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JOINT PARENTAL CARE

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The concept of custody does not only enclose a right consisting of parental powers but also enclose entire obligations regarding the representation and the protection of the personalities and properties of the minor and in some exceptional cases the people who are under the care of guardian[1]. The joint parental care can be characterized as a custody right given both to mother and father collectively and equally[2].

It is impossible to alienate the custody right from its holder. Besides, custody right belongs exclusively to mother and/or father. Therefore it is impossible to assign this right to other people even from family such as brother, sister, uncle, aunt, grandfather or grandmother[3].

This paper will briefly report on joint parental care system in Turkey. In parallel with Turkish Civil Code, it is appropriate to examine joint parental care from four different prospects: Joint parental care during the marriage, during the separation, after divorce and also for the couples who never get married.

1. DURING THE MARRIAGE

1.1. General principle

The article 336 para. 1 of the Turkish Civil Code with the title *"II. If the parents are married"* is arranged as follows:

[1] Sarı, p. 86, Dural; Öğüz; Gümüş, AILE HUKUKU (2014), p. 341, N. 1676, Kürşat, p. 257, Akıntürk; Karaman, AILE HUKUKU (2014), p. 406, Usta, ÇOCUK HAKLARI VE VELAYET (2012), p. 21, Baktır Çetiner, VELAYET HUKUKU (2000), p. 30.

[2] Serdar, p. 162, Kiremitçi, p. 10.

[3] Akıntürk; Karaman, AILE HUKUKU (2014), p. 408, Baktır Çetiner, VELAYET HUKUKU (2000), p. 43, Usta, ÇOCUK HAKLARI VE VELAYET (2012), p. 22.

"During marriage, the parents exercise parental care jointly."

If mother and father are married, parental rights arise directly under the law from the minute the child is born[4]. As a rule, lawmaker assigns the parental rights jointly to both the mother and father together.

Although spouses have to exercise the parental care jointly, rights and liabilities regarding custody are assigned to mother and father individually, independent and separate from each other. Accordingly, mother and father are individually responsible of exercising custody, independent from one another. Along with this, joint exercise of custody rights is essential regarding all custody-related issues. Mother and father will act jointly in the child's all personal matters and regarding the properties under the child's name and will represent the child jointly when necessary[5].

It goes without saying that the fact that mother and father will exercise parental rights jointly does not mean that they have to always act at the same time and together. Mother and father may exercise parental rights severally[6], in all individual tasks and processes and works based on implicit or express consent[7] of the other party.

It is possible that mother and father have different opinions about how the interests of a child regarding a specific issue shall be protected in the best way possible. By Turkish Civil Code that entered into force in 2002, major changes have been made in various organizations. A primary change was made especially to re-organize provisions in the field of family law that injure equality of women and men. One of the issues addressed within this scope is the right of the mother and the father to exercise right of custody jointly[8]. According to the former Turkish Civil Code, during marriage, couples used to exercise the right of the custody together. Nonetheless in case of disagreement, the father was accorded the right of final decision.

The legal arrangement that prefers the vote of one parent against the other parent in case of these kinds of disputes is abolished in Turkey, like in other countries, based on the grounds that such arrangement is contrary to the principle of equality between spouses under Turkish law[9]. Nonetheless, no arrangement is made under the relevant provision that explains how any dispute between a

[4] Akıntürk; Karaman, AILE HUKUKU (2014), p. 407-408, Baktır Çetiner, VELAYET HUKUKU (2000), p. 34-35.

[5] Sarı, p. 88, Dural; Öğüz; Gümüş, AILE HUKUKU (2014), p. 343, N. 1682.

[6] Sarı, p. 89.

[7] Consent may be given after the action and act that took place as well as before it, may arise by subsequent consent afterwards.

[8] Sarı, p. 83

[9] Sarı, p. 85, 90, Akıntürk; Karaman, AILE HUKUKU (2014), p. 408.

mother and father will be resolved[10]. In this case general provisions of marriage are executed. In this regard, article 195 of the Turkish Civil Code entitled "*Protection of the Marital Union*" can be applied. According to this article:

> "If a spouse fails to fulfil his or her duties to the family or if the spouses disagree on matters of importance to the marital union, they may apply jointly or separately to the court for mediation."

