



# Post-Separation Parenting: Contemporary Trends and Challenges

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### Abstract

The main aim of the paper is to identify the European legal framework for shared parenting after separation or divorce. The author examines emerging trends in legislation and legal doctrine in Europe with a special focus on non-legally binding instruments relevant to exercising parental responsibility in non-intact families. Then, the author presents the definition and terms of joint physical custody, but also its application in national jurisdictions. Different approaches to shared parenting following separation on the example of Swedish, Italian, Polish, as well as Swiss experiences are presented. This article attempts to answer the question of whether this kind of child arrangement is the prevailing trend in contemporary legal practice. It is also considered whether it would be warranted to make joint physical custody a legal presumption, ie the benchmark for the courts that have dealt with children's matters in divorce and relationship breakdown.

### I. Introduction

The social behaviour and attitudes of people, lifestyles, values, and stereotypes, as well as politics and science are changing. This inevitably requires legal evaluation at national and international levels in various fields. One area of law that perfectly reflects social, cultural, and political changes in family law. It is true that at present, in many countries in Europe marriage rates are declining, whereas divorce rates are increasing. Also, many countries experience significant changes in family structure and approach to family relationships. This applies to both intact and non-intact families. Intact family means a family in which both parents reside in the same household. Non-intact family in turn mostly concerns families in which parents are separated or divorcing. In a non-intact family, both parents are not present in the home. The major assumption underlying the legal response to social changes is widely understood equality.<sup>1</sup> It is a current

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<sup>1</sup> G. Douglas, 'The changing concept of 'family' and challenges for family law in England and Wales', in J.M. Scherpe ed, *European Family Law, II, The Changing Concept of 'Family' and Challenges for Domestic Family Law* (Cheltenham, UK, Northampton, MA, USA: Edward Elgar, 2016), 22.

challenge for lawmakers to create, develop, and implement reforms promoting gender equality. In recent years, the equal rights and duties of the mother and father have been underlined in the legislation.<sup>2</sup> There is a growing consensus that parents exercise parental responsibility (still commonly called parental authority) jointly. The content of parental responsibility includes personal care of the child, administration of the child's property, and representation.<sup>3</sup> Importantly, parents equally share childcare responsibilities during marriage, and this is continued after divorce or separation. Joint parental responsibility, therefore means that both parents have full parental rights and duties concerning their child.

If joint parental responsibility does not cause much debate in doctrine and judicial decisions, there are some doubts about joint physical custody. Joint physical custody means that both parents have the right and obligation to take care of the child on the daily basis. In the scientific literature, it has also been referred to as joint residence, shared residence or dual residence, because it applies to a practice where the child spends equal or substantial amounts of time in each parent's home after they separate. It is now believed that both parents are equally entitled to take care of the child, which is also reflected in a growing acceptance of joint physical custody in rulings of family courts. It is also a modern trend in recent legislation. Bearing this in mind, it is reasonable to look at joint physical custody from legal and practical points of view. The main aim of the paper is to identify the European legal framework for shared parenting in non-intact families. To fulfil this goal, first specific legal instruments are examined. The starting point is joint parental responsibility because this concept is wider than the concept of joint physical custody. If parents are entitled to exercise joint physical custody, it always means that they both keep parental responsibility, but not the other way around. Then, the regulations for joint physical custody in different European countries are discussed. The legal systems of Sweden, Italy, Poland and Switzerland are investigated. The question is if this kind of childcare arrangement is the prevailing trend in contemporary legal practice.

## **II. Emerging Trends in Legislation and Legal Doctrine<sup>4</sup> in Europe with Special Emphasis on Non-Legally Binding Instruments**

<sup>2</sup> In the paper it is assumed that parents are, in principle, mother and father (woman and man) for simplification purposes. However, in some legal systems parents could be same-sex, eg Sweden and Switzerland.

<sup>3</sup> See, eg Art 95 (1) of the Polish Family and Guardianship Code 1964 (*Kodeks rodzinny i opiekuńczy*, Act of 25 February 1964, initially promulgated in Journal of Statutes 1964, No 9, item 59).

