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Equality and shared parental responsibility: the role of fathers

Committee Opinion¹

Committee on Social Affairs, Health and Sustainable Development

Rapporteur: Mr Stefan SCHENNACH, Austria, Socialist Group

A. Conclusions of the committee

1. The Committee on Social Affairs, Health and Sustainable Development fully supports the draft resolution prepared by the Committee on Equality and Non-Discrimination and congratulates its rapporteur, Ms Françoise Hetto-Gaasch, on her wide-ranging explanatory memorandum which takes children's rights into account.
2. The committee wishes to emphasise that a parent's right to shared parental responsibility, joint custody or shared residence for a child can never supersede the rights of the child concerned. Every child has the right not to be separated from his or her parents, and to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. A child who is capable of forming his or her own views also has the right to express those views freely in all matters affecting him or her, the views of the child being given due weight in accordance with the age and maturity of the child. It is thus not sufficient for parents themselves or the competent courts to determine how parental responsibility, custody or the child's residence are to be shared – the views of the child concerned must be taken into account and his or her best interests must be given primacy.
3. The Committee on Social Affairs, Health and Sustainable Development wishes to propose only two amendments to the draft resolution, as the Committee on Equality and Non-Discrimination has, in general, mainstreamed the child-rights perspective.

B. Proposed amendments to the draft resolution

Amendment A (to the draft resolution)

In paragraph 5.5, replace “but under no circumstances in cases of sexual or gender-based violence” with:

“limiting any exceptions to cases of child abuse or neglect, or domestic violence”

Explanatory note: Children have the right to be protected from abuse and neglect. This right supersedes the right of parents to benefit from the principle of shared residence. The proposed amendment seeks to clarify that all cases of child abuse or neglect should be taken into account when allocating residence, as well as domestic violence which generally affects both adults and children, and not only sexual or gender-based violence.

1. Reference to committee: [Doc. 13443](#), Reference 4039 of 11 April 2014. Reporting committee: Committee on Equality and Non-Discrimination. See [Doc. 13870](#). Opinion approved by the committee on 29 September 2015.



Amendment B (to the draft resolution)

In paragraph 5.9, after the words “a court-ordered mandatory information session”, insert the words:

“in order to make the parents aware that shared residence may be an appropriate option in the best interest of the child, and to work towards such a solution”

C. Explanatory memorandum by Mr Schennach, rapporteur for opinion

1. Ms Françoise Hetto-Gaasch, the Rapporteur of the Committee on Equality and Non-Discrimination, has written a remarkably wide-ranging explanatory memorandum which tackles the question of shared parental responsibility from a gender-equality viewpoint, but also takes children’s rights into account. I fully share her conclusion that, in general, shared parental responsibility – both when a family is still intact, but in particular, following a separation – benefits all parties (the mother, the father and the child), all the more so when shared parental responsibility is the outcome of an amicable settlement (for example, reached through mediation), rather than ordered by a court.

2. As the rapporteur for opinion of the Committee on Social Affairs, Health and Sustainable Development, whose mandate it is to protect children’s rights, it is my duty to add emphasis to the child-rights perspective. All too often, separating couples treat custody of and access to their children in the same way they treat their material belongings: if they cannot agree who should keep the house or the car or the sofa, they turn to the courts to validate their rights to their property – and they expect the courts to do the same when it comes to sharing parental responsibility, custody and/or the child’s residence. Too many courts, steeped in legal and societal traditions for which children’s rights are still relatively new, succumb to the temptation to try to do justice to the parents’ competing claims – while losing focus of the rights of the child concerned. Even when an amicable settlement is found, for example through mediation, the focus is all too often on ensuring that parents have equal rights vis-à-vis their children, rather than on the rights of the child.

3. It bears mentioning here that there is no express right of a parent to shared (or other) parental responsibility for a child in international law (and even less so to shared residence) – but each and every child has the right to maintain personal relations and direct contact with both parents on a regular basis.

