

PARENTAL AUTHORITY BETWEEN LAW AND PSYCHOLOGY

Ioana PĂDURARIU*

Abstract

The Romanian Civil Code uses the concept of „parental authority”, which means all the rights and duties concerning both the child and his/her assets. The rights and duties belong equally to both parents and are exercised in the best interests of the child. It does not matter whether the child’s parents are married or not, and whether the child was born during or outside the marriage. When making the decision, the court will consider, first of all, the interest of the child. So the court must observe the personality of the child, the lifestyles of his parents, as well as the emotional orientation and background of the child. The court will also must take into consideration the child’s right that the parents care for him, his right to maintain regular personal contact with the parent to whom he has not been entrusted and, for that parent, the right to obtain regular information about the child. Also, the court may also decide to approve an agreement between the parents unless it is clear that this agreement is not in accordance with the principle of the best interest of the child.

The term „parental authority” is an old concept from ancient times where parents were presumed to have power and a sense of ownership over their children, just as they had over their goods or animals. Nowadays, taking into consideration the recognition and acknowledgement of children’s rights, this concept of a parent having control or domination over the child’s life is seen as being outdated. More appropriate seems to be the term of „parental responsibility” or even „parental responsibilities”, in order to refer at the rights and duties „owed” by the parents towards their children. More than authority, the parents have responsibilities and the children are individuals in their own right and should be treated as such. No one has power over another human being, but everyone has responsibilities to others and, most importantly, parents have the obligation to ensure that their children become into responsible and mature adults.

Keywords: parental authority, parental responsibility, best interests of the child, children’s rights, Convention on the Rights of the Child, emotional development of the child, parenting styles.

- „1. Sons, listen to me, father, and behave so that you may redeem yourselves,
2. That the Lord raised the father over the sons and strengthened the mother’s judgment over the children.”¹

1. Short considerations about parental authority in the Roman and the Germanic law

In the Roman law, the power („*potestas*”) was characterized by absolute rights over the persons and things belonging to the household. The power over the children of the house („*fili*” and „*filiae familias*”) was called „*patria potestas*”, the power over the wife to whom the „*pater familias*” was married „*cum manu*” was called „*manus*”, and the power over slaves was called „*ownership*” (or „*dominica potestas*”).

So, the Roman period placed the children under the „*patria potestas*” and they were, as a rule, under the authority of the head of the family, who could be their father or even their grandfather. Like their mother, the children were considered „*alienii iuris*”, there was no age of civil majority, but children could become „*sui iuris*”, even at an early age, if, for example, the head of the family was taken prisoner, or lost his citizenship.

On the other hand, in the Germanic law, like the „*patria potestas*” of early Roman law, the „*munt*” was initially a complex of powers. The idea that the head of the family owed duties to those subject to his power developed only later, in the Middle Ages. In Germanic

law, legal capacity depended on the capacity to bear arms. Since women and children were not capable of bearing arms, they were subject to „*munt*”. The reason for the subordination of women and children was thus the physical helplessness of the woman or child. „*Munt*” had to be exercised in the interests of the woman or child. For this reason, „*munt*” gradually lost his characteristic of power, and became an obligation to care for the woman or for the child.¹

In ancient roman times, this power was actually limitless, the „*pater familias*” being able to punish children, sell them, abandon, banish, marry or even kill those under his power. So, the content² of „*patria potestas*” referred to:

a) the „*ius vitae necisque*” (the power of life and death) was expressly mentioned in the Twelve Tables and it was seen as the core of „*patria potestas*” – domestic discipline implied even the right to kill the child;

b) the power to alienate the child (the authority to sell those under his „*potestas*” into slavery; this authority was abolished in the post-classical period,

* Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: padurariu_ioana@yahoo.fr).

¹ *Book of Wisdom of Jesus, Son of Sirah (Ecclesiastic)* 3:1-2, <http://www.bibliortodoxa.ro/carte.php?id=72&cap=3>, website consulted last time on March, 16th, 2021.

² See H. Kruger, *The legal nature and development of parental authority in Roman, Germanic and Roman-Dutch law - a historical overview*, page 102, https://journals.co.za/doi/pdf/10.10520/AJA1021545X_69, website consulted last time on March, 10th, 2021.

³ See H. Kruger, *op. cit.*, pages 92-93.

however, the „*pater familias*” still had the power to sell new-born children into slavery in case of poverty);

c) the power over the child’s estate and juristic acts (almost any acquisitions by those under „*patria potestas*” automatically became the property of the „*pater familias*”; also, the „*pater familias*” had the right to give his children in marriage even without their consent; the „*pater familias*” also had the right to dissolve the marriages of his children);

d) the power to institute proceedings to recover the child against a third party who obtained possession of the child and exercised control over him.

Gradually, this situation of the descendants „*alienii iuris*” improved in classical and postclassical law, the parental power being restricted by many exceptions, but not completely abolished. Only in the age of Justinian, the legal personality of the person under parental power becomes complete.³

The patriarchal vision and full powers of the „*pater familias*” can only lead to the conclusion that, in relation to what we understand today by the notion of „parental authority”, it was then exercised only by the father or by another ascendant of the child and the mother never had „*potestas*”. And how could the mother have had such power, since she herself „benefited” from a diminished civil capacity and was regarded as an „accessory”, possibly „good accessory” of the man? It was only in the 4th century that imperial law enshrined the right of the mother to be the legal protector of her child whose father had died, but only if she did not to remarry, in order to watch over the property of the protected child from the possible fraudulent acts of the stepfather.

Unlike the Roman law, in Germanic law the mother enjoyed some authority over her children. In practice, she had considerable say over the care and education of the children, although her position was never equated with that of the father.⁴

In Roman law, in case of divorce, children born during marriage remained under the parental authority of their father. Their mother risked never seeing them again, and this fact weighed heavily when she could only think about dissolving the marriage.

However, in exceptional cases, for reasons related to the depraved nature of the father, the mother could receive physical custody of the child, a term that today would be called *the establishment of the child’s residence* with the mother. But, even so, the „*patria potestas*” of the father was not affected in any way.

