

The International Survey of Family Law

2013 Edition



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Macedonia

THE EXERCISE OF PARENTAL RIGHTS AFTER DIVORCE IN MACEDONIAN FAMILY LAW

*Dejan Mickovik and Angel Ristov**

Résumé

Dans cet chapitre, les auteurs analysent la régulation juridique de l'exercice des droits parentaux après le divorce dans la législation macédonienne. Ils concluent que droit de la famille de la République de Macédoine ne contient pas de disposition précise qui prévoit que les parents peuvent continuer à accomplir en commun l'autorité parentale après le divorce. Cela provoque de graves problèmes dans la pratique, parce que le parent qui a obtenu la garde de l'enfant après le divorce dans la plupart des cas, apporte les décisions les plus importants pour l'enfant et ses droits et intérêts, et l'autre parent, habituellement le père, a seulement le droit de maintenir des contacts personnels avec l'enfant et l'obligation de payer une pension alimentaire. Les auteurs estiment qu'il est nécessaire de prévoir dans la loi de la famille une disposition précise par laquelle l'exercice conjoint de l'autorité parentale après le divorce serait un principe de base, et seulement si c'est dans l'intérêt de l'enfant le cour peut décider que les droits parentaux va accomplir un seul parent. Ceci est cohérent avec l'intérêt supérieur de l'enfant, ainsi qu'avec la Convention des Nations Unies relative aux droits de l'enfant et les tendances dans les législations contemporaines.

I INTRODUCTION

In the past decades in all Western countries the number of divorces has dramatically increased,¹ which is one of the main reasons for the disruption of the existing family model and the emergence of pluralism of family forms.²

* Dejan Mickovik, PhD, Associate Professor at Faculty of Law 'Iustinianus Primus', University 'Saints Cyril and Methodius', Skopje, Republic of Macedonia.

Angel Ristov, PhD, Assistant Professor at the Faculty of Law 'Iustinianus Primus' University 'Saints Cyril and Methodius', Skopje, Republic of Macedonia.

¹ In the countries of the European Union in 1960 only 170,000 marriages ended in divorce; in 1993 there were 636,000 divorces, and in 2006 the number of divorces increased to 1,040,000. See more: Spirovikj-Trpenovska, Mickovik and Ristov, *Family Law Act* (Blesok, Skopje, 2013) p 54.

² See more about the pluralism of family forms in: Mickovik, *Family in Europe XVI – XXI century* (Blesok, Skopje, 2008) pp 183–195. According to Castels nowadays there is no longer only one existing family model. In contemporary societies there is a diversity of family forms.

Seen from a legislative perspective, one of the most significant reforms in family law systems is the liberalisation of divorce.³ In addition, all jurisdictions have been faced with the dilemma of how to regulate the exercise of parental rights and responsibilities after divorce. This question is extremely important because of the fact that many studies show that divorce causes severe and long-term negative consequences for children, and affects all aspects of their lives.⁴

Under the influence of changes in marital and family relationships, a significant transformation has been taking place in contemporary legal systems in the last few decades. Instead of protecting the marital relationship by prohibiting divorce, or providing that divorce is possible only in the case of the fault of one of the spouses, modern legislation protects the relationship between parents and children.⁵ In most European countries there is a tendency for parents to continue to jointly perform parental rights after divorce, unlike before, when children were entrusted solely to one of the parents, in most cases to the mother.⁶

See more: Castels, *The Power of Identity* (Blackwell Publishers, London, 1999) p 227. In this sense, Judith Stacey states that conditions in the post-industrial society led to the creation of many different family models. See more: Stacey, *In the Name of the Family, Rethinking Family Values in the Postmodern Age* (Beacon Press, Boston, 1996) p 7.