<sup>4</sup> Legal doctrine includes, among others, judicial opinions and views of researchers from the legal academy and from political science departments who conduct research on the law. 'Legal doctrine is the currency of the law', see E.H. Tiller and F.B. Cross, 'What is legal doctrine' 41 *Northwestern University School of Law*, 517 (2006).

No authority at the European level has the mandate to legislate definitely in the sphere of family law. However, some institutions contribute to the evolution of European family law. These institutions can be divided into two groups. The first one consists of the ones that have a direct impact on family law matters, including the European Union (EU), the European Court of Human Rights, and the Court of Justice of the European Union. They establish minimum standards for the respective issues of the law. The second group includes institutions that indirectly affect family regulations, such as the Council of Europe (not to be confused with the European Council, the EU institution), the Hague Conference, and the Commission on European Family Law (CEFL). National lawmakers are realising that they operate in the European context, and are making the rules accordingly. And national courts are making decisions with European legal instruments in mind.<sup>5</sup> In this paper, three non-legally binding instruments were selected for the analysis which seems to be undervalued in the studies. However, it is to be noted that the role in the national legislation of international documents of non-legally binding character has been growing.<sup>6</sup> They are an important attempt to adapt the law to the changes in society, including changing roles and family relationships, and therefore they should not be overlooked in scientific discussions.

Firstly, the impact of the Council of Europe's work on family law should be taken into account. An example is a Recommendation on parental responsibilities which was adopted by the Committee of Ministers in 1984.<sup>7</sup> It was the first international instrument to embrace the concept of parental responsibility.<sup>8</sup> The Recommendation stipulates that parental responsibility is

‘a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular by taking care of the person of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the

<sup>5</sup> J.M. Scherpe, ‘Introduction to European family law’, in J.M. Scherpe ed, *European Family Law*, I, *The Impact of Institutions* n 1 above, 1-3.

<sup>6</sup> The concept of soft law means quasi-legal instruments, such as non-binding resolutions, declarations, recommendations or guidelines created by governments and private organizations, which have no legal force, see B.H. Druzin, ‘Why does soft law have any power anyway?’ 7 *Asian Journal of International Law*, 361 (2017); A.T. Guzman and T.L. Meyer, ‘International soft law’ 2(1) *Journal of Legal Analysis*, 172 (2010).

<sup>7</sup> Recommendation No R (84) 4 of the Committee of Ministers to Members States on parental responsibilities (adopted by the Committee of Ministers on 28 February 1984 at the 367<sup>th</sup> meeting of the Ministers' Deputies).

<sup>8</sup> The first international legally binding document to mention parental responsibility as opposed to parental authority, was the Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.

administration of his property'.<sup>9</sup>

It has been an inspiration for national legislators, in particular concerning the possibility of replacing the legal term 'parental authority' with the term 'parental responsibility'.<sup>10</sup> For example, the Polish legislator has currently the dilemma concerning the accuracy of the term 'parental authority' used under Polish law. It is assumed by the legal doctrine that the need to amend terminology is justified by the need to put greater emphasis on the child's qualities as a subject in its relationships with parents. The term 'parental responsibility' underlines the essence of parental authority, while the currently used expression emphasises what is secondary, namely parental rights.<sup>11</sup>

In addition, it is worth paying attention to principle 2 of the said Recommendation, according to which equality between parents should be respected in any decision that concerns the attribution of parental responsibility or how that responsibility is exercised. In the case of dissolution of marriage or separation of the parents, the competent authority, usually, a court, should rule on the exercise of parental responsibility, eg by dividing the exercise of this responsibility between the two parents or, where they consent, by providing that parental responsibility will be exercised jointly. The Council of Europe Recommendation promotes the adoption of joint parental responsibility as a rule, but not necessarily in the form of joint physical custody.

Another non-legally binding instrument is the Draft recommendation on the rights and legal status of children and parental responsibilities, adopted in 2011, which contains a detailed definition of 'parental responsibility'.<sup>12</sup> According to principle 20, the notion of parental responsibility means 'a collection of duties, rights and powers, which aim to promote and safeguard the rights and welfare of the child following the child's evolving capacities, including health and development; care and protection; enjoyment and maintenance of personal relationships; provision of education; legal representation; administration of property'. Parental responsibility should belong to each parent and the dissolution of parents' marriage, or their separation, should not of itself constitute a reason for terminating this responsibility *ex lege*. Each parent has an equal right and duty to exercise parental responsibility and should be encouraged to do so jointly. Principle 31 of the Draft recommendation stipulates that in cases where parents are living apart, they should agree upon with whom the child resides.