In case of amiable divorces, the parents could agree, extrajudicially, to share physical custody over

their children or, even, for those very young children, to remain with their mother.⁵ We can see how the dichotomy between the exercise of parental authority and the concrete establishment of the child’s residence after divorce, when the parents no longer lived together, dates back to the era of classical Roman law.

It was only in the age of postclassical Roman law that Justinian’s *Novela* 117 established a major, substantial transfer of parental authority over the children to their mother if she had been unjustly repudiated by her husband or if she had obtained a divorce against the father of her children.⁶

As a conclusion, the doctrine⁷ noted important differences between Roman and Germanic concepts of parental authority, regarding:

a) the nature of parental authority (*in Roman law* the „*pater familias*” was vested with a kind of quasi-ownership in respect of his children; *in Germanic law*, on the other hand, the reason for the subordination of women and children was the physical helplessness of the woman or child and the parental authority had to be exercised in the interests of the child);

b) the duration of the parental authority (the *Roman „patria potestas*” lasted until the death of the father, unless it was terminated before that date by emancipation, adoption or the marriage of a daughter and it was regarded as a kind of perpetual authority; in *Germanic law*, on the other hand, parental authority was exercised for the protection of the child);

c) in *Roman law* „*patria potestas*” was exercised by the „*pater familias*” and the child’s mother had no authority in respect of her children — she was herself subject to „*potestas*”; in *Germanic law*, on the other hand, although also subject to her husband’s „*mund*”, the mother had some authority in respect of her children.

2. Meanings of the expressions „parental authority”, „parental responsibility” or „parental responsibilities”, between philosophy and law

If there are parental rights, what are their grounds? Many contemporary philosophers (but not only them) reject the notion that the children are their parents’ property and reject also the idea that parents have rights to their children and over their children. Some philosophers argue for a biological basis of parental rights, while others focus on the best interests of the children or a social contract as the grounds of

³ See, for more information, M.D. Bob, *Elementary manual of Roman private law*, Universul Juridic Publishing House, Bucharest, 2016, page 101-105, quoted by M. Floare, *The exercise of parental authority and the issue of the child’s habitual residence in national Romanian law, comparative law and private international law*, in M. Avram (coordinator), *Parental authority. Between greatness and decline*, Solomon Publishing House, Bucharest, 2018, page 241 et sequens.

⁴ For more informations about the parental authority in the Germanic Law, see H. Kruger, *op. cit.*, pages 100-104.

⁵ See J.E. Grubbs, *Women and the Law in the Roman Empire – a sourcebook on marriage, divorce and widowhood*, Routledge, London and New York, 2002, pages 199-200, quoted by M. Floare, *op. cit.*, page 243.

⁶ See P. Gide, *Étude sur la condition privée de la femme dans le droit ancien et moderne et en particulier sur le senatus-consulte velléien*, L. Larose et Forcel, Paris, 1885, page 191, quoted by M. Floare, *op. cit.*, page 244.

⁷ See H. Kruger, *op. cit.*, pages 104-106.

such rights. Still others reject outrightly the notion that parents have rights, as parents. They do so because of the skepticism about the structure of the putative rights of parents, while others reject the idea of parental rights in view of the nature and extent of the rights of children.

Apart from biological, best interests and social contract views, there is also a casual view of parental obligations, which includes the claim that those who bring a child into existence are thereby obligated to care for that child. It is not a simple, theoretical question about parental rights and obligations; we must also focus the attention on practical questions like: making medical decision⁸, the autonomy of children, child discipline⁹ or the propriety of different forms of moral, political and religious¹⁰ upbringing of children.

Parental responsibilities express a collection of rights and duties in order to promote and protect the rights and the welfare of the children. It should, however, be pointed out that certain States prefer to use the term „parental authority”, for example Germany¹¹ (*elterliche Sorge*), Italy (*potestà genitoriale*), Spain (*patria potestad*) or France (*autorité parentale*), or even „custody” as is the case in Canada and the United States. Other countries, the United Kingdom or the Czech Republic for example, use the term „parental responsibility”. The Swiss legal system has both concepts: „parental responsibility” is used as a generic term referring to all the obligations of parents towards their children and includes both parental authority and the maintenance obligation. In this context, „parental authority” comprises all the rights and duties of parents towards children.

However, it is important to point that in *Canada* and in the *United States*, the term *parental responsibility* refers to the potential or actual liability that may be incurred by parents for the behavior of their children.

Parental responsibility legislation has been enacted in three Canadian provinces: Manitoba (1997), Ontario (2000) and British-Columbia (2001). Under the

Parental Responsibility Act, 2000¹², a *child* is anyone under the age of 18 years and *parent* means either the biological, adoptive or legal guardian parent of the child or the person who has lawful custody of, or a right of access to, the child. This legislation¹³ allows victims of theft or property damage to sue the parents of a minor in Small Claims Court for their damages. The parents will be found automatically responsible, unless they can prove they were exercising „reasonable supervision” over the child at the time of the activity in question, and they had made „reasonable efforts” to prevent or discourage the child from engaging in such activity. Secondly, the legislation states that in all other litigation outside of the Small Claims Court, a parent will be assumed to have failed to exercise reasonable supervision and control over the child, unless they can prove otherwise. This is known as a „reverse onus” provision. The consequences of the Parental Responsibility Act may be significant if the child causes an injury to someone else.

All *U.S. states* allow parents to be sued for the various actions of their children. But the idea of a criminal legislation to allow the prosecution of adults for „neglectful” parenting is relatively new.¹⁴ For example, a number of states have enacted or proposed laws that will automatically hold parents financially responsible for all expenses associated with a second false bomb threat or 911 call made by a child; or impose a prison term and order payment of restitution to any victims if the child commits a serious crime; but also if the child uses a gun owned by the parent to commit a crime.