³ According to Mary Ann Glendon, as opposed to the previous period when divorce was allowed only in exceptional cases, today it is possible to divorce by mutual consent of the spouses or by unilateral request by one of the spouses. See more in: Glendon, *The Transformation of Family Law Act: State, Law, and Family in the United States and Western Europe* (University of Chicago Press, Chicago and London, 1989) p 226. According to Patrick Parkinson, previously divorce was possible exclusively because of the fault of one or both marital partners, and today in most Western countries, a marriage can be dissolved by unilateral decision made by one of the spouses, even when the other opposes the divorce. Parkinson, 'Family Law Act and the Indissolubility of Parenthood', *Legal Studies Research Paper*, No 06/31, October 2006, University of Sydney, Sydney Law School, p 3.

⁴ According to Paul R Amato many studies show that the parents' divorce has negative consequences for the children when they grow up, including lower socio-economic status, marital problems and greater likelihood of divorce. See more in: Amato, 'The Consequences of Divorce for Adults and Children' (2000) 62(4) *Journal of Marriage and Family* 1279.

⁵ In this sense, Patrick Parkinson says that in contemporary societies the state, instead of proclaiming the indissolubility of marriage, foreshadows the indissolubility of parenting. Patrick Parkinson, above n 3, p 2.

⁶ Earlier, in 90% of the cases the mother had exercised the parental rights after divorce, and the father had only the right to maintain personal contact with the child. See in Meldeurs-Klein, *La personne, la famille et le droit, Trois décennies de mutations en occident* (Bruylant, Brussels, LGDJ, Paris, 1999) p 266. In recent years, the joint exercise of parental rights after divorce is widely accepted. In France, the Law of 2002 introduced the joint exercise of parental responsibilities by both parents as a basic principle, which means that the termination of the marital relationship has no effect on parental responsibility. In Germany, the legal changes from 1998 provide that after divorce the parents continue to jointly perform the role of providing parental care in relation to the child, without a decision by the court. In Sweden there is a general assumption that the joint performance of parental rights is in the best interest of children, so the court can decide that both parents exercise parental rights after divorce, even when one of them does not agree with the decision. In 2002, in Sweden in 97% of the cases, both parents continued to jointly exercise their parental rights after divorce. About the joint exercise of parental rights after divorce, read more in: Spirovikj-Trpenovska, Mickovik and Ristov, above n 1, pp 203–213. In Spain, in the autonomous region of Aragon, with the

The major changes in marital and family relationships, and the profound reforms in family legal systems, which are common to all European countries, are also happening in the Republic of Macedonia. However, due to its specific historical, cultural, economic and political conditions, family transformations in Macedonia took place much later in comparison with some other European countries. In this regard, it is interesting that the Republic of Macedonia, according to a survey conducted between 1990 and 2000, had the lowest rate of divorces in Europe.⁷ The causes of this were numerous: the patriarchal relations, the strict customary and moral norms, the economic crisis as well as the high unemployment rate of 30%. However, in recent years the trend of a growing number of divorces is visible in Macedonia too.⁸

Divorce is connected with many legal consequences related to the spouses and the common children.⁹ The most important consequences associated with divorce are closely related to the exercise of parental rights and responsibilities after divorce. In this sense, which of the spouses shall be entitled to raise the child, by what criteria the court will be guided in making its decision, as well as many other similar questions constitute very important issues that in the end, determine the proper physical and mental development of children.¹⁰

The authors of this chapter make a thorough analysis of the Macedonian family law which regulates the exercise of parental rights after divorce, in order to determine whether it is in accordance with the UN Convention on the Rights of the Child,¹¹ and with the legislative trends in other European countries concerning legal regulation of the exercise of parental rights after

amendments of 2010, the joint exercise of parental rights has been given priority in cases when the partners cannot agree upon the exercise of parental rights after divorce. See more in Hayden, 'Shared Custody: A Comparative Study of the Position in Spain and England', *InDret, Revista Para el Analisis del derecho*, Barcelona, January 2011, p 4.