<sup>9</sup> N. Lowe, 'The Impact of the Council of Europe on European family law', in J.M. Scherpe ed, *European Family Law*, I, n 1 above, 99.

<sup>10</sup> See, eg Section 3 (1) of the English Children Act 1989.

<sup>11</sup> J. Słyk, 'The Legal Content of Parental Authority in Polish Family Law' 32 *Prawo w Działaniu*, 94-95 (2017).

<sup>12</sup> Draft recommendation on the rights and legal status of children and parental responsibilities (Meeting Report of the 86<sup>th</sup> Plenary meeting of the European Committee on Legal Co-Operation, Strasbourg, 12-14 October 2011, CDCJ 2011 15).

Nevertheless, this requirement does not mean that the child's place of residence has to be in one location (either with the mother or father). It is permissible for parents to agree upon a shared care arrangement under which the child lives with each parent for a certain period.

It must be noted that, unlike the previous legal acts or legislative proposals, the Draft recommendation explicitly enshrines joint physical custody as an option for divorced or separated parents. The said Recommendation does not provide details concerning joint physical custody and leaves it to the Member States to choose the most appropriate form and methods for giving effect to such kind of childcare arrangement. This is an important piece of legislation which falls within the context of modern legal developments.

Besides these two soft law instruments originating from the Council of Europe, it is worth discussing the other, but equally valuable, legal instruments. In 2007, the CEFL published the Principles of European family law regarding parental responsibilities as a contribution towards the establishment of European family law. This comprehensive set of rules is based on respect for the rights of the child, and the equality of rights and duties of the parents. In its Principles, the CEFL uses the concept of parental responsibility as 'a collection of rights and duties aimed at promoting and safeguarding the welfare of the child'. They may, in particular, include care, protection and education; maintenance of personal relationships; determination of residence; administration of property, and legal representation. Principle 3:11 provides that parents should have an equal right and duty to exercise parental responsibility and, whenever possible, they should exercise it jointly.

As in the Draft recommendation, the Principles indicate that parents who exercise parental responsibility jointly and who are living apart should agree upon with whom the child resides. More significantly, the child may reside alternately with the parents upon an agreement approved by a court, or a decision issued by a court. Principle 3:20 encompasses practical guidance on how the court should decide on joint physical custody. One should take into consideration, *inter alia*, the age and opinion of the child; the ability and willingness of the parents to cooperate in matters concerning the child, as well as their situation; the distance between the residences of the parents and to the child's school. The CEFL has devoted a relatively large amount of attention to the topic of joint physical custody. However, it is not clear whether joint physical custody should be the rule or the exception to the rule of single physical custody. The starting point in this respect must be joint parental responsibility, which is reflected especially in sharing the decision-making ability (education, medical treatment, religion, and other major life decisions that concern the child), and it should only be the next stage to consider whether to rule in favour of joint physical custody, bearing in mind the specific circumstances of the cases and respecting the principle of child welfare.

The CEFL has analysed and compared the family law approaches of the European countries, resulting in the drafting of non-binding Principles of European family law regarding parental responsibilities. It has proposed several changes which aim to harmonise family law in Europe, but also modernise national regulations regarding family.<sup>13</sup> It is worth emphasising that national policymakers have been inspired by the model legal rules proposed by the CEFL. One example is Norway, where a legislative reform was carried out in 2010 to modernise family law through the introduction of joint physical custody. The Norwegian Child Law Commission was largely guided by the Principles, implementing entirely Principle 3:20.<sup>14</sup>

For the sake of completeness, it appears that non-legally binding instruments should not be underestimated in legal analyses in the field of European family law. Legally binding measures are rather aimed at formulating general rules and broad notions, like parent-child relationship protection, whilst non-binding ones contain detailed regulations on specific legal issues. They govern practical problems, such as joint physical custody. Soft law instruments seem to be more progressive, introducing new legal terminology and notions. Those discussed in this paper have been drafted by nationally renowned experts in family law and developed based on long-term research. Joint physical custody would be very helpful for national courts in their decisions and national legislators when drawing up legislative initiatives.