The generally accepted definition of the concept of *parental responsibility*, as given in a recent

⁸ Exceptions to parental autonomy are usually made at least in cases where the life of the child is at stake, on the grounds that the right to life exceed the right to privacy, if those rights come into conflict. A different issue arise with respect to medical decision making as it applies to procreative decisions. An increasing number of couples are using reproductive technologies to select the sex of their children (the process of *in vitro* fertilization or the process of sperm sorting). One criticism of this practice is that it transforms children into manufactured products, they become the result, at least in part, of a consumer choice. Similar worries are raised with respect to the future use of human cloning technology. For details, see M. Austin, *Rights and obligations of parents*, <https://iep.utm.edu/parentri/>, point 4, c. Medical Decision Making, website consulted last time on March, 10th, 2021.

⁹ Some authors argue that punishment in the family should both result from and maintain trust. See D. Hoekema, *Trust and Punishment in the Family. Morals, Marriage and Parenthood*, Laurence Houlgate, ed. Belmont, CA: Wadsworth, 1999, pages 256-260, quoted by M. Austin, *op. cit.*, point 4, d. Disciplining Children.

¹⁰ See M. Austin, *op. cit.*, point 4, e. The Religious Upbringing of Children.

¹¹ The term „parental responsibility” refers to all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care (custody). Parents have the duty and the right to care for their child. Parental care involves taking care of the child and his/her property, and representing the child; the right to make decisions for the child is therefore in principle associated with parental care. Parental responsibility also includes contact with the child and the duty to provide maintenance for the child. As a general rule, joint parental custody is possible if the child is born to married parents, or the parents marry after the birth of the child, or the parents declare that they wish to care jointly for the child (custody declarations) or if the Family Court (*Familiengericht*) grants them joint custody of the child. For details, see https://e-justice.europa.eu/content_parental_responsibility-302-de-en.do?member=1, website consulted last time on March, 15th, 2021.

¹² See <https://www.ontario.ca/laws/statute/00p04?search=Parental+Responsibility+Act>, website consulted last time on March, 15th, 2021.

¹³ See <https://oatleyvigmond.com/the-parental-responsibility-act/>, website consulted last time on March, 15th, 2021.

¹⁴ For more information about parental responsibility in U.S., see E.M. Brank, V. Weisz, *Paying for the crimes of their children: Public support of parental responsibility*, *Journal of Criminal Justice*, Science Direct. 32 (5), pages 465-475, 2004, <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1551&context=psychfacpub>, website consulted last time on March, 15th, 2021.

Recommendation of the Committee of Ministers¹⁵, identifies this notion like a „collection of duties, rights and powers, which aim to promote and safeguard the rights and welfare of the child in accordance with the child’s evolving capacities”. This collection of „duties, rights and powers” relate to health and development, personal relationships, education and legal representation, decisions on the habitual place of residence and the administration of the property of the children.

In the UK’s law, *parental responsibility* seems like an ambiguous and confused concept. In part, this ambiguity is due to the wide statutory definition in that the definition includes all aspects of being a parent: „all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”¹⁶. Although the statutory definition of parental responsibility and indeed the term itself refers to the rights and responsibilities of a parent, the concept is not synonymous with parentage or parenthood. At the time of the creation of parental responsibility, one of the recommendations of the Law Commission was that the title refer to responsibility instead of rights „it would reflect the everyday reality of being a parent and emphasize the responsibilities of all who are in that position”¹⁷. It can be seen that the Law Commission wished to underline the functional aspect of the new legal concept of parental responsibility, perhaps due to the greater diversity of family forms in the twentieth century. This was in order to benefit *all* parents, including those who lacked a genetic link with the child (for example, the step-parents, who lack automatic parental responsibility¹⁸).

Since its creation, judicial interpretation of the concept has tended to focus on the rights aspect rather than functional responsibilities (granting the practical benefit of having parental responsibility for social parents which would include the right to consent to medical treatment on the child’s behalf).

The *Danish national concept of „parental responsibilities”*, as defined by the Council of Europe (see above), is *forældremyndighed*, which is best

translated as „parental authority”.¹⁹ The holder(s) of parental authority have certain duties and powers and decisions must be made from the perspective of the child’s interests and needs. The holder(s) of parental authority is/are also the child’s guardian(s), which entails a right to act on behalf of the child in legal and financial matters. It has been considered on a number of occasions whether the concept of parental authority should be changed into a concept which better reflects the responsibility of the holder(s). When the Danish Act on parental authority and contact was changed in 1985 the concept of parental authority was retained, the underlying reasoning being that a change in concept would not change the legal content of the concept. It was further stressed that the concept of parental authority entailed not just a right to decide for the child, but also a duty to protect and care for the child. In general it is the parents or one of the parents who is/are the holder(s) of parental authority. Parental authority can be transferred to a non-parent (for example, a step-parent) or to two non-parents (this must be a married couple), but there can never be more than two holder(s) of parental authority at the same time (art. 11 Danish Act on Parental Authority and Contact). If child protection measures are taken, the holder(s) of parental authority retain parental authority but their rights and duties are accordingly restricted. When a child is taken into care as a child protection measure, the local authorities and/or the foster parents with whom the child is placed are not endowed with parental authority.

The *Romanian Civil Code* uses the concept of *parental authority*. Parental authority means all the rights and duties concerning both the child and his assets. The rights and duties belong equally to both parents and are exercised in the best interests of the child. Parental authority shall be exercised until the child reaches full legal capacity.²⁰

According to the Articles 487-499 of the Romanian Civil Code and Law No 272/2004 on the protection and promotion of children’s rights, the parental rights and duties include²¹:

¹⁵ Recommendation CM/Rec(2015)4 of the Committee of Ministers on preventing and resolving disputes on child relocation, adopted on 11 February 2015, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22022&lang=en>, website consulted last time on March, 22nd, 2021.

¹⁶ See Children Act 1989, Section 3, (1), <https://www.legislation.gov.uk/ukpga/1989/41/section/3>, website consulted last time on March, 15th, 2021.

