal of the child's property) verifies the existence in courts of another Member State for a request for divorce among the parents of the same child, which attract different provisions and different procedure. Thus, in a first case, we will analyze the situation where there is an application for divorce before the courts of a Member State, and in the second case, where there is such a request. How will the Romanian judge proceed?

¹ Published in OJ L 338, 23.12.2003, p. 1. The Regulation applies from March 1, 2005 to all Member States of the European Union, except Denmark. On this regulation, see Ioana Burduf, Ulrike Frauenberger, Maria Kaller, katalin Markovits, Viviana Onaca, Flavius George Păncescu, Walter Rechberger, Camelia Tobă, *Cooperarea judiciară în materie civilă și comercială, Manual/ Judicial cooperation in civil and commercial matters, Manual*, pp. 140-158, address available at http://www.just.ro/Portals/0/CooperareJudiciara/Doc%201_Manual%20Civil.pdf.

² Ratified by Romania by Law no. 361/2007, published in Official Monitor no. 895 of 28 December 2007. The act implements the Council Decision 2003/93 / EC of 12 December 2002 authorizing Member States, in the Community interest to sign the Hague Convention of 1996, published in the Official Journal of the European Communities no. L 48 of 21 February 2003.

1. In the absence of an application for divorce the rule in the matter is that action concerning parental authority with an extraneity element is for the courts of the *Member State of habitual residence of the child, when it is brought before the court* (art. 8 of the Regulation).

This rule – of habitual residence of the Child is established also in the situation, so often encountered in practice, of **unlawful removal or retention of a child**¹ and which the regulation expressly provides it in art. 10. Thus, the courts (Jugastru, 2014, pp. 81-99) of the Member State where the child is habitually resident immediately before cross-border abduction² retains jurisdiction until the child acquires habitual residence in another Member State and additional conditions were met, namely:

- Any person, institution or body to whom custody has been granted in the his removal or retention, or

- The child has resided in that Member State for at least one year after the person, institution or any other body entrusted the child had or ought to be aware of where the child is, until the child adapted in his new environment and until it was satisfied at least one of the following conditions:

a) within one year since the person to whom it was entrusted the child had, or ought to be aware of where the child is, did not submitted any application for return to the competent authorities of the Member State where the child has been removed or retained;

b) it was withdrawn an application for the return of the child filed by the person to whom the child was entrusted, and he has not filed any other new application within one year previously provided;

¹ The removal or return of a child is considered unlawful under art. 3, paragraph (1) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, to which Romania adhered to by the Law no. 100/1992 in the following cases:

“a) it is in breach of rights of custody attributed to a person, an institution or any other body, acting either separately or together, by the law of the State where the child was habitually resident immediately before the removal or its retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone taking action or would have been so exercised if such circumstances would not have occurred.”

² According to art. 2, pt. 1) of the Regulation wrongful removal or retention of a child occurs when:

“a) there has been a breach of rights of custody acquired by a court, by an act of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention and

b) provided that custody were actually exercised, either jointly or alone at the time of removal or retention, or would have been so exercised if the removal or retention would have not occurred.”

c) a case solved before the courts of the Member State where the child was habitually resident immediately before the unlawful removal or retention has been closed under art. 11, par. 7;

d) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the unlawful removal or retention.

Related to this last condition, in **Case C-211/10 PPU, Povse** the Court of Justice of the European Union has ruled on 1st July 2010 that according to art. 10, letter b), pt. 4 of the Regulation it was interpreted as follows: a provisional measure is not a “judgment on custody that does not entail the return of the child” within the meaning of that provision and it cannot justify a transfer of jurisdiction to the courts of the Member State where the child was wrongfully removed. In practice, such decisions are common when parallel with the divorce proceedings it is filed at a court in the State of destination a spouse also filed an application for provisional custody of the child, which causes the pending judgment to legally block any approach of returning the child in the State.

1.2. In order to encourage understanding the parties in any proceedings concerning parental authority on a child¹, the European legislator has offered also the solution of jurisdiction prorogation (art. 12 par. 3). Thus, although according to art. 8 the jurisdiction should return to the courts of the Member State where the child's habitual residence is, the courts of another state will be called upon to decide the case, due to the agreement of the parties. This prorogation of jurisdiction therefore stems from the parties' agreement, which is crucial if the following conditions are met, being verified by the judge handling that case:

- the child has a close connection with that State. Examples of such bonds: the child has the nationality of that State or one of the parents, as the holder of the parental authority has his habitual residence in that state;
- the parties accepted at the date of seizing the court, explicitly or otherwise unequivocally the jurisdiction of that court;
- the jurisdiction of the Court is in the best interests of the child.

The Court of Justice of the European Union has passed a judgment on 1 October 2014 in **Case C-656/13**, according to which the jurisdiction in matters of parental responsibility, prorogued, pursuant to art. 12, par. (3) of Regulation No. 2201/2003

¹ Flaviu George Păncescu, *Dreptul internațional privat român. Tradiție. Reformă. Tendințe/Romanian private international law. Tradition. Reform. Trends*, in (Uliescu, 2011, p. 458)

in favor of a court of a Member State, seized of proceedings in agreement with the holders of parental responsibility, ends with a judgment which has become *res judicata* in this case. In this case, the spouse is a Spanish citizen, and his wife is a citizen of the United Kingdom, the last common residence being in Spain, where the baby was born and lived about five years. After separating in fact, the spouses (who are in different Member States) conclude an agreement on child's custody and visiting rights for the spouse, which he submitted to the court for approval in Spain. Later, the mother entrusts a court in the UK with an action based on art. 8 of the Regulation for reducing the visiting program, and the father responded with an application based on art. 41 and art. 47 of the Regulation. Based on article 15 of the Regulation, the mother turns to a court in Spain, and then, based on article 8, to a court in the United Kingdom, which has made the preliminary question for the European court.