### III. Cross-National Analysis of Joint Physical Custody in Europe

First of all, it is necessary to clarify what joint physical custody is. It requires parents to share decision-making responsibility as in joint legal custody and also requires the child to share his time with parents more or less equally. Joint physical custody may involve alternate large blocks of time (eg half a year with each parent), alternate short blocks of time (eg a week with each parent), or a bird's nest custody, in which the child lives in only one house, but the parents move in and out for various periods.<sup>15</sup> It must be stressed that an alternate child custody arrangement is not always tantamount to each parent obtaining physical custody for the same amount of time.<sup>16</sup> One can ask about custody time limits.

<sup>13</sup> K. Boele-Woelki, 'The Impact of the Commission on European Family Law (CEFL) on European family law', in J.M. Scherpe ed, *European Family Law*, I, n 1 above, 210; K. Boele-Woelki, 'The principles of European family law: its aims and prospects' 1(2) *Utrecht Law Review*, 161 (2005).

<sup>14</sup> K. Boele-Woelki, F. Ferrand, C. González-Beilfuss et al, *Principles of European Family Law Regarding Parental Responsibilities* (Antwerpen-Oxford: Intersentia, 2007), 132-133.

<sup>15</sup> The parents take turns living in that house with the child, never at the same time. In other words, mother leaves when father comes home, and father leaves when mother comes home, see C. Cox, 'Joint Custody: Dividing the Indivisible' 3 *Utah Law Review*, 578 (1986).

<sup>16</sup> C. Farris, 'Child Custody: An Overview of Child Custody Laws, Custody Laws in Alabama,

In the doctrine, taking into account the results of empirical research, it is most often assumed that joint physical custody is when the child lives with each parent at least thirty five percent of the time.<sup>17</sup> It is justifiable to put a time limit, and it is derived from the essence of joint physical custody, namely staying with both parents in post-separation child-rearing and maintaining strong relationships, including frequent and continuous contact with children. It cannot involve the child spending only the weekends with one of the parents, as it boils down to spoiling children by entertaining them in expensive places and buying them toys and gifts.<sup>18</sup>

The current trend of many courts is to recognise the importance that each parent plays in the child's life, irrespective of their status *vis-à-vis* each other. Lawmakers are now considering changes to the law that would encourage joint physical custody or make it a default solution even when parents disagree. This applies mostly to countries such as Belgium, France, the Netherlands, and Sweden. There is currently a trend towards shared parenting and continued involvement of both parents in the life of their children after divorce or separation. These countries conduct effective family policies which encourage to division of parental responsibilities fairly and equally, regardless of whether the parents are married or living together. In other jurisdictions, a shared residence order is theoretically possible but is relatively rarely used in practice, eg in the Czech Republic, Germany, Italy and Poland. This may result from the fact joint physical custody is the subject of much judicial scepticism and criticism from some academics.<sup>19</sup> Many still believe that it is the mother that is more necessary or plays a role that is more important than the role of the father in their infants' or toddlers' lives, and children can grow up without a father. This refers to the 19<sup>th</sup>-century American common law principle that mothers should automatically have custody of their children in the event of divorce. The tender years' doctrine has implied a presumption of maternal custody for children aged

and a National Trend towards Shared Parenting' 41(1) *Journal of the Legal Profession*, 162 (2016).

<sup>17</sup> L. Nielsen, 'Shared Physical Custody: Summary of 40 Studies on Outcomes for Children' 55(8) *Journal of Divorce & Remarriage*, 614-636 (2014).

<sup>18</sup> M.A. Kipp, 'Maximizing Custody Options: Abolishing the Presumption against Joint Physical Custody' 79(1) *North Dakota Law Review*, 70 (2003).