¹⁷ See Law Commission, Family Law Review of Child Law, Guardianship and Custody, Law Com No 172 at paragraph 2.4., on <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2016/07/LC-172-FAMILY-LAW-REVIEW-OF-CHILD-LAW-GUARDIANSHIP-AND-CUSTODY.pdf>, website consulted last time on March, 15th, 2021.

¹⁸ The only acknowledgement of their legal position is provided within Section 3 (5) Children Act 1989 which authorises the to „do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child’s welfare”. See Children Act 1989, Section 3, (5), <https://www.legislation.gov.uk/ukpga/1989/41/section/3>, website consulted last time on March, 15th, 2021.

¹⁹ There are no official translations of Danish legislation. At <http://www.jur.ku.dk/biblioteker/infoseog/> a number of unofficial translations of different acts can be found. The Danish Act on parental authority has not been translated. However, the unofficial translation of an older version of the Act on the formation and dissolution of marriage, Act No. 148 of 08.03.1991 with later amendments, uses the concept of custody. The concept of custody can also be found in a number of older articles and governmental reports. The concept of parental authority is chosen as a better direct translation of the Danish concept *forældremyndighed*. For details, see I. Lund-Andersen, C. Gyldenløve Jeppesen de Boer, *National report: Denmark, Parental Responsibilities – DENMARK*, <http://ceflonline.net/wp-content/uploads/Denmark-Parental-Responsibilities.pdf>, website consulted last time on March, 15th, 2021.

²⁰ See, for more information, https://e-justice.europa.eu/content_parental_responsibility-302-ro-en.do?member=1, website consulted last time on March, 22nd, 2021.

²¹ *Ibidem*.

- the right and duty to establish and preserve the child's identity;
- the right and duty to raise the child, to care for the health and physical, psychological and intellectual development of the child, of his education, studies and professional training, according to their own beliefs, characteristics and needs of the child;
- the right and duty to provide child supervision;
- the right and duty to provide child support²²;
- the right to take certain disciplinary measures against the child²³;
- the right to ask for the return of the child from any person who holds him with no right;
- the right of the parents to reunite with their child;²⁴
- the right of the parent to have personal relations with his child (for example: visiting the child in his home, visiting the child while he is in school, the child spending holiday with each of his parents);
 - the right to determine the child's home;²⁵
 - the right to consent to the engagement and marriage of the child in the case of minors who have reached 16 years of age;
 - the right to consent to the child's adoption;
 - the right to appeal against the measures taken by the authorities with regard to the child and to make requests and actions in their own names and on behalf of the child.

The parental rights and duties (Article 500-502 of the Romanian Civil Code) as regards the child's assets may include²⁶:

- *management of the child's assets*. The parent has no right over the assets of the child, nor has the child over the assets of the parent, apart from the right to inheritance and maintenance. Parents have the right and duty to manage the assets of their minor child and to represent him in legal civil acts or to give their consent to these acts. After the age of 14, the minor shall exercise his rights and shall execute his duties alone, however, with the consent of the parents and of the Court, where appropriate.
 - *the right and duty to represent the minor in civil acts or to give one's consent to such acts*. Up to the age of 14, the child shall be represented by the

parents in civil acts as he lacks legal capacity entirely. From the age of 14 to 18, the child shall exercise his/her rights and shall execute his/her duties alone, however, the prior consent of the parents is required as she/he has limited legal capacity.

According to the Romanian Civil Code, the rights and duties belong equally to both parents²⁷ [Article 503 (1)]: if the parents are married; after divorce (Article 397); to the parent whose filiation has been established if the child was born out of wedlock and to both parents if the parents live in domestic partnership [Article 505 (1)].

From my point of view, which is not singular²⁸, the term *parental authority* is an obsolete concept from olden times where parents were presumed to have power and a sense of ownership over their children, just as they had over their goods or animals. Nowadays, taking into consideration the recognition and acknowledgement of children's rights, this concept of a parent having control or domination over the child's life is seen as being outdated. I find more appropriate using the term of *parental responsibility* or even *parental responsibilities*, in order to refer at the rights and duties „owed” by the parents towards their children. Maybe, in the past, children had no say in familial matters and parental authority was exercised with nothing say to the children's wishes, but the world has moved away from such a drastic measures. More than authority, the parents have responsibilities and the children are individuals in their own right and should be treated as such. No one has power over another human being, but everyone has responsibilities to each other and parents have the obligation to ensure that their children become responsible and mature adults. Parental responsibilities are not static. As the child grows these responsibilities change and adapt, so, the level of responsibility diminishes, like a natural progression, as children grow older.

In decisions such as living arrangements, contracts, or consenting to medical/surgical/dental procedures, the capacity to make decisions and act in the child's best interest was vested in their parent or guardian, because, until this moment, the child was seen as lacking the capacity to express a valid consent,

²² Parents are obliged, jointly and severally, to provide maintenance for their minor child. Parents are obliged to support their grown-up child until graduation if he is pursuing his studies, but no later than by the age of 26 years.

²³ However, it is forbidden to take certain measures, such as some physical punishment that would impair the physical, mental or emotional state of the child.

²⁴ This right is correlated with the right of the child to not be separated from his parents other than for exceptional and temporary reasons (for example, placement measures).

²⁵ The minor child shall live with his parents. If the parents do not live together, they shall decide the child's home by mutual agreement. In case of disagreement between the parents, the Court shall decide.

²⁶ See, for more information, https://e-justice.europa.eu/content_parental_responsibility-302-ro-en.do?member=1, website consulted last time on March, 22th, 2021.

²⁷ Parents may agree on the exercise of parental authority or as regards the measures taken to protect the child with the consent of the Court, if it is in the best interest of the child (Article 506 of the Romanian Civil Code). If the parents cannot come to an agreement on the issue of parental responsibility, the alternative means for solving the conflict without going to court is mediation. Mediation is optional before the referral to the Court. During the resolution of the trial, the judicial authorities are obliged to inform the Parties about the possibility and advantages of using mediation. If mediation does not result in an agreement, the disputed issues shall be settled in Court.