According to this provision, it will be possible to apply to the court for mediation in case of a disagreement between spouses arise on matters of importance[11]. In these cases, the court reminds the spouses of their duties and attempts to settle their differences. If the spouses give consent, experts may be consulted or they may be referred to a marriage guidance or family counselling agency. Nevertheless, in such case the judge cannot decide instead of parent. The competent court in this regard is the family court[12].

1.2. Exceptions of Joint Parental Care During the Marriage

We had better say that the general rule is that father-mother will exercise the parental rights jointly. However in parallel with Swiss Civil Code, in some exceptional cases it was made possible under Turkish Law to withdraw parental care of either the father or the mother with judicial decision. According to Civil Code article 348 *"III. Withdrawal of parental care"*:

> "Where other measures have failed or offer little prospect of providing adequate child protection, the guardianship supervisory authority shall withdraw parental care from the parents:
>
> 1. if the parents are unable to exercise parental care as required on account of inexperience, illness, disability, absence or other similar reasons;
>
> 2. if the parents have not cared for the child to any meaningful degree or have flagrantly violated their duties towards the child.
>
> […]"

As can be seen, Turkish Civil Code lawmaker ruled that withdrawal of parental care from the mother or father or both is possible when father and mother do not exercise parental care as required or if measures stipulated under the law

[10] Dural; Öğüz; Gümüş, AILE HUKUKU (2014), p. 343, N. 1683.

[11] It should be stated that, the reason why mediation of a judge is not mentioned under article 336 regarding the issue and the reason why application for mediation was only made possible for matters of importance, is to prevent application of spouses to court in any matters of dispute regarding exercising parental rights. For detailed information, see Sarı, p. 92.

[12] Sarı, p. 91.

for protection of the child are not sufficient[13]. However it is better to mention that, this severe measure is only possible by judicial decision in case one of the possibilities specified under paragraph one and two of such article takes place[14].

According to the para. 1, it can be decided to withdraw parental care from the parents if the parents are unable to exercise parental care as required on account of inexperience, illness, disability, absence. It can be easily deduced that reasons specified under the article as "similar reasons" which may lead to withdrawal of parental care are not limited only with the reasons stated specifically under the article. For example withdrawal of parental care is possible for the father or mother in case the power of discernment of the father or the mother is lost or restricted[15].

According to para. 2 of the same article, if the parents have not cared for the child to any meaningful degree or have flagrantly violated their duties towards the child, custody can be taken from them. It goes without saying that in such a possibility that will cause the judge to use exercise individual discretionary power and withdraw parental care from the father-mother, unlike the above mentioned possibility, here misconduct by father-mother is required. Also it is mandatory that this misconduct is continuous[16].

2. DURING THE SEPARATION

According to the art. 336/para. 2 of the current Turkish Civil Code, if the parents cease living together or they are separated, the court may award parental care to one spouse alone.

It shows that the judge will be able to grant the custodial right to one of the parties if the cohabitation has ended and spouses have been separated. From

[13] Akıntürk; Karaman, AILE HUKUKU (2014), p. 440, Grassinger, TÜRK MEDENI KANUNU'NDA YER ALAN VELAYET HÜKÜMLERI ARASINDA KÜÇÜĞÜN KIŞI VARLIĞININ KORUNMASI IÇIN ALINACAK TEDBIRLER (2009), p. 164.

[14] Grassinger, TÜRK MEDENI KANUNU'NDA YER ALAN VELAYET HÜKÜMLERI ARASINDA KÜÇÜĞÜN KIŞI VARLIĞININ KORUNMASI IÇIN ALINACAK TEDBIRLER (2009), p. 165, Dural; Öğüz; Gümüş, AILE HUKUKU (2014), p. 338, Akıntürk; Karaman, AILE HUKUKU (2014), p. 438. The judge to rule on this issue is the judge of family court. Judge should allow the child, that reached the maturity to declare his/her opinions, to speak on the issue of granting parental rights to the mother or father. This principle is clearly stated under Convention on the Rights of the Child Art. 12, Art.3 and Art. 6.