<sup>19</sup> See, eg *Nález Ústavního soudu ze dne 15.03.2016, Právo obou rodičů pečovat o dítě a podílet se na jeho výchově v zásadě stejnoměrou* (III. ÚS 2298/15-1); K. Holásková, 'Experiment střídavá péče: rodiče dělají základní chyby, ženou dítě do záhuby', available at <https://tinyurl.com/2tsc7yc5> (last visited 31 December 2022); Corte di Cassazione 29 March 2012 no 5108, *CED Cassazione*; F. Giardini, 'Joint Custody of Children on Separation and Divorce: The Current Law in Italy: An Overview of the Law and How It is Applied' *International Survey of Family Law*, 237 (2014); H. Sünderhauf-Kravets, *Wechselmodell: Psychologie - Recht - Praxis: Abwechselnde Kinderbetreuung durch Eltern nach Trennung und Scheidung* (Wiesbaden: VS Springer Fachmedien, 2013), 61; wyrok Sądu Najwyższego z dnia 21.11.1952 (C 1814/52, OSNCK 1953/3/92); W. Stojanowska, 'Porozumienie rodziców jakoprzestawienie im obojgu władzy rodzicielskiej po rozwodzie' [The agreement between parents as a condition to exercising parental authority over a child after divorce] 6(821) *Acta Iuris Stetinensis*, 306 (2014).



four and younger.<sup>20</sup> This leads to the conclusion that fathers are still considered second-class parents and are very often excluded from the daily life of the child.

It is worth comparing different approaches to shared parenting after divorce on the example of Swedish, Italian and Polish experiences. For the sake of completeness, the Swiss legal solutions for joint physical custody will be discussed also. First, Sweden adopted joint parental responsibility preference after divorce as early as 1976. The Children and Parents Code<sup>21</sup> clearly states that even if the child's parents divorce, the main rule is that the child will remain under custody (*vårdnad*) of both parents.<sup>22</sup> So far, there has been no legal presumption in favour of joint physical custody. The welfare of the child is the decisive factor in all decisions concerning custody, residence and contacts.<sup>23</sup> In Sweden, the rise in joint physical custody has been significant, rising from one per cent of children with separated parents in the 1980s to forty per cent in recent years.<sup>24</sup> The Swedish experience of shared parenting in the post-divorce context demonstrates that it is important to promote equal shared parenting even before the parents' relationship breaks down. There is a perception that children benefit most when parents are actively engaged in their lives through a wide range of daily activities. Both parents feel responsible for providing the day-to-day childcare, including measurable tasks, like feeding, clothing, arranging for medical and dental care, education, recreation, etc.<sup>25</sup> The fact that childcare responsibilities are, as far as practicable, equally shared between the father and the mother in an intact family is considered acceptable in society. It is therefore not surprising that equality between parents must be guaranteed in the case of divorce as well. Swedish parents are more likely than parents in other countries to exercise joint physical custody of their children. In the case of divorce, they also tend to live in nearby neighbourhoods so the distance between their residences is relatively small.<sup>26</sup>

In 2006, the Italian legislature replaced the preference for sole parental custody with the preference for joint parental custody.<sup>27</sup> The current rules guarantee the preservation of the exercise of parental responsibility by both

<sup>20</sup> S. McCall, 'Bringing Specificity to Child Custody Provisions in California' 49 *Golden Gate University Law Review*, 153 (2019).

<sup>21</sup> Act on the Children and Parents Code (*Lagen om Föräldrabalk*, SFS 1949:381).

<sup>22</sup> J. Stoll, 'Legal Relationships Between Adults and Children in Sweden', in J. Sosson, G. Willems and G. Motte eds, *Adults and Children in Postmodern Societies. A Comparative Law and Multidisciplinary Handbook* (Cambridge-Antwerp-Chicago: Intersentia, 2019), 518-519.

<sup>23</sup> See sec 6:2 a of the Swedish Children and Parents Code.

<sup>24</sup> M. Bergström, B. Modin, E. Fransson et al, 'Living in two homes - a Swedish national survey of wellbeing in 12 and 15 year olds with joint physical custody' 13 (868) *BMC Public Health*, 1 (2015).

<sup>25</sup> K.T. Bartlett, 'Prioritizing Past Caretaking in Child-Custody Decisionmaking' 77(1) *Law and Contemporary Problems*, 49 (2014).

<sup>26</sup> E. Fransson, A. Hjern and M. Bergström, 'What Can We Say Regarding Shared Parenting Arrangements for Swedish Children?' 59(5) *Journal of Divorce & Remarriage*, 349-350 (2018).