⁷ According to Matthijs Kalmijn, there were major differences in divorce rate among certain regions in Europe in the period from 1990 to 2000 (divorce rate indicates the number of divorces per 1,000 inhabitants). The divorce rate in Western Europe during this period was 2.24, in Northern Europe 2.36, in Central and Eastern Europe divorce rate was the highest – 2.93, and the lowest rate was registered in the South East Europe – 0.84. The divorce rate in the Republic of Macedonia in this period was only 0.38, and was significantly lower compared to other countries in the region. See more in Kalmijn, 'Explaining cross-national differences in marriage, cohabitation, and divorce in Europe, 1990–2000' (2007) 61(3) *Population Studies* 249.

⁸ According to the State Statistical Office, in the Republic of Macedonia there were 710 divorces in 1995, in 2005 the number was 1,552, and in 2011 the number of divorces increased to 1,753. See in Spirovikj-Trpenovska, Mickovik and Ristov, above n 1, p 54.

⁹ On the consequences of divorce for spouses and children in Macedonian law see more at: Spirovikj-Trpenovska, Mickovik and Ristov, above n 1, p 159–162; Hadzivasilev, *Family Law Act, Self-government practice* (Skopje, 1987) p 214–221.

¹⁰ On the exercise of parental rights in practice see more details in: Toshanova, Trajchovska and Jovanov-Trajkovska, 'The Exercise of Parental Rights, Termination of Parental Rights and Prolongation of Parental Rights', in Chavdar (ed), *The Family Legislation of the Republic of Macedonia* (Supreme Court of Macedonia, Skopje, 1994) pp 103–105.

¹¹ For more about the level of harmonisation of national legislation with the Convention on the Rights of the Child see Davitkovski, Buzarovska–Lazhetikj, Kalajdziev, Mickovik and Gruevska Drakulevski, *Comparative Overview of Legislation in the Republic the Macedonia and the Convention on the Rights of the Child* (Ministry of Justice, Republic of Macedonia, Skopje, 2010).

divorce. The first part of the chapter briefly presents the legal framework that regulates the exercise of parental rights during the marriage. The second part is devoted to the analysis of norms governing the exercise of parental rights after divorce, in the case of divorce by mutual consent of the spouses, as well as in the case of divorce at the request of one of the spouses. The third part analyses the role of the Centres of Social Work and the Courts in the exercise of parental rights after divorce. In the fourth part, the authors present some proposals for amendments to the Macedonian family law in relation to the exercise of parental rights after divorce.

II THE EXERCISE OF PARENTAL RIGHTS DURING MARRIAGE IN THE REPUBLIC OF MACEDONIA

In the family law of the Republic of Macedonia the term 'parental rights' is used, but the authors consider that it would be more appropriate to replace this term with the term 'parental responsibility'.¹² According to the Family Law Act (FLA)¹³ the parents exercise parental responsibility jointly and by agreement (art 76 FLA).¹⁴ According to the principle of equality, the parents have equal rights and duties regarding their children. This provision is consistent with the principle of shared responsibility of parents, envisaged in Art 18 of the UN Convention on the Rights of the Child, according to which both parents have common responsibilities for the upbringing and development of children.¹⁵ When children live with their parents it is assumed that there is an agreement among the parents concerning the exercise of parental rights. In the case of disagreement among the parents in exercising their parental rights, the Centre of Social Work is entitled to make a decision.

¹² The term 'parental responsibility' is more appropriate, because it describes better the essence of the relationship between parents and children in modern legislation, in which parents have particular responsibilities and obligations to their children, and the rights of the parents towards the children are determined only to the extent which is needed to fulfil their responsibilities. The term 'parental responsibility' is used in the UN Convention on the Rights of the Child, as well as in numerous European jurisdictions. According to Stephen M Cretney, in Britain, at the time of enacting of the Children Act in 1989, it was considered that the words 'responsibilities' and 'obligations' better describe the interests of the parents, rather than the term 'rights', and, because of this view, the term 'parental responsibility' was adopted in the law. See more at: Cretney, *Family Law Act* (Sweet & Maxwell, London, 1997) p 168. Beside that, in Recommendation 974 (1979) of the Council of Europe it is highly recommended that the term 'parental right' should be replaced by the term 'parental responsibility'. On dilemmas over which term should be used in the French law see more at: Malaurie and Fuchiron, *La Famille* (Lextenso éditions, Paris, 2009) p 602.