See, for more information, https://e-justice.europa.eu/content_parental_responsibility-302-ro-en.do?member=1, website consulted last time on March, 22th, 2021.

²⁸ See also A.M. Mangion, Is it the end of parental authority?, June 2010, <https://timesofmalta.com/articles/view/is-it-the-end-of-parental-authority.310466>, website consulted last time on March, 15th, 2021.

until the child attained majority. The current approach establishes that the parental powers are effective only so long as they are needed for the protection of the person and of the property of the child. Therefore, it is no longer accepted the rule that children remain under parental control until they are of certain age.²⁹

The principle according to which the extent of the parental responsibilities diminishes was established by *Gillick v West Norfolk & Wisbech Area Health Authority* (1986)³⁰. The ruling in this case provides that the child's voice is listened to in court when he reaches a sufficient understanding to be capable of making up his own mind. In practice, the child's ability to make decisions for himself relates to a number of different situations, but the main areas where issues often arise, however, are connected with consent or refusal of medical or psychiatric treatment.

When we have to establish if the child has capacity to consent (his maturity and his understanding), we must determine that they can understand the nature, purpose and possible consequences of investigations or treatments proposed, as well as the consequences of not having treatment. Only if they are able to understand, retain, use and weigh this information, and communicate their decision to others can they provide a valid consent.

If the children are found to have the required level of understanding, their decision could be upheld even if the parents' wishes are different. After the court's decision to uphold the child's view, the parents will not have authority to contradict that decision or even to force their child into the opposite course of action. As Lord Scarman said in the *Gillick case*, „parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.”³¹

3. „Best interests of the child” and parental authority

The concept of the best interests of the child is defined by the United Nations *Convention on the Rights of the Child – CRC*, but also in the Convention of the Hague on international adoption, seen as a concept that has two „traditional” roles, one that seeks to control and one that finds solutions (criterion of control and criterion of solution³²). „Best” and „interests”, as a whole, mean that the final goal should and must be the

well-being of the child, as defined through the Convention, especially in the Preamble and in the Article 3 of the CRC (paragraphs 2 and 3).

This expression is also included in a number of other articles of the CRC³³, as a reference point that must be considered in particular situations.

For example, Article 9 of the CRC put the principle promulgated by Article 3 of CRC in relation to the right of the child to live with his parents, also referring to the rule that the child must maintain personal relationships and direct contact with both parents, unless this threatens the best interests of the child (situations that include an open conflict between the child and one or both parents, or the cases when a child and his parents may become separated as a result of an official decision, necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence, but only when such a decision takes into account the best interests of the child).

Also, Article 18 establishes the principle according to which the two parents must be involved with the education of the child; this is called the common responsibility for education.

We observe that the principle of the best interests of the child is a general principle which must be applied in all activities related to implementation of the entire CRC.³⁴

It is important to mention here that child's rights do not eliminate parental responsibilities. Indeed, the Article 5 of CRC³⁵ provides that „*State parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.*”

This „right” is not the right of parents to control their child but rather the right to guide their child in exercising his or her rights; furthermore, the parents' rights diminish as the child grows in knowledge, experience, and understanding.³⁶

We must consider the development of a proper family environment in which children may freely express their views.

²⁹ See <https://www.inbrief.co.uk/child-law/children-making-legal-decisions/>, website consulted last time on March, 16th, 2021.

³⁰ *Ibidem*.

³¹ See <https://www.inbrief.co.uk/child-law/children-making-legal-decisions/>, website consulted last time on March, 16th, 2021.

³² See P. Pichonnaz, *Le bien de l'enfant et les secondes familles (familles recomposées)*, in *Le Bien de l'enfant*, Verlag Ruegger, Zürich/Chur, 2003, page 163; H. Fulchiron, *De l'intérêt de l'enfant aux droits de l'enfant in Une Convention, plusieurs regards. Les droits de l'enfant entre théorie et pratique*, IDE, Sion, 1997, page 30 et sequens.

³³ See <https://www.ohchr.org/documents/professionalinterest/crc.pdf>.

³⁴ For details on the principle of the best interests of the child, see I. Pădurariu, *The principle of the best interests of the child*, LESIJ - Lex ET Scientia International Journal no. XXVII, vol. 2/2020, ISSN: 1583-039X, pages 7-13.

³⁵ See <https://www.unicef.org/child-rights-convention/convention-text>, website consulted last time on March, 16th, 2021.

³⁶ See, for more details about that, <https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/>, website consulted last time on March, 16th, 2021.

The participation right of children is one of the core principles of the CRC. Citizen participation, of course, is a key value of a democracy, and the CRC establish new ground by viewing children as „agents who share the power to shape their own lives” and encouraging them to exercise their own rights as members of society.³⁷ The CRC³⁸ grants each child the right to participate in all decision-making processes that affect his life, so that the child might obtain a more equal role in relationships with adults and a greater opportunity to think and act independently.

It is also important to note that under Article 12, children have a right to the information necessary to formulate their views and to choose to not express their views.³⁹ The CRC does not, however, delineate an unlimited participation right – and decision making powers – of children. The treaty recognizes a right to free expression only for children who are capable of forming independent views, and even then, the weight given to their views depends upon the age and maturity of each child. Even when a child is able to express his or her views, they are not necessarily dispositive—Article 12 merely asks that children’s views, if expressed, act as a factor in decisions regarding the children.⁴⁰

The CRC regulates different but yet fundamental principles (best interests of the child and the participation right of the children), and in some cases the principles are in „tension” with each another. For example, Article 12 stands in opposition to another central principle of the CRC: the best interests of a child. The CRC is committed to the protection of the „best interests” of each child, a principle best reflected in its Article 3 (1)⁴¹.

The tension between those principles is due to the fact that Article 3 sees children as vulnerable objects in need of protection from parents or other authority figures, while Article 12 views children as autonomous beings with the right to make their own decisions, whether or not it is in their best interests.