<sup>27</sup> F. Giardini, n 19 above, 230.

parents, even when their relationship breaks down.<sup>28</sup> This also follows from Art 30 of the Italian Constitution, since ‘it is the duty and right of parents to support, raise and educate their children, even if born out of wedlock’.<sup>29</sup> Under Italian law, the value of the right of the child to maintain a relationship not only with both parents but also with closer or more distant relatives (eg grandparents, cousins) is emphasised.<sup>30</sup> Joint physical custody is legally accepted and consists in spending part of the time with each parent, through the child’s alternate residence in each parent’s home, or the alternate residence of both parents in their former common home. Nonetheless, this kind of childcare arrangement is not viewed as a starting point in children’s matters. It is not applied, and the available data shows that most children of divorced parents continue to live with the mother and visit the father at weekends or during holidays.<sup>31</sup>

It is worth noting that the Polish regulations governing parental responsibility resemble the solutions adopted by the Italian legislature. For several years, family law has evolved towards increasing the involvement of both parents in parenting after divorce.<sup>32</sup> The Family and Guardianship Code provides for the possibility of retaining full parental responsibility of both divorced (also factually or legally separated) parents, including the possibility for the court to rule that parents have physical custody periodically.<sup>33</sup> When deciding on child custody, the court should take into account the child’s right to be raised by both parents but, most of all, the best interests of the child. The starting point is a joint parental responsibility, which in practice means that both divorced parents have the legal authority to make major decisions for the child. However, there is no presumption of joint physical custody that would provide for equal or almost equal time for the child to spend with both parents. The rule of being raised by both parents is fairly general so it can take many forms, and each childcare arrangement must be following the principle of child welfare, even if it leads to a traditional sole physical custody order.<sup>34</sup> Joint physical custody is very rarely

<sup>28</sup> See Art 315-*bis* ff of the Italian Civil Code.

<sup>29</sup> F. Giardini, ‘Unification of Child Status and Parental Responsibility: The Reform of Filiation Remodels the Family in the Legal Sense in the Italian Legal System’ 1 *Interdisciplinary Journal of Family Studies*, 4 (2017).

<sup>30</sup> G. Tamanza, S. Molgora and S. Ranieri, ‘Separation and Divorce in Italy: Parenthood, Children’s Custody, and Family Mediation’ 51 (4) *Family Court Review*, 558 (2013).

<sup>31</sup> S. Stefanelli, ‘Legal Relationships Between Adults and Children in Italy’, in J. Sosson, G. Willems and G. Motte eds, n 22 above, 358-359.

<sup>32</sup> A. Grabowska, ‘Zmiany w zasadach orzekania o władzy rodzicielskiej przy rozwodzie wprowadzone ustawą z dnia 25 czerwca 2015 r. o zmianie ustawy - Kodeks rodzinny i opiekuńczy oraz ustawy - Kodeks postępowania cywilnego’ (Changes in the rules for adjudicating on parental responsibility after divorce, introduced by the Act of June 25, 2015 amending the Family and Guardianship Code and the Code of Civil Procedure), in M. Andryszczak, R. Badowiec and D. Gęszicka eds, *Prawo - rodzina - praca (Law - family - labour)*, (Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2017), 103.

<sup>33</sup> See Art 58 (1) and 107 (1) of the Polish Family and Guardianship Code 1964.

<sup>34</sup> M. Habdas, ‘The Evolution of Joint Parenting in Poland: The Legal Perspective on

used in Poland. Even if both parents have full parental responsibility, only one parent is the child's primary carer, ie the parent with whom the child lives. Studies show that around ninety per cent of primary caregivers are mothers, and only 10 per cent are fathers.<sup>35</sup> It appears that knowledge about the essence of joint physical custody and the experiences of other jurisdictions in this respect is still insufficient in Poland. Polish courts lack empirical studies showing how to use shared residence in practice. Above all, there is a need to change the stereotypical views on such an alternate child custody arrangement. It does not necessarily have to be symmetric custody, because just thirty-five per cent of the time with each parent is enough to take care of the proper development of the child.<sup>36</sup>

Also, it is necessary to pay attention to Switzerland and its extensive jurisprudence in the field of shared parenting, which can provide practical guidance to other jurisdictions. In Swiss family law, both parents exercise, as a rule, parental responsibility (*Gemeinsame elterliche Sorge*). A joint parental responsibility order does not necessarily mean that they are entitled to exercise physical custody jointly. According to Art 298, Section 2-ter,<sup>37</sup> the court should consider,

‘concerning the child's best interests, (...) the possibility of the child residing with both parents on an alternating basis, if this is requested by one of the parents or by the child’.