¹³ Official Gazette of Republic of Macedonia' n 80/92, 9/96, 38/04, 33/06, 84/08, 67/10, 156/10 and 39/12.

¹⁴ Parental rights can be carried out by only one of the parents even though the other parent is alive. That will be the case when the other parent: (1) is prevented from exercising parental rights; (2) the place of habitude and residence is not known; (3) is deprived of parental rights, and (4) has lost legal capacity or has limited legal capacity.

¹⁵ The equal status of the parents is also guaranteed in the Protocol 7 of the European Convention on Human Rights, which provides that spouses have equal rights and obligations in relation to their children for the duration of marriage and in the event of its termination.

The right of children to live with their parents is of utmost importance, and for that reason the UN Convention on the Rights of the Child prohibits the separation of the child from the parents against their will. The Family Law Act of the Republic of Macedonia provides that minor children have the right to live with their parents. In this regard, the separation of children from parents is allowed only exceptionally, when it is necessary and it is in the best interest of the child, followed by a decision of a competent national authority according to legally established procedures.¹⁶

The Family Law Act regulates the performing of parental rights when a child's parents do not live together, but the marriage is not yet ended by divorce.¹⁷ In this case they should reach an agreement about which of them the child will remain living with¹⁸ and in which manner the non-resident parent will maintain personal relations and direct contact with the child.¹⁹ If the agreement is in the best interest of the children, the legislature expects its observance. If the parents cannot agree on these issues, or the agreement is not in the interests of children, then the Centre of Social Work is responsible for reaching the decision.

III PARENTING AFTER DIVORCE

Macedonian law provides three grounds for divorce: (a) by mutual consent of the spouses; (b) at the request of one of the spouses if the marriage relationship has been disrupted to an extent which makes common living unbearable; and

¹⁶ If it is necessary from the standpoint of the interests of the child, the parents can entrust the child to a third person or suitable institution (that would take care of child's upbringing). If the parents or the parent who solely exercises parental rights are deprived from doing so for a while, similarly in situations when for justified reasons the parent is absent from home for a longer period of time (and does not take the children with herself/himself), the children can be entrusted for their care and upbringing to a third person, only if the Centre of Social Work gives permission for this.

¹⁷ Article 78 of the Family Law Act.

¹⁸ 'In cases where the child's parents do not live together, they agree which of them the child will remain living with (and to be raised and cared for), and if they cannot agree or if their agreement does not meet the interests of the child, then the Centre of Social Affairs will make the decision. The Centre of Social Affairs, at the request of a parent or ex officio, will make a new decision on entrusting the child for care and upbringing, where that is required by the modified circumstances' (art 78 of the Family Law Act).

¹⁹ 'In cases where the child's parents do not live together they should agree on the manner of maintaining personal relations and direct contact with the child. If the child's parents within two months do not agree on how to maintain personal relations and direct contact with the child, the Centre of Social Affairs will make a decision. While determining the child's personal relations and direct contacts with the parents, the Centre of Social Affairs shall inform the child about the ongoing procedure, and it shall take into account its views and opinions according to its age and level of development. The Centre of Social Affairs, on a request submitted by the parent, can decide again on the manner of maintaining personal relations and direct contact between parents and children, if that is required by the modified circumstances. The maintenance of personal relations and direct contacts of children with their parents may be limited or barred only temporarily for health reasons and other interests of the child' (art 79 of the Family Law Act).