Some critics of the CRC argue that the rights-focused approach of the CRC, a shift away from a purely best-interests-focused approach, has failed to protect either the rights or the best interests of children. After all, a child’s preferences may not always coincide

with what is in his or her best interests, at least from the government’s or parents’ point of view.⁴²

The initial lack of guidance from the Committee resulted in a wide variety of methods of implementing the CRC into domestic law.⁴³ However, the *United Kingdom* and *Germany* demonstrate that different approaches to resolving the tension between Article 12 and parental authority have some telling similarities.

The CRC has helped update the language of parental authority to emphasize duties over rights. In *England and Wales*, the Children Act 1989 translated key principles of the CRC, including those of Article 12, into domestic law. The Act „replace[d] the concept of parental rights and duties with the concept of parental responsibility,” abandoning such notions as the „right[s] to custody” in favor of the child’s interests. This was an acknowledgment of the outdated language of parental „rights” and „authority”, incongruous with the modern view that „parenthood is a matter of responsibility rather than of rights.”

Germany reflects a similar trend, in which „the child and [his or her] welfare have increasingly become the focal point” in parental authority. Legal reform in 1979 transformed „parental powers” into „parental care,” emphasizing both the rights and responsibilities of parents over their children.

The language of *U.S. law*, on the other hand, asserts the right of parents to manage their children’s lives on a basis separate from the interests of children. Yet much of the law reflects an underlying rationale grounded in the best interests of a child rather than the liberty interest of parents; in other words, giving parents primary authority and discretion over the upbringing of children is often justified as being in the child’s interest.

There is, therefore, an inconsistency between the rhetoric of parental rights and the practice of emphasizing the interests of children to justify parental rights.

Children are not at all the property of their parents. That being the case, we must admit that the term „authority” is a little bit more excessive, redundant. The Convention above mentioned admits that children’s capacities are evolving and increase as they grow up. Therefore, parental responsibilities should be exercised in accordance with the children’s

³⁷ *Ibidem*.

³⁸ Article 12 sets out this right:

„(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.” See <https://www.unicef.org/child-rights-convention/convention-text>, website consulted last time on March, 16th, 2021.

³⁹ See, for more details about that, <https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/>, website consulted last time on March, 16th, 2021.

⁴⁰ *Ibidem*.

⁴¹ „In all actions concerning children (...) the best interests of the child shall be a primary consideration.” See also, <https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/>, website consulted last time on March, 16th, 2021.

⁴² See, for more details about that, <https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/>, website consulted last time on March, 16th, 2021.

⁴³ *Ibidem*.

evolving capacities. So, it is undeniable that children must be raised by a parent or parents who will best serve their interests. On this subject, parental rights are grounded in the ability of parents to provide the best possible context for childrearing.⁴⁴

4. The psychological component of the concepts „best interests of the child” and „parental authority”. Parenting styles and their effects on children

We know very well that the children do not come with instructions, and they certainly do not come with a „pause” button. So the children are not at all easy to raise. What they do come with is an important set of physical and emotional needs that must be met. As it was mentioned before, „failure of the parents to meet these specific needs can have wide-ranging and long-lasting negative effects”⁴⁵.

The essential responsibilities that parents must adhere to in order to defend and keep their child's physical and/or emotional well-being are⁴⁶:

1. *provide an environment that is safe* (keep the children free from physical, sexual, and emotional abuse; correct any potential dangers around the house; take safety precautions like use smoke and carbon monoxide detectors, lock doors at night, always wear seatbelts etc.);

2. *provide the children with basic needs* (water, food, shelter, medical care as needed/medicine when ill, clothing that is appropriate for the weather conditions, space / a place where the children can go to be alone);

3. *provide the children with self-esteem needs* (accept the children's uniqueness and respect their individuality, encourage the children to participate in an activity or sport, notice and acknowledge the children's achievements and pro-social behaviors, set expectations for the children that are realistic and age-appropriate, use the children's misbehavior as a time to teach, not to criticize or ridicule);

4. *teach the children morals and values* (honesty, respect, responsibility, compassion, patience, forgiveness, generosity);

5. *develop mutual respect with the children* (use respectful language, respect their feelings, their opinions, their privacy and their individuality);

6. *provide a fair, well structured, predictable and consistent discipline which is effective and appropriate;*

7. *involve in the children's education* (communicate regularly with the children's teachers, make sure that the children are completing their homework, assist the children with their homework, but do not do the homework, talk to the children each day about school, recognize and acknowledge the children's academic achievements);

8. *get to know the children* (spend quality time together, be approachable to the children, ask questions, communicate, communicate and communicate, like Lenin once said⁴⁷ „Learn, learn, learn!).

On the other hand, it was also identified *responsibilities that parents do not have*: supplying the children with the most expensive designer clothes or shoes available; picking up after the children; cleaning the children's room; dropping everything the parents are doing to give the children a ride somewhere; providing the children with a cell phone, television, computer, or game system; bailing the children out of trouble every time they does something wrong; replacing toys or other items that the children has lost or misplaced; welcoming any or all of the children's friends into the home for social or other activities.⁴⁸

From an emotional point of view, the characteristics of the family environment are dispersed. First of all, we are talking about psychological safety and balance, and secondly, about their opposite characteristics. Family life also includes all the material and spiritual conditions that are offered to the child, especially through psychological security, affection, freedom, independence, intellectual constructivism, appetite for culture and others.⁴⁹

The parenting style can affect everything from how much the child weighs to how he feels about himself. It's important to ensure that the parenting style is supporting healthy growth and development because the way the parents interact with the child and how they discipline him will influence him for the rest of his life. Researchers have identified four types of parenting

⁴⁴ See M. Austin, *op. cit.*, point 2, c. Best Interests of the Child.

⁴⁵ See <https://www.parentcoachplan.com/article3.php>, website consulted last time on March, 16th, 2021.

⁴⁶ *Ibidem*.