The primary prerequisite for joint physical custody is always the child's well-being.<sup>38</sup> Moreover, the Swiss Federal Supreme Court established criteria that should be examined before the court's ruling on the shared residence is issued. These criteria include parenting skills; distance between the parents' homes; ability and desire to cooperate; model of childcare before the relationship breakdown; the possibility of a parent to care for the child personally; the age of the child; the child's relationship to siblings; general embeddedness in the social environment; the child's opinion.<sup>39</sup>

There are a few aspects that need to be highlighted in assessing joint physical custody. First of all, according to the latest research, most children in joint physical custody reported better outcomes than children in predominantly single-parent custody, including physical health and stress-related illnesses, as

Lessons Learned and Still to Be Learned' 33 *International Journal of Law, Policy and the Family*, 346-347, 351-352 (2019).

<sup>35</sup> M. Fuszara, 'Divorce in Poland' 2(12) *Societas/Communitas*, 221 (2011).

<sup>36</sup> L. Nielsen, 'Shared Physical Custody: Does It Benefit Most Children?' 28(1) *Journal of the American Academy of Matrimonial Lawyers*, 198 (2015).

<sup>37</sup> Swiss Civil Code of 10 December 1907 (*Schweizerisches Zivilgesetzbuch*).

<sup>38</sup> A. Jungo and L. Rutishauser, 'Legal Relationships Between Adults and Children in Switzerland', in J. Sosson, G. Willems and G. Motte, n 22 above, 558-559.

<sup>39</sup> Bundesgericht, 142 III 612 vom 29, September 2016.

well as psychological, emotional, and social well-being.<sup>40</sup> One argument frequently used by opponents of shared residence is that it results in instability in children's lives. Nevertheless, according to the researchers, it is exactly the opposite. Shared residence leads to stability because it usually resembles the model of living enjoyed before the relationship breakdown.<sup>41</sup> Moreover, an alternate child custody arrangement is beneficial as it provides the child with ongoing contact with his parents. It may lead to an increase in the quantity, but also quality, of the time, spent together. It could result in better communication with both parents by mitigating the stress factors related to divorce, like the economic hardship and time constraints arising from single parenthood. The cost of child maintenance is likely more equally divided between parents in shared residence than when the non-residential parent pays alimony and child support to the residential parent.<sup>42</sup> Joint physical custody fits into the ideology of gender equality and shared parenting, moving away from the concept of the 'winner takes all' that has been rooted in custody disputes. Sole custody often creates an adversarial forum which forces parents to fight for full custody of their child. Whether she or he believes it or not, a parent is forced to point out every single imperfection and flaw in the other parent's character, in hopes of increasing their chances of winning the case.<sup>43</sup> Child custody is a zero-sum game, there is no 'winner' or 'loser'. Parents must be and, in the event of divorce or separation, remain partners, not adversaries, in issues about the child.

On the other hand, joint physical custody is not a panacea for all post-divorce parenting cases and the court should not automatically make such a determination, because the individual needs and circumstances of each family are different. The court is required to issue a ruling that takes into account the welfare of a particular child to the greatest extent possible. Some European legislators are now considering whether to change their family norms and adopt a statutory presumption in favour of shared residence. However, it is questionable whether this arrangement always protects the welfare of the child. Applying for shared residence by default might entail risks associated with a long-lasting parental conflict, domestic violence, the physical distance between each parent's home and the difficulty in transporting the child between homes, the child's special needs, etc.

Practice and research show that not all parents are candidates for joint

<sup>40</sup> L. Nielsen, 'Shared Physical Custody: Does It Benefit Most Children?' 28(1) *Journal of the American Academy of Matrimonial Lawyers*, 113 (2015).

<sup>41</sup> N.M. Schave, 'Best Interests of Minnesota: Adopting a Presumption of Joint Physical Custody' 33(1) *Hamline Journal of Public Law and Policy*, 186 (2011).