(c) by factual termination of the common life at least for a year.²⁰ Therefore, the guilt of the partners has no importance in the grounds for divorce in Macedonian family law. Given the primacy that should be provided to the interest of the children, the legislation provides that, in the content of the judgment by which the marriage is dissolved, the Court will decide on guardianship, upbringing and maintenance of common children.²¹ In addition, it should be noted that the Family Law Act does not contain specific rules that regulate the exercise of parental rights after divorce.²² This means that after the divorce the parent to whom the children are not entrusted for upbringing and care does not lose parental rights.²³ But in practice the situation is different. In Macedonia it is common that the parent of the child entrusted by the court with the right of bringing up the child (guardianship and education are key elements of parental rights) is the one who exercises the parental rights and makes most decisions regarding the child. The other parent has the right to maintain personal relations with the child and has the obligation to pay child support. Due to the fact that the children after the divorce are usually entrusted to the mother, the fathers are isolated from the child's life and restrained from the process of making the most crucial decisions regarding child's interests.²⁴ Undoubtedly, this legal gap in the national legislation relating to the exercise of parental rights after divorce causes problems in practice and is contrary to the purpose of the legislature, which underlines that the child should be cared for, brought up and maintained by both parents, regardless of their status and mutual relations.

²⁰ For more on the grounds for divorce in the Macedonian Family Law Act see Spirovikj-Trpenovska, Mickovik and Ristov, above n 1, pp 140–142.

²¹ Article 80, para 1 of the Family Law Act.

²² Unlike the Macedonian law, the Serbian law expressly predicts the existence of two types of parental rights – joint and individual exercise of parental rights. For this, see more details in: Panov, *Family Law Act* (Faculty of Law, University in Belgrade, Belgrade, 2010); Kovacek Stanikj, *Family Law Act: Partnership, Children and Custodial Law* (Faculty of Law in Novi Sad, Novi Sad, 2007) pp 310–318; Drashkikj, *Family Law Act and Children's Rights* (JP Official Gazette, Belgrade, 2009) pp 288–295; Pochucha, *Family Law Act* (University Chamber Academy, Novi Sad, 2010) pp 182–185. Such a solution is also provided in the domestic legislation of Republic Srpska. Guided by the interests of the child, the Court shall order single or joint exercise of parental rights. See more at Bubich and Traljich, *Parental and Custodial Rights* (Faculty of Law, University Sarajevo, Sarajevo, 2007) pp 176–182.

²³ The same view is expressed by Mile Hadzivasilev, above n 9, pp 220–221. For a similar view see Toshanova, Trajchovska and Jovanov-Trajkovska, above n 10, p 104.

²⁴ This practice in the Republic of Macedonia is contrary to the provision of art 76 of the Family Law Act which provides that parents perform their parental rights jointly and in agreement, and it is contrary to the UN Convention on the Rights of the Child. Furthermore, many studies show that the involvement of the father in the child's upbringing and socialisation is beneficial for the child's welfare after the divorce. According to an analysis of 63 studies that have investigated the relationship between the father and the children who did not live together after divorce, Amato and Gilbreht concluded that the proper exercise of parental responsibilities by the father is associated with the children's improved academic outcomes and fewer problems in their psychological development. See more at: Amato, above n 4, p 1280. According to one study, the intensity of contact with the child's father after divorce positively affects the financial contribution made by the father by way of child alimony. See more at: Juby, Le Bourdais and Marciel-Gratton, 'Sharing Roles, Sharing Custody? Couples' Characteristics and Children's Living Arrangements at Separation' (2005) 67(1) *Journal of Marriage and Family* 157.