[15] Grassinger, TÜRK MEDENI KANUNU'NDA YER ALAN VELAYET HÜKÜMLERI ARASINDA KÜÇÜĞÜN KIŞI VARLIĞININ KORUNMASI IÇIN ALINACAK TEDBIRLER (2009), p. 169, Akıntürk; Karaman, AILE HUKUKU (2014), p. 439.

[16] Dural; Öğüz; Gümüş, AILE HUKUKU (2014), p. 338, Grassinger, TÜRK MEDENI KANUNU'NDA YER ALAN VELAYET HÜKÜMLERI ARASINDA KÜÇÜĞÜN KIŞI VARLIĞININ KORUNMASI IÇIN ALINACAK TEDBIRLER (2009), p. 167.

the opposite meaning of this article we understand that the judge is not authorized to do this and the custody can be exercised by both[17]. As can be seen, the parental right during the separation and following divorce are arranged differently. This means, by conscious choice, law maker preferred to obligate termination of joint custody by termination of marriage instead of the termination of the status of living together. Accordingly even if it is stipulated that the spouses live apart for three years, unless otherwise is agreed, for the interest of the child, mother and father will have joint custody of the child[18].

3. IF MARRIAGE IS TERMINATED BY DIVORCE

Most of the European countries recognized joint parental care after divorce based on the idea that divorce breaks the ties between spouses but should not affect the parent-child relationship[19]. Even in Switzerland, with the new reform of the Swiss divorce law in 2000, joint parental care after divorce is recognized. Although Turkish Civil Code comes into force in 2002, the changes made in Switzerland are not adopted. It shows that while Swiss law has made a step forward on the field of parent-child relationships and the promotion of the child's well-being, Turkish law maker did not want to take into consideration that possibility.

There are two provisions under Turkish Civil Code regarding arrangement of parental care if the marriage ends by divorce. The first one of these provisions under Turkish Civil Code is second paragraph of article 182 *"Discretionary Power of the Judge"*. According to mentioned provision:

> "In organization of the relationship of the child with the spouse who is not granted the parental care right, interest of the child specifically in terms of health, education and morals is taken as basis. […]"

It cannot be said that this paragraph is clear and explicit about joint parental care issue. There is no remark under this paragraph about the obligation to assign parental rights to either the mother or the father in case of divorce or separation. This provision only covers the essentials that will guide the judge about arrangement of rights and liabilities of the other spouse who is not assigned the parental care rights, in case parental rights are assigned to only one of the spouses. Based on the sole phrase "*spouse who is not granted the parental care right*", it is not possible to say that in case of divorce, law maker stipulates

[17] Koçhisarlıoğlu, BOŞANMADA BIRLIKTE VELAYET VE YASANIN AŞILMASI (2004), p. 25.

[18] Öztan, p. 255.

[19] For detailed information see Kiremitçi, p. 13-19.

assigning of parental care rights to only one of the parents, either the mother or the father, and rules out joint parental care completely[20].

Another provision under Civil Code regulating the parental care rights in case of divorce is included under paragraph three of article 336.

> "On the death of a spouse, parental care passes to the surviving spouse[21]; in the case of divorce parental care belongs to the spouse to whom it was granted."

It is seen that, none of the provisions covering regulations about parental care rights in case marriage ends by divorce, refers to the possibility of joint parental care.

In these condition whether judge has the option to decide to joint parental care after divorce is the main question needed to be answered. Turkish Supreme Court concluded that under our national law it is not possible to decide to joint custody after divorce[22]. On the other hand, in 2009, **İzmir** Family Court ruled to joint parental care after divorce[23].

In order to decide whether joint parental care is possible or not under Turkish Civil Law, it will be also necessary to determine whether MK 336/f.3 stipulating that right of parental care will be granted to only one of the parties is a mandatory regulation or not. Because if it is reached to the conclusion that such is a mandatory regulation, it will be concluded that Turkish Civil Code law maker does not allow for joint parental care[24].