<sup>42</sup> T. Bjarnason and A. Arnarsson, 'Joint Physical Custody and Communication with Parents: A Cross-National Study of Children in 36 Western Countries' 42(6) *Journal of comparative family studies*, 20-21 (2011).

<sup>43</sup> N. Lapsatis, 'In the Best Interests of No One: How New York's Best Interests of the Child Violates Parents' Fundamental Right to the Care, Custody, and Control of Their Children' 86(2-3) *St. John's Law Review*, 709 (2012).

custody. The parents who demonstrate serious impairment of adult functioning over time, ie marital relationships characterised by ongoing conflict and violence, are probably poor risks for managing joint custody.<sup>44</sup> A shared residence is most beneficial for children when the level of parental conflict is low, and when both parents can communicate and cooperate.<sup>45</sup> D.J. Miller presents a sample of the distances that presently separate parents engaging in joint physical custody with a rotation cycle of fewer than two weeks:

‘across the street, on the same block, within walking distance, twelve blocks apart, in the same school district but a different neighbourhood, in adjacent suburbs, a 30-minute car ride away, and a 90-minute car ride away’.<sup>46</sup>

The geographic proximity of parents after divorce or separation is the practical aspect of joint physical custody. Hence, it would seem advisable to treat joint physical custody as an option, and its application is to remain, in fact, at the discretion of the court.

#### IV. Conclusions

Until recently, there was no doubt that when parents divorce or separate, the child would reside with one parent that has full parental responsibility. At present times, parents share responsibility, irrespective of whether they live together and irrespective of whether they ever lived together. In several national jurisdictions, this approach obliges the court to consider joint physical custody as an option in cases of divorce. The child has the right to maintain a loving, meaningful relationship with each parent. Both divorcing or divorced parents should remain responsible for raising and caring for the child, and shared residence could be the best possible way to achieve this.<sup>47</sup> However, national rules on the parent-child relationship should be structured both to promote co-parenting from the time of the child’s birth and to reinforce the parents’ overall relationship. If the regulations are so structured, like in Sweden, then shared parenting becomes a reality for more parents even without a legal mandate.<sup>48</sup> While currently there is a discussion in the doctrine and jurisprudence about the primacy of the mother and, on the other hand, gender equality in post-

<sup>44</sup> B.W. Ferreiro, ‘Presumption of Joint Custody: A Family Policy Dilemma’ 39(4) *Family relations*, 424 (1990).

<sup>45</sup> Corte di Cassazione 19 June 2008 no 16593, *CED Cassazione*; Corte di Cassazione 17 December 2009 no 26587, *ibid*.

<sup>46</sup> D.J. Miller, ‘Joint Custody’ 13(3) *Family Law Quarterly*, 389 (1979).

<sup>47</sup> K. Boele-Woelki, n 13 above, 222.

<sup>48</sup> M.H. Weiner, ‘Thinking outside the Custody Box: Moving beyond Custody Law to Achieve Shared Parenting and Shared Custody’ 4 *University of Illinois Law Review*, 1537 (2016).

divorce parenting, the issue of sharing parenting duties between mothers and fathers (and work-family balance) within the intact family is often overlooked. Therefore the advocates of adopting joint physical custody as the preferred normative model for post-separation family life should consider how it was working in the intact family in the first place.<sup>49</sup>

The institutions, such as the Council of Europe, and the academic initiative of the CEFL, appear to have a considerable and growing impact on European family law. The national legislature is inspired by the work of these institutions. Therefore, the conclusion is that the Council of Europe recommendations and the CEFL Principles are not only black letter law but also well-functioning practice (law in action). The Recommendation on parental responsibilities, the Draft recommendation and the Principles support the joint exercise of parental responsibility. It is certainly a positive trend. If both parents agree to joint responsibility, there is no winner or loser in a custody battle. Both the mother and father keep parental rights and do not have to prove that the other person is an unfit parent. All of these legal instruments also mention, directly or indirectly, shared residence. However, none of them decides whether such an arrangement should be the rule or the exception. They provide only that joint physical custody is one of the child arrangements that national legislation should at least allow.

<sup>49</sup>S. Harris-Short, 'Building a house upon sand: post-separation parenting, shared residence and equality - lessons from Sweden' 23(3) *Child and Family Law Quarterly*, 362, 369 (2011).