(a) Divorce by mutual consent

The first ground for divorce envisaged in the Macedonian legislation is the mutual consent of the spouses.²⁵ According to the Family Law Act, the spouses should express their mutual consent for divorce in the proposal for divorce. Spouses are not required to state the reasons that led them to file for a proposal for divorce by mutual consent. Moreover, in the case of divorce by mutual consent of the spouses the Court is not obliged to determine the real causes for the divorce. Nevertheless, if the spouses have common minor children or adult children over whom the parental rights have been prolonged, along with the proposal for divorce, the spouses must submit an agreement about the exercise of parental rights, including the payment of alimony for the child. In providing this rule the legislature was guided by the belief that the parents know their family situation and therefore they are most competent to assess what will be best for their children. The agreement must be submitted in writing or must be given verbally in the record in front of the competent court. During the evaluation of the agreement the Court has an obligation to obtain an opinion from the Centre of Social Work on whether this agreement is in the best interest of the children. Practice shows that Centres of Social Work almost always respect the agreement reached by the parents. Otherwise, if the spouses have not reached an agreement on raising and bringing up their children after the divorce, the proposal for divorce by mutual consent will be rejected by the Court, so the married couple will not be able to divorce on this legal basis. If the spouses have reached an agreement for which the Centre of Social Work has given a positive opinion, the Court will make a decision on divorce by mutual consent, but only after it determines that the spouses gave their consent freely, seriously and unyieldingly.²⁶

(b) Divorce by a lawsuit

Upon the request of one of the spouses the marriage can be dissolved: (1) if the marriage relations are disrupted to the extent that joint life is unbearable (art 40 of the FLA)²⁷ and (2) if the marital union has actually ceased for more than one year (art 41 of the FLA).²⁸ When marriage is dissolved on these grounds, guilt as a subjective factor is not subject to evaluation by the court. The guilt of

²⁵ Article 39, para 1 of the Family Law Act.

²⁶ Article 39, para 3 of the Family Law Act.

²⁷ The disruption of relations, although it cannot be defined precisely, represents an objective condition which is determined on the basis of certain criteria on the environment in which the partners live, and based on generally accepted standards of human relations. An unbearable condition of living together undoubtedly is a subjective category, because it depends on the subjective assessment of each of the spouses of the situation and the circumstances that led to deteriorated relations. When it comes to divorce due to deteriorated relations between spouses, the court does not have an obligation to establish the fault for the disruption of marital relationships that led to divorce.

²⁸ It is mandatory for one of the spouses to file a lawsuit before the competent court asking for a divorce on the basis of actual cessation of marriage. Otherwise, the marriage remains formally valid, though the common life among the spouses actually ceased to exist in the legally prescribed term.

the spouses may be of importance only when the court is deciding on the request for spousal maintenance after the divorce.

In cited cases, as part of the divorce judgment the Court decides on the upbringing, education and maintenance of the children.²⁹ If parents have not reached an agreement or if their agreement does not meet the interests of the children, the Court will decide upon this question after obtaining an opinion from the Centre of Social Work and after examining all of the circumstances. Depending on this, the Court may decide from the following: (1) the children to stay for upbringing and education with one of the parents, (2) some children to remain with the mother, and some with the father and (3) all children to be entrusted to a third person or an institution.³⁰

The parent to whom the children have not been entrusted for upbringing and education has the right to maintain personal relations and direct contact with them, unless the court decides otherwise in view of the interests of children.³¹ If the changed circumstances so require, at the request of one of the divorced spouses or the Centre of Social Work, the Court may amend its decision on upbringing and education of the children and on the relations of the divorced spouses towards their common children.

IV THE ROLE OF THE AUTHORITIES IN DECIDING ON THE EXERCISE OF PARENTAL RIGHTS AFTER DIVORCE

In Macedonian family law the competence for deciding on the exercise of parental rights after divorce is entrusted to the Courts and the Centres of Social Work. The Court has the competency to decide on whom to entrust the upbringing and education of the common children to and on their maintenance after divorce, based on the opinion of the Centre of Social Work and after investigating all the circumstances of the case. The Centre of Social Work is responsible for arranging personal relations and direct contact between the non-resident parent and the children after the divorce. Under the Macedonian legal system the Centre of Social Work has very extended competences that are of direct relevance to the development of children, unlike the Court itself.³²

²⁹ The court shall decide on giving the care of the child to one parent when: (1) it makes a decision that the marriage does not exist, and (2) in disputes about filiation, paternity or maternity if the making of the decision about the dispute and circumstances of the case is possible and necessary (art 81, para 1).