1.3. A special situation and, more rarely applied in the practice of the Romanian courts, for now, is that under article 15 of the Regulation, i.e. the **jurisdiction transfer** from a seized court of a Member State to a court of another Member State with which the *child has a special bond*. Situations where a child has a special bond to a Member State shall be provided by art. 15, par. 3 of the Regulation, namely:

- after informing the competent court, the child has acquired his habitual residence;
- the child has had his habitual residence in that state or he is national of that State;
- one of the holders of parental responsibility is habitually resident in that State;
- the litigation concerns the measures for child's protection on the administration, preservation or disposal of the assets owned by the child and that is on this territory.

Thus, in such a situation, the Romanian judge considering the perspective of the best interest of the child, which between the courts is better "placed" to hear the case or other application accessory to it, it may have one of the following solutions:

- Suspend the procedure and invite the parties for, in a certain agreed period, submitting an application before the court of another Member State. It is understood that if the court of another Member State is not notified within the period prescribed by the judgment of the Romanian judge, the court first seized

shall continue to exercise jurisdiction in accordance with art. 8-14 of the Regulation;

- Require the court of another Member State to exercise jurisdiction within six weeks after being notified. So being, the Romanian court declines jurisdiction by the court of the State with which the child has a special bond. If the court declares having no jurisdiction, the court in Romania, being the first seized shall continue to exercise its jurisdiction in accordance with art. 8-14 of Regulation.

1.4 The mere *presence of the child* in a Member State in the following circumstances: if the child's habitual residence cannot be identified and the jurisdiction cannot be determined on the basis of art. 12; the child has the refugee status or has been moved internationally, due to the disturbances occurring in his country, attracting the scope of art. 13 of the Regulation. That is, jurisdiction lies with the courts of the Member State in which that child is.

1.5. Finally, if no court has jurisdiction pursuant to art. 8-13 of the Regulation, the jurisdiction is governed by the law of the Member State, being in a situation of residual jurisdiction provided for by art. 14.

2. The Court of Romania Finds an Application for Divorce before a Court of a Member State

The Romanian judge makes the application of art. 12 of the Regulation, which means that the court hearing a divorce action under art. 3 of the Regulation retains jurisdiction in cases relating to parental authority in connection with divorce (Avram, 2013, pp. 230-231) if the following conditions are met:

- At least one of the spouses has parental authority on the child, which means that in fact the child is under the care and supervision of that parent;
- The judge verifies that when the court was seized, all holders of parental responsibility accept the jurisdiction of the divorce court, whether by formal acceptance or through unequivocal conduct.
- The jurisdiction of that court is in the best interests of the child.

When asked until when the court retains jurisdiction, the answer is different, depending of the circumstances of the case. Thus, the court retains jurisdiction until the divorce judgment has become *res judicata*, or until the decision by which it was

solved the application on parental responsibility has become *res judicata* or the proceedings for the divorce and parental authority ended for another reason, such as for example, waiving court, the intervention of obsolescence. (Buglea, 2013, pp. 195-196)

3. Special Situation for Prorogation of Jurisdiction

A special situation is one in which two courts in different Member States are notified, one with a case concerning the exercise of parental authority on a child and another with cases concerning a provisional or protective measures on the child or his property. Which court has jurisdiction to decide on provisional or protective measures?

By the incidence of art. 20 of the Regulation, the jurisdiction to hear the case on provisional or protective child or goods does not belong to the court of settlement of merits, but the court of another Member State, provided that they meet cumulatively the following conditions: to be urgent; child or his property to be present on the territory of this member state.

3. The Applicable Law on Parental Authority

Once the jurisdiction of the courts of a Member State of the European Union is established, it identifies the law applicable to parental responsibility, according to the provisions of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children adopted at the Hague on October 19, 1996.

Based on art. 20 of the Convention, it results that the provisions of this instrument are universal, which means that the applicable law even chosen by the parties by their convention, may be the law of a contracting State or a non-contracting State. According to art. 22 of the Convention, the court of a Member State may remove the law designated by the parties, if the application of this law would be contrary to the **public order** and the best interests of the child.

In the absence of the law applicable to parental authority, the rule in matter is that on the merits of the law it is applied the national law of the competent authorities under Regulation (EC) No. 2201/2003, i.e. the law of the State of residence of the child. In exceptional cases and only if the protection of the person or property of the child requires it, the court may apply the law of the state with which the case has the closest connection (art. 15 par. 2).

Also, if there is a *conflict of movable laws*, the law of the Contracting State in which the child's new residence has been established is applicable only to the conditions of application of the measures taken in the initial state of residence of the child (art. 15, par. 3) and to exercise parental responsibility (art. 17). (Nicolae, 2014, p. 343)

4. Conclusion

The European law and the jurisprudence of the European Court grants legislative and jurisprudential points for Romanian court invested with the prosecution of a case, with an element of extraneity, which covers parental authority on the child resulted from on or out of wedlock, on the Romanian territory or in another Member State. The principle of the best interests of the child transpires in all regulations, including establishing jurisdiction, so that the evidence focuses on this issue.

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