To decide whether this is mandatory regulation or not, first we need to scrutinize the purpose of this provision. The main reason Turkish Civil Code law

[20] Öztan, p. 253-254.

[21] Termination of marriage may arise due to death of one of the spouses or if judge rules for divorce. Provision takes both possibilities into consideration.

[22] Y.2.HD., T. 08.04.1971, E. 2238, K. 2310, (Kazancı Casebook), YHGK., T. 18.01.1950, E. 2-9, K. 46, (Kazancı Casebook). According to Çetiner also (pp.108-109), despite current article of the Turkish Civil Code, it is hard to say that the judge has the power to decide to joint parental care. On the other hand, since as mentioned under article 3 of United Nations Convention on Children's Rights, the best interests of the child shall be a primary consideration, if there is no reason for the abrogation of the parental care, even after divorce joint custody should be the general rule.

[23] İn the present case the spouses asked for the uncontested divorce. According to the agreement, the parties agreed to use of the right to custody jointly. The Court requested the examination by experts whether joint custody is for the benefit of the children. In the report prepared by experts it was stated that the ideal solution for the child is that both parents participate actively in reaching decisions regarding the child and that child sees each parent as much as desired without any restriction. For detailed information see, Serdar, p. 171, footnote 59.

[24] Öztan, p. 255, Koçhisarlıoğlu, BOŞANMADA BIRLIKTE VELAYET VE YASANIN AŞILMASI (2004), p. 33.

maker wants to grant parental care to either the mother or father may be based on the assumption that this will be more beneficial for the child. However, it is hard to accept as truth that parental care should be granted to either the father or the mother[25].

Today many European countries adopted the opinion that joint parental care may be to the benefit of the child on the basis of the notion that divorce does not aim to end the relationship between the parents and the child, but only aims to end the relationship of the mother with the father. If we look at the recent reforms made under Swiss Civil Code, we see that it is accepted as a presumption that for the benefit of the child, joint parental care should be imposed and for this reason, even in case of divorce, joint parental care is accepted as a rule. In other words, judges in Switzerland, grant parental care rights to either the mother or the father in exceptional cases where it is determined that joint parental care is contrary to the interests of the child. In the report prepared by experts and included under the resolution dated 27.05.2009, where 4th Family Court of Izmir ruled for joint parental care, it was stated that the ideal solution for the child is that both parents participate actively in reaching decisions regarding the child and that child sees each parent as much as desired without any restriction[26]. For this reason, especially taking into consideration the principle on interests of the child, we cannot say that Turkish law maker completely excluded the possibility of joint parental care and that this is a mandatory regulation[27].

Nevertheless there is no special provision under our Civil Code that sets forth joint parental care as there is under Swiss Civil Code. According to an opinion, there is an implicit gap in law and this gap can be filled by teleological reduction. Accordingly it can be said that article 362 that does not allow for joint parental care, but in case mother and father are ready and willing and if this is to the interest of the child, this is possible by teleological reduction[28].

[25] According to Kürşat (p. 262), just because the joint life has been terminated, neither of the parties should be deprived of his/her custodial right. If the use of the right will not be difficult, for example if the parties have peacefully settled the dispute over custody, there should be no hesitation about preferring joint parental care.

[26] 4th Family Court of Izmir, T. 27.05.2009, E. 448, K. 470, Serdar, p. 171, ref. From footnote 59.

[27] Same opinion Koçhisarlıoğlu, BOŞANMADA BIRLIKTE VELAYET VE YASANIN AŞILMASI (2004), p. 175 vd., p. 237, Öztan, p. 258. Writer also explains that if lawmaker wanted such a result, it would clearly state this in writing to avoid any doubts. Serozan, ÇOCUK HUKUKU (2005) p. 256, and it is stated that, without discussing whether this is a mandatory regulation or not, it may be claimed that current provision is contrary to Constitution, in the light of United Nations Convention on the Rights of the Children, principle of equality under constitution, in terms of right of developing character of the child and rights of parents.

[28] Serozan, MEDENI HUKUK (2013), p. 163, N. 41h.