4. In societal terms, the policy of the member States will be geared towards incentives for parents, in particular fathers, to actively participate in child care and to shoulder greater responsibility. The role of fathers in child care has only been marginally developed within society, and unfortunately, the consequences of this become apparent in the event of separation or divorce.

5. The member States need to make a political commitment to ensure that the public is aware that while relationships and marriages may end, parenthood does not. Mothers and fathers remain lifelong parents, even when their romantic relationship has ceased to exist. Here, society needs to become aware that rules and regulations are solely intended to benefit the child and cannot be misappropriated with regard to relationship issues.

6. Although briefly mentioned in Ms Hetto-Gaasch’s explanatory memorandum, I would like to recall the three most important children’s rights in this context, which have been guaranteed by the United Nations Convention on the Rights of the Child (UNCRC) for over 25 years now, namely:

- a. the child’s right not to be separated from his or her parents, and to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests (Article 9);²
- b. the right to express his/her views freely in all matters affecting him or her, the views of the child being given due weight in accordance with the age and maturity of the child (Article 12);
- c. the right for the best interests of the child to be a primary consideration (Article 3), as interpreted in General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.³

2. This right is also included in Article 24.3 of the European Union’s Charter of Fundamental Rights: “Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”

3. In paragraph 34 of the General comment, the UN Committee on the Rights of the Child has underlined that the flexibility of the concept of the child’s best interests leaves room for manipulation, and has been abused by parents to defend their own interests in custody disputes.

7. Indeed, General comment No. 14 (2013) spells out the view of the United Nations Committee on the Rights of the Child on shared parental responsibility:

“67. The Committee is of the view that shared parental responsibilities are generally in the child’s best interests. However, in decisions regarding parental responsibilities, the only criterion shall be what is in the best interests of the particular child. It is contrary to those interests if the law automatically gives parental responsibilities to either or both parents. In assessing the child’s best interests, the judge must take into consideration the right of the child to preserve his or her relationship with both parents, together with the other elements relevant to the case.”

8. The UN Committee on the Rights of the Child has also made very clear which elements must be taken into account when assessing what the best interests of the child are: first and foremost, the child’s own views. Recommendations which only focus on guaranteeing parents equal rights vis-à-vis their children, or automatically granting shared parental responsibility (or shared custody or residence) to both parents thus fall short of children’s rights, who have the right to have their own views taken into account, and their best interests given primacy.

9. It goes without saying that it is not in the best interest of a child to be exposed to violence and abuse: this, of course, should be the primary consideration in allocating (or rather, not allocating), in particular, custody rights to an abusive or neglectful parent. Unfortunately, available data suggests that such situations of violence are not as exceptional as they should be,⁴ and allegations of violence – in particular when voiced by the child him or herself – should be taken seriously and properly investigated.

10. The rapporteur of the Committee on Equality and Non-Discrimination has devoted several pages of her explanatory memorandum to the “shared residence” model, in accordance with which each parent spends 35% to 65% of time with the child after their separation, underpinning the recommendation contained in the draft resolution that the principle of shared residence for children of separating couples should be introduced, limiting exceptions to this principle to situations of abuse and violence and adjusting the actual time of residence with each parent to the needs and interests of the children concerned.

11. The United Nations Committee on the Rights of the Child has not (yet) issued guidance on the shared residence model, but, as in the case of shared parental responsibilities, I would expect it to emphasise the rights of the child in this context: the right for the child to be heard and have his/her views taken into account, and the right for the best interests of the child to be a primary consideration.

12. On the first count, it is unfortunately rare for a child’s views to be sought⁵ (as, however, required in Croatia),⁶ in particular if the parenting plan is not the outcome of a judicial order (in the United Kingdom, for example, priority is given to the “no-order”-principle,⁷ and thus only when parents disagree does the case come to court). It also seems to be rare to have children’s views heard in mediation, which has led to calls for more child inclusive mediation.⁸ I can thus not emphasise enough the importance of paragraph 5.6 of the draft resolution: “respect the right of children to be heard in all matters that affect them when they are deemed to have a sufficient understanding of the matters in question”, not just by courts, mediators and other professionals involved, but also by parents themselves. I would also add that children’s views need to be given due weight: it is not enough to listen to them and then simply discard their views without taking them into consideration. Of course, some things that children may want may not be in their best interests, and children’s