³⁰ Article 80, para 2 of the Family Law Act.

³¹ Article 80, para 3 of the Family Law Act.

³² Unlike the Macedonian legislation, the situation in other countries in the region is significantly different. With the recent reform in Bosnia and Herzegovina and Croatia, the competences of the Centre of Social Work in the sphere of the exercise of parental rights are significantly reduced, and the courts have increased competences to decide on the exercise of parental rights after divorce. The law of the Republic of Srpska in only one case permits the Centre of Social Work to decide with which of the parents the child will live after divorce. In all other situations, such as when deciding on giving the care of the child's upbringing and education to one parent,

These competences of the Centre of Social Work are contrary to the Convention on the Rights of the Child, which clearly provides for judicial competence.³³ The legal regulation of the competences of the Centre of Social Work in terms of decision-making that resolves significant rights and interests of the child is also criticised by the Macedonian legal literature.³⁴

(a) The Centre of Social Work

According to the Family Law Act, the Centre of Social Work has significant powers in the sphere of the exercise of parental rights during the marriage and after the divorce.³⁵ If parents fail to agree on the exercise of parental rights after divorce, or if their agreement does not meet the interests of the children, the Court, before making a decision, has an obligation to seek the opinion of the Centre of Social Work. The opinion of the Centre of Social Work regarding the upbringing and education of common children after divorce is prepared by its expert teams composed of psychologists, pedagogues, social workers and lawyers. The final decision on entrusting the children after divorce is delivered by the Court, but the practice shows that the Court in most of the cases accepts the opinions of the Centre of Social Work. The basic problem is that the Macedonian Family Law Act does not stipulate an obligation to consider the child's opinion in determining with which parent the child will live after the divorce. This is in direct contradiction to Art 12 of the UN Convention on the Rights of the Child, which stipulates that the child has the right to express an opinion in any judicial and administrative proceedings deciding on the child's rights and interests.³⁶ In an analysis of the harmonisation of national legislation with the UN Convention on the Rights of the Child one of the basic remarks refers specifically to this issue,³⁷ bearing in mind that the child's right to express an opinion, and to be considered, depending on the age and maturity of the child, is one of the fundamental pillars of the UN Convention on the Rights of the Child.³⁸

as well as for maintaining personal relationships and contact with the child, the court decides. See more at: Bubich and Traljich, above n 22, pp 176–182. Under Croatian law, the competence of the Centre of Social Work is reduced only when entrusting the exercise of parental rights in relation to the child's upbringing and education to another person. See more at: Alinčić, Hrabar, Jakovac-Lozić and Korać-Graovac, *Obiteljsko pravo* (Narodne Novine, Zagreb 2007) p 264.

³³ Article 9 of the UN Convention on the Rights of the Child.

³⁴ This point of view in the Macedonian legal literature is advocated by Borche Davitkovski, Gordana Buzarovska-Lazhetikj, Gordan Kalajdziev, Dejan Mickovik and Aleksandra Gruevska Drakulevski. See more in: *Comparative Review of Legislation in the Republic of Macedonia and the Convention on the Rights of the Child*, above n 11, pp 84–85.

³⁵ For more about this see Petrushevski and Josifovska 'The Conciliation of the Spouses before the Centre of Social Work and the Participation of the Centre of the Social Work in the Procedure of Giving the Care of Children to One Parent', *Family Legislation of the Republic of Macedonia* (Supreme Court of Macedonia, Skopje, 1994) pp 252–260.

³⁶ Article 12 of the UN Convention on the Rights of the Child.

³⁷ See more