Before the reform in Switzerland in 2014, as a rule, in case of divorce, it was stipulated that mother or father is granted the parental care solely, but only in exceptional cases and presence of very special conditions that are difficult to take place, joint parental care was allowed. According to that article joint parental care could be decided by the court only if it was jointly requested by the spouses, and on condition that two additional conditions are met: first, the spouses signed a written agreement contemplating all aspects of the future care of their children (custody, residence, visitation rights, maintenance); secondly, the court was convinced that shared parental care was the best solution for the well-being of the child[29].

After the reform of the Civil Code entered into force on July 1, 2014, divorced parents keeps joint parental care of their children except where assigning sole parental responsibility to one of the parents is "*necessary to safeguard the child's well-being*". The principles that were applicable until June 30, 2014 are therefore completely overturned: now joint parental care is the rule, while individual parental care is the exception. According to current new version of article 298, para. 1:

> "In divorce proceedings or proceedings to protect the marital union, the court shall assign one parent, sole parental responsibility if this is necessary to safeguard the child's well-being."

4. IN CASE PARENTS ARE UNMARRIED

In case mother-father are not married, the resolution about who will be granted the right of parental care is explained under Turkish Civil Code, article 337 "*III. If the parents are unmarried*". According to the provision:

> "If the parents are not married, the mother has parental care. If the mother is a minor or if she dies, or if parental care is taken away from her, the child protection authority, according to the child's best interests, transfers custody to the father or appoints a legal guardian for the child."

Law maker that guards the interests of the child, has established parental care relationship between the mother and the child as maternity relationship between these two is established naturally. For the father, it is mandatory that paternity is established between the child and the father. Because if recognition or paternity suit is not in question, paternity cannot be established between the father and the child and as a result no right of parental care may be spoken of.

As can be clearly understood from the article, it is not enough to only establish the paternity relationship with the child in order for the father to have parental

[29] Guillod, article…

care rights. Even if paternity is established between the child and the father by recognition or paternity suit, only upon meeting conditions stated under second paragraph of article 337, will the father have the right of parental care[30]. It means that it is not possible for the father who is not granted the parental care right, to have and say in any act or actions regarding the child.

Even though this practice is correct for father or mother model that is uncaring to his/her child, it is difficult to say that this regulation is correct for tender parents who embrace their children and who wish to share child's responsibility and right of parental care[31].Article does not contain the answer to the question of what will happen in case father and mother, that are unmarried, wish to exercise parental care rights jointly.

One opinion that we also agree in this regard, points out that there is a gap in law about this and that judge should fill this gap according to article 1/f. II of Civil Code. Judge will fill this gap according to paragraph one of article 7 that stipulates that child has the right to get to know his/her father-mother and to be cared by them as much as possible and according to article 3 of United Nations Convention on Children's Rights, that value the interest of the child above everything. According to opinion mentioned, since the purpose of the law is not to make a difference between illegitimate and legitimate child or not to deprive the child from the love and attention of his/her father, father and mother should be able to claim joint parental care and judge should be able to decide for joint parental care in case this is not against the interest of the child[32].

Swiss legislator took into considaration the case where unmarried father and mother wish to exercise parental care rights jointly. According to the current Swiss Civil Code article 298 entitled "*I. Joint declaration by the parents":*

> "If the parents are not married to each other and if the father recognizes the child, or the parent-child relationship is established by court judgment but joint parental responsibility was not ordered at the time of the judgment, joint parental responsibility is established based on a joint declaration by the parents."

5. CONCLUSION

There are many legal arrangements under Turkish Civil Code regarding parental care. When these arrangements are examined, it is seen that law maker

[30] Serdar, p. 192.

[31] Serozan, MEDENI HUKUK (2013), p. 255, N. 104.

[32] Serdar, p. 193.

explicitly allows for joint parental care only when the marriage continues. According to this regulation, law maker accepts joint parental care as a general rule as long as the marriage continues and resolves that sole parental care of the mother or father is only possible in exceptional cases stated under law. It should also be added that law maker allows joint parental care when father and mother lives separated from one another or when judge rules for their separation.