4. Available data suggests that one in five children in Europe is a victim of sexual violence alone (mostly in the child’s circle of trust), and that one in three women in Europe is a victim of domestic violence. In the USA, the number of divorced couples with children where at least one parent is physically abusive, violent, drug addicted, alcoholic or mentally disturbed has been estimated to stand at 8%-15% – see Johnston J., Roseby V. and Kuehnle K.: *In the name of the child: Understanding and helping children of conflicted and violent divorce*, 2009, Springer, New York, cited in Nielsen L.: *Shared Residential Custody: Review of the Research (Part I of II)*, *American Journal of Family Law*, 2013, p. 63.

5. “It is worth noting that in fact relatively few children do appear able to influence their own care arrangements”, even though “all qualitative studies in the field have clearly indicated that children are happier with arrangements where they have had some say and are able to influence arrangements and are unhappy where arrangements are imposed upon them and where they are unable to make changes”. Trinder, L.: *Shared residence: a review of recent research evidence*, *Child and Family Law Quarterly*, Vol. 22, No. 4, 2010, 475-498, p. 481.

6. Doc. 13870, paragraph 58.

7. Section 1 of the Children Act 1989.

8. For example, from the mediator Dr Ines Weyland in the United Kingdom, see: shared residence from a mediator’s perspective, www.birmingham.ac.uk/Documents/college-mds/haps/projects/MESH/AHRC-Meetings/Meeting1/WeylandSharedResidencefromaMediatorsPerspective1.pdf.

views can, of course, also change over time as they mature. But I would argue very strongly in favour of taking into account a child's views, in particular if he or she is distressed by the residence model applied in their particular case.⁹

13. On the second count, the question of which living arrangements are actually in the best interest of the child, opinions diverge, though no-one will disagree with Baroness Hale of Richmond:

*"When any family court decides with whom the children of separated parents are to live, the welfare of those children must be its paramount consideration ... This means that it must choose from the available options the future which will be best for the children, not the future which will be best for the adults."*¹⁰

14. There is, in fact, no consensus, yet, that the shared-residence model is in the best interest of the child – opinions diverge widely among researchers, campaigners (such as fathers' rights groups¹¹) and professionals (in particular, amongst lawyers). Basically, there are still large gaps in the knowledge base (in particular on the 50/50 "equal time" arrangements),¹² which allow researchers to come to different conclusions. These conclusions are, as is natural, then cited to support the arguments of those who favour or oppose the shared-residence model.

15. The most convincing arguments in favour of the shared-residence model, which have also been cited by Ms Hetto-Gaasch, are, in my opinion, that the available evidence suggests that children who have lived in such arrangements do, on average, as well or marginally better¹³ than children of other divorced couples¹⁴ – an outcome which is obviously in the child's best interest, and which seems to be due, to a large part, to the children's better relationships with their fathers.¹⁵

16. We should not gloss over the risks associated with making the shared-residence model the norm, either, though: as expressed by the British Law Society, "[s]uch a presumption risks subordinating a child's best interests to the parents' expectations of equal rights",¹⁶ or by the Children in Families Committee of the Family Justice Council, "[s]hared residence applications are often made for the benefit of the parents; their feelings; their power struggles within their relationship; their attempts to control one another post separation ...".¹⁷ Disentangling financial and care motivations is also sometimes difficult.¹⁸ The solution to mitigating these risks lies, in my opinion, in prioritising children's rights, by deciding on a case-by-case basis, involving the

9. Little research has actually been done on the views of children on living in shared residence: the most well-known study, "Young adults perspectives on divorce living arrangements" by William V. Fabricius and Jeffrey Hall, undertaken in the United States in 1996-1999, is largely hypothetical and rear-view in nature (college students from divorced parents were asked which living arrangement they believed was best for children, whether or not they had actually lived in that arrangement). The result was mixed: while 70% of all participants believed that living equal amounts of time with each parent was the best living arrangement for children (rising to 93% for those few who had actually had that arrangement), only 20% of participants themselves would have wanted equal time given their particular family circumstances. *Journal: Family Court Review*, Vol. 38, No. 4, pp. 446-461, 2005.