⁴⁷ Apparently it wasn't Lenin who invented that phrase. That appears in earlier Lenin's writings. For instance, the first time Lenin used this exact phrasing was in his 1899 article „The reverse direction of Russian Social Democracy”, published in „Proletarian Revolution” journal, 1924, no. 8-9 (after Lenin's death) [„While educated society loses interest in honest, illegal literature (...) the real heroes emerge from amongst workers who (...) find quite much of character and willpower within themselves *to learn, learn, and learn*, and to develop conscious social democrats from themselves(...)]”.

The original of the quote is traced back to Anton Chekhov, who wrote these words in a context almost directly opposite to how Lenin used them. That was first published in a supplement to highly popular „Niva” magazine in 1896. Lenin could absolutely read that and probably did („We must *study, and study, and study* and we must wait a bit with our deep social movements; we are not mature enough for them yet; and to tell the truth, we don't know anything about them.” (Anton Chekhov. My Life, Chapter VII).

See *What is the origin of Lenin's quote „Learn, Learn, Learn”?*, on <https://www.quora.com/What-is-the-origin-of-Lenins-quote-Learn-Learn-Learn>, website consulted last time on March, 16th, 2021.

⁴⁸ See <https://www.parentcoachplan.com/article3.php>, website consulted last time on March, 16th, 2021.

⁴⁹ For more details about the psychological component of the notion „best interests of the child”, see M.-M. Pivniceru, C. Luca, *The best interests of the child. Psychological expertise in case of separation / divorce of parents*, Hamangiu Publishing House, Bucharest, 2016, pages 19 et sequens.

styles: authoritarian, authoritative, permissive and uninvolved.⁵⁰

*Authoritarian parents*⁵¹ believe kids should follow the rules without exception. Those parents are famous for a „because I said so” answer when a child questions the reasons behind a rule. They are not interested in negotiating, their focus is on obedience and they also don't allow kids to get involved in problem-solving challenges or obstacles. They make the rules and enforce the consequences with little regard for a child's opinion, using punishments instead of discipline. So rather than teach a child how to make better choices, they are invested in making kids feel sorry for their mistakes. Children who have authoritarian parents tend to follow rules much of the time. But, their obedience put a higher risk on them, while they may develop self-esteem problems because their opinions aren't valued, or they may also become hostile or aggressive. Rather than think about how to do things better in the future, they often focus on the anger they feel toward their parents and may grow to become good liars in an effort to avoid punishment.

*Authoritative parents*⁵² have rules and they use consequences, but they also take their children's opinions into account. They validate their children's feelings, while also making it clear that the adults are ultimately in charge. Authoritative parents invest time and energy into preventing behavior problems. They also use positive discipline strategies to reinforce good behavior, like praise and reward systems. Researchers have found that kids who have authoritative parents are most likely to become responsible adults who feel comfortable expressing their opinions. Children raised with authoritative discipline tend to be happy and successful. They are also more likely to be good at making decisions and evaluating safety risks on their own.

*Permissive parents*⁵³ are indulgent. They are quite forgiving and they adopt an attitude of „kids will be kids”. When they do use consequences, they may not make those consequences stick. They might give privileges back if a child begs or they may allow a child to get out of time-out early if he promises to be good. Permissive parents usually take on more of a friend role than a parent role. They often encourage their children to talk with them about their problems, but they usually don't put much effort into discouraging poor choices or bad behavior. So their children may exhibit more behavioral problems as they don't appreciate authority

and rules, often have low self-esteem and may report a lot of sadness. They're also at a higher risk for health problems.

*Uninvolved parents*⁵⁴ tend to have little knowledge of what their children are doing. There tend to give few rules. Children may not receive much guidance and parental attention. Uninvolved parents expect children to raise themselves. They don't devote much time or energy into meeting children's basic needs and they are neglectful but it's not always intentional. Children with uninvolved parents are likely to struggle with self-esteem issues. They tend to perform poorly in school. They also exhibit frequent behavior problems and rank low in happiness.

5. Conclusions

The most significant feelings perpetuated in the family are love and intimacy. Both involve accepting and appreciating the other's uniqueness, and observing their mode of consumption within the family substantiates the child's future behavioral pattern regarding love relationships and the manifestation of his own intimacy. The gestation of a human being is a long process and the psycho-emotional development of the child is as relevant as his cognitive or physical development, because the degree of maturity acquired by the child will depend on that, and also his ability to relate authentically or not, as well as the autonomy that the child will assume it in his evolution.⁵⁵

In the absence of „love”⁵⁶, the concept of „parental authority” and for sure the whole mechanism that turns the wheels of his profound understanding will become meaningless. Because loving your children is the most important parental „obligation” in the whole world, although some people might say that there is no duty to love. However, parents do have a moral obligation to love their children. A lack of love can harm a child's psychological, social, cognitive and even physical development.

Parents – biological or adoptive – are those who have the strongest and most direct obligation to care for their children, and this obligation is the basis of their „authority” over those children. Just as a mother's womb is the ideal place for physical and psychological gestation during the first nine months of life, so the natural family is the ideal place to complete that gestation, extending it morally and intellectually.⁵⁷ That confidence grounds a sense of security that

⁵⁰ For this typology of parenting styles, detailed below, see <https://www.verywellfamily.com/types-of-parenting-styles-1095045>, website consulted last time on March, 16th, 2021.

⁵¹ *Ibidem*.

⁵² *Ibidem*.

⁵³ *Ibidem*.

⁵⁴ *Ibidem*.

⁵⁵ C. Rusu, Assuming parental roles. Implications for children's development, in M. Avram (coordinator), Parental authority. Between greatness and decline, Solomon Publishing House, Bucharest, 2018, page 371 et sequens.

⁵⁶ „There is only the authority of love, the natural one, that we naturally have since birth, preserved only by love. Authority is not what I want to impose, but just what others recognize in me.” See S. Baştovoi, *The price of love*, Cathisma, Bucharest, 2018, pages 80-81.