Nonetheless, unlike Swiss Civil Code, under Turkish Civil Code, there is no explicit legal arrangement about joint parental care in case mother-father is not married or in case they are divorced. This fact causes hesitations about determining whether judge is authorized to rule for joint parental care in two of the above possibilities. According to one opinion which also agreed by us, it cannot be concluded from the way the articles regarding such issues are drawn upon, that joint parental care is excluded explicitly and under all circumstances[33].

According to the opinion accepted, which we also consider reasonable, since there is no explicit provision prohibiting joint parental care in case father and mother is not married or they are divorced, by taking into consideration the legal arrangements under United Nations Convention on Children's Rights, it might be possible for the judge to rule for joint parental care until a new arrangement is made in this field.

However, there is no doubt that new arrangements need to be made regarding these issues. For as much as it is possible to reach to this conclusion by interpretation, it is very difficult to determine under which conditions judge shall rule for joint parental care. For this purpose, to prevent arising of different enforcements, what needs to be done is to bring special arrangements regarding joint parental care, just like in old Swiss Civil Code. Nevertheless, to my opinion, it would be better first to see how in Turkey joint parental care is implemented after divorce or for the couples who does not desire to marry to each other. For this reason, instead of accepting joint parental care as a general rule like recent reforms in Switzerland, it is more appropriate to empower the judge to rule for joint parental care in presence of specific conditions like in the provision abolished in Switzerland in 2014.

[33] See also Koçhisarlıoğlu, BOŞANMADA BIRLIKTE VELAYET VE YASANIN AŞILMASI (2004), p. 237, Öztan, p. 258. Writer also explains that if lawmaker wanted such a result, it would clearly state this in writing to avoid any doubts. Serozan, ÇOCUK HUKUKU (2005), p. 256, and it is stated that, without discussing whether this is a mandatory regulation or not, it may be claimed that current provision is contrary to Constitution, in the light of United Nations Convention on the Rights of the Children, principle of equality under constitution, in terms of right of developing character of the child and rights of parents.

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Turški Civilni zakonik pozna različne oblike vzgoje in varstva otroka. Ena izmed njih je tudi skupna vzgoja in varstvo. To obliko vzgoje in varstva določbe Civilnega zakonika izrecno dovoljujejo samo v času trajanja zakonske zveze. Za poročene starše sta skupna vzgoja in varstvo predpisana celo kot pravilo. To pomeni, da sta starša v zakonski zvezi na podlagi zakona ne samo upravičena, temveč celo zavezana skupaj skrbeti za otroka. Zgolj v primeru, ko so podani izredni in izjemni razlogi, se otrok na podlagi sodne odločbe lahko zaupa v vzgojo in varstvo le enemu od staršev. Poročena starša sta v skladu z določbami Civilnega zakonika dolžna skupaj skrbeti za vzgojo in varstvo otroka ne le, če živita skupaj, temveč tudi, kadar sta se razšla in živita ločeno, čeprav nista zahtevala razveze.

Za razliko od švicarskega Civilnega zakonika, po katerem se turški Civilni zakonik zelo močno zgleduje, turški zakonik ne vsebuje posebnih določb o skupni vzgoji in varstvu za primer, ko starša nista v zakonski zvezi ali sta razvezana. To dejstvo vzbuja vprašanje, ali je sodnik sploh pooblaščen za odločitev, da se otrok neporočenih ali razvezanih staršev zaupa v skupno vzgojo in varstvo. Po večinskem mnenju iz odsotnosti izrecne določbe o skupni vzgoji in varstvu neporočenih ali razvezanih staršev še ni mogoče sklepati na to, da skupna vzgoja in varstvo otroka neporočenih ali razvezanih staršev ni dopustna prav pod nobenim pogojem. Za tako razlago po večinskem mnenju pravne stroke govorijo tudi določbe Konvencije Združenih narodov o otrokovih pravicah. Konvencija o otrokovih pravicah je po prevladujočem mnenju stroke tudi ustrezna pravna podlaga, na katero lahko sodnik v odsotnosti ustreznih zakonskih določb opre svojo odločitev o skupni vzgoji in varstvu otroka neporočenih ali razvezanih staršev.

Kljub nakazani možnosti neposredne uporabe določb Konvencije Združenih narodov o otrokovih pravicah, pa stroka opozarja, da je neposredno skliceva-

nje na določbe Konvencije zgolj zasilna in ne optimalna rešitev. Brez določne zakonske podlage je namreč izredno težko določiti pogoje, pod katerimi naj bosta neporočena ali razvezana starša sploh upravičena skupaj skrbeti za otroka. Iz tega razloga je treba vprašanje varstva in vzgoje otroka neporočenih in razvezanih staršev v Civilnem zakoniku izrecno urediti. Izrecna ureditev je nujno potrebna tudi zato, da v podobnih dejanskih primerih ne prihaja do različnih sodnih odločitev. Tako stanje namreč ogroža pravno varnost in s tem tudi otrokovo korist.

Družinskopravna stroka v Turčiji predlaga, naj se nova ureditev skupne vzgoje in varstva ne zgleduje po novi ureditvi tega vprašanja v švicarskem Civilnem zakoniku iz leta 2014, po kateri sta skupna vzgoja in varstvo otroka tudi pri neporočenih in razvezanih starših predpisana kot pravilo. Zgled novi turški ureditvi naj bo ureditev švicarskega Civilnega zakonika pred letom 2014, ki je določala zgolj pogoje, na podlagi katerih so bili starši upravičeni do skupne vzgoje in varstva. S pomočjo tovrstne ureditve bo namreč v Turčiji mogoče preizkusiti, kako model skupne vzgoje in varstva otroka sploh deluje pri neporočenih in razvezanih parih. Na podlagi izkušenj te ureditve se bo Turčija lahko odločila, ali naj skupno vzgojo in varstvo otroka v prihodnje reformira tudi na način, da skupna vzgoja in varstvo postaneta pravilo za vse starše.

Pregledni znanstveni članek UDK: 347.635:173.5-055.52(560), 347.61/.64-053.2(560)

YAKUPPUR, Sendi: Skupna starševska skrb

Pravnik, Ljubljana 2015, let. 70 (132) št. 9-10

Turški Civilni zakonik pozna različne oblike vzgoje in varstva otroka. Ena od njih je tudi skupna vzgoja in varstvo. Ta oblika je v zakoniku izrecno omenjena samo pri starših, ki so v zakonski zvezi. Poročeni starši imajo praviloma skupno vzgojo in varstvo otroka, če živijo skupaj, pa tudi, če živijo ločeno. Pri neporočenih in razvezanih starših pa Turški civilni zakonik ne omenja možnosti, da bi ti starši lahko skupaj skrbeli za otroka. Ta okoliščina odpira vprašanje, ali imajo neporočeni in razvezani starši sploh možnost skupaj skrbeti za otroka. Splošno mnenje je, da odsotnost izrecne ureditve ne pomeni, da neporočeni in razvezani starši ne bi smeli imeti skupne vzgoje in varstva. Toda vprašanje je, pod kakšnimi pogoji so ti starši upravičeni do skupne skrbi za otroka. Odgovor na to vprašanje mora v prihodnje dati zakonska ureditev. Ta pa naj skupne vzgoje in varstva neporočenih in razvezanih staršev ne postavi kot pravila, temveč naj zgolj določi pogoje, pod katerimi sta starša upravičena skupaj skrbeti za otroka.

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There are many legal arrangements under the Turkish Civil Code regarding parental care. According to this regulation legislator explicitly accepts joint parental care as a general rule during the marriage. This rule is applied also for the case when married couple lives separated from one another. Notwithstanding, under Turkish Civil Code there is no explicit legal arrangement about joint parental care in case when parents are not married and in case they are divorced. This fact causes hesitations about determining whether judge is authorized to rule for joint parental care in these two circumstances. According to the general opinion, it cannot be concluded that joint parental care is explicitly excluded under all circumstances. However, it is very difficult to determine under which conditions judge shall rule for joint parental care. Therefore special arrangement needs to be done. The new arrangement should not regulate the joint parental care as a rule but it should empower the judge to rule for joint parental care only in the presence of specific conditions.