10. Remarks made in the shared residence case *Holmes-Moorhouse v Richmond-Upon-Thames LBC*, cited in Trinder L.: *Shared residence: a review of recent research evidence*, p. 476.

11. Such as, for example, "Fathers 4 Justice" (www.fathers-4-justice.org), "Families Need Fathers" (www.fnf.org.uk).

12. Trinder, L.: *Shared residence: a review of recent research evidence*, p. 477.

13. Measured on academic, emotional and psychological results (however, in one study cited, the stress levels of children in shared residence were somewhat higher, though still in the normal range, and in another study, reports from independent observers – teachers – indicated that children seemed to be doing best in primary mother care), see Nielsen, L.: *Shared Residential Custody: Review of the Research (Part II of II)*, *American Journal of Family Law*, 2013, p. 124-127, and Trinder L.: *Shared residence: a review of recent research evidence*, p. 489.

14. Nielsen, L.: *Shared Residential Custody: Review of the Research (Parts 1 and II)*. To be noted, however, that the research results are less favourable for children of never-married separating couples (p. 62).

15. *Ibid.*, pp. 62-63.

16. Cited in: Bansal, B. "It's Good to Share" – Should there be a presumption of equality between parents when it comes to caring for their children? *Family Law Week*, 2012.

17. The use of shared residence orders, a discussion paper prepared as part of the Family Justice Council's written response to the *Family Justice Review* (2014).

18. "There are also suggestions that child support rules in some jurisdictions may offer an economic incentive to fathers to pursue shared care or at least to facilitate strategic bargaining ...", in Trinder, L.: *Shared residence: a review of recent research evidence*, p. 478. I would add that the financial motivation may also be on the mother's side: in my own country, but even more so in my neighbouring country (Germany), the bulk of day-to-day child-raising responsibilities even in intact families often still lies with women – not just because of outdated gender stereotypes and traditional roles, but also because the "system" (employers, tax regimes, etc.) still favours a model where one parent (the mother or the father, whoever earns most usually) works full-time, while the other parent either stays at home altogether or works only part-time.

children in the decisions taken, and making their best interests the primary consideration. It is also for this reason that I am proposing two amendments to the draft resolution: one to paragraph 5.5, to clarify that all cases of child abuse or neglect or domestic violence should be taken into account when allocating residence, not only sexual or gender-based violence, and one to paragraph 5.9, to further promote mediation in the best interest of the child.

17. Finally, I would like to mention a shared-residence, 50/50 “equal time” arrangement which is, unfortunately, very rarely practised (probably because it presupposes the resources for three separate residences): the child continues to live in the family home, and it is the parents who alternately share that home with the child. I believe that this arrangement is probably the one most suited to safeguarding the child’s best interests, as it combines all the benefits of shared-residence, 50/50 “equal time” arrangements, without the drawback of the child losing their home and having to to-and-fro between parents. It is also the one which presupposes that the parents really do put their child’s needs and interests first.

18. Allow me to sum up, in conclusion: As rapporteur for opinion of the Committee on Social Affairs, Health and Sustainable Development with a mandate to protect children’s rights, I feel that my focus must be on the child-rights perspective, rather than on the gender equality viewpoint. I fully support the conclusion of the Committee on Equality and Non-Discrimination that, in general, shared parental responsibility benefits all parties (the mother, the father and the child), and commend Ms Hetto-Gaasch on her wide-ranging report, which takes children’s rights into account. I would like to emphasise that it is important to recognise that a parent’s right to shared parental responsibility, joint custody or shared residence for a child can never supersede the rights of the child concerned. It is thus not sufficient for parents themselves or the competent courts to determine how parental responsibility, custody or residence is to be shared – the views of the child concerned must be taken into account and his or her best interests must be given primacy.