⁵⁷ See M. Moschella, *To whom do children belong? A defense of parental authority*, October, 2015, <https://www.thepublicdiscourse.com/2015/10/15409/>, website consulted last time on March, 16th, 2021.

permits children to develop their independence with the knowledge that someone will be there to pick them up when they fall, literally or metaphorically. As mentioned in the study⁵⁸ cited above, «When addressing the rights and obligations of parents in the *Summa Theologiae*, Thomas Aquinas speaks of a child as in some sense „a part” of its parents and as „enfolded in the care of its parents,” first physically in the mother’s womb, and then in the „spiritual womb” of the family. Aquinas’s „spiritual womb” metaphor profoundly expresses the connection among parental obligations, children’s needs, and parental authority.»

It is very important that any cause involving a child can find a solution best suited to his best interests, so that his development will not suffer. It is also clear that the child has rights and he must be heard if he is able to form and communicate his views if the case affects him. Nevertheless, it is evident that the principle of the best interests of the child is, like the concept of „parental authority”, most difficult to explain and to settle down. We need to clarify that we cannot see only the rights, but also the responsibilities that the parents have towards their children.

References

- Book of Wisdom of Jesus, Son of Sirah (Ecclesiastic) 3:1-2, <http://www.bibliaortodoxa.ro/carte.php?id=72&cap=3>, website consulted last time on March, 16th, 2021;
- Hanneretha Kruger, The legal nature and development of parental authority in Roman, Germanic and Roman-Dutch law - a historical overview, https://journals.co.za/doi/pdf/10.10520/AJA1021545X_69, website consulted last time on March, 10th, 2021;
- Pascal Pichonnaz, Le bien de l’enfant et les secondes familles (familles recomposées), in *Le Bien de l’enfant*, Verlag Ruegger, Zürich/Chur, 2003;
- Hugues Fulchiron, De l’intérêt de l’enfant aux droits de l’enfant in *Une Convention, plusieurs regards. Les droits de l’enfant entre théorie et pratique*, IDE, Sion, 1997;
- Marius Floare, The exercise of parental authority and the issue of the child’s habitual residence in national Romanian law, comparative law and private international law, in Marieta Avram (coordinator), *Parental authority. Between greatness and decline*, Solomon Publishing House, Bucharest, 2018
- Michael W. Austin, Rights and obligations of parents, <https://iep.utm.edu/parentri/>, website consulted last time on March, 10th, 2021;
- Eve M. Brank, Victoria Weisz, Paying for the Crimes of Their Children: Public Support of Parental Responsibility, 2004, Published in the *Journal of Criminal Justice* (2004) 32: 465-475, 2004, <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1551&context=psychfacpub>, website consulted last time on March, 15th, 2021;
- Ingrid Lund-Andersen, Christina Gyldenløve Jeppesen de Boer, National report: Denmark, Parental Responsibilities – DENMARK, <http://ceflonline.net/wp-content/uploads/Denmark-Parental-Responsibilities.pdf>, website consulted last time on March, 15th, 2021;
- Ann Marie Mangion, Is it the end of parental authority?, June 2010, <https://timesofmalta.com/articles/view/is-it-the-end-of-parental-authority.310466>, website consulted last time on March, 15th, 2021;
- Ioana Pădurariu, The principle of the best interests of the child, *LESIJ - Lex ET Scientia International Journal* no. XXVII, vol. 2/2020, ISSN: 1583-039X, pages 7-13;
- Mona-Maria Pivniceru, Cătălin Luca, The best interests of the child. Psychological expertise in case of separation / divorce of parents, Hamangiu Publishing House, Bucharest, 2016;
- Claudia Rusu, Assuming parental roles. Implications for children’s development, in M. Avram (coordinator), *Parental authority. Between greatness and decline*, Solomon Publishing House, Bucharest, 2018;
- Savatie Baștovoii, *The price of love*, Cathisma, Bucharest, 2018;
- Melissa Moschella, To whom do children belong? A defense of parental authority, October, 2015, <https://www.thepublicdiscourse.com/2015/10/15409/>, website consulted last time on March, 16th, 2021;
- https://e-justice.europa.eu/content_parental_responsibility-302-de-en.do?member=1, website consulted last time on March, 15th, 2021;
- <https://www.ontario.ca/laws/statute/00p04?search=Parental+Responsibility+Act>, website consulted last time on March, 15th, 2021;
- <https://oatleyvigmond.com/the-parental-responsibility-act/>, website consulted last time on March, 15th, 2021;
- <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1551&context=psychfacpub>, website consulted last time on March, 15th, 2021;
- Children Act 1989, Section 3, (1), <https://www.legislation.gov.uk/ukpga/1989/41/section/3>, website consulted last time on March, 15th, 2021;
- Law Commission, Family Law Review of Child Law, Guardianship and Custody, Law Com No 172 at paragraph 2.4., on <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2016/07/LC.-172-FAMILY-LAW-REVIEW-OF-CHILD-LAW-GUARDIANSHIP-AND-CUSTODY.pdf>, website consulted last time on March, 15th, 2021;

⁵⁸ *Ibidem*.

- <https://www.inbrief.co.uk/child-law/children-making-legal-decisions/>, website consulted last time on March, 16th, 2021;
- <https://www.ohchr.org/documents/professionalinterest/crc.pdf>;
- <https://www.unicef.org/child-rights-convention/convention-text>, website consulted last time on March, 16th, 2021;
- <https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/>, website consulted last time on March, 16th, 2021;
- <https://www.unicef.org/child-rights-convention/convention-text>, website consulted last time on March, 16th, 2021;
- <https://www.parentcoachplan.com/article3.php>, website consulted last time on March, 16th, 2021;
- What is the origin of Lenin's quote „Learn, Learn, Learn“?, on <https://www.quora.com/What-is-the-origin-of-Lenins-quote-Learn-Learn-Learn>, website consulted last time on March, 16th, 2021;
- <https://www.verywellfamily.com/types-of-parenting-styles-1095045>, website consulted last time on March, 16th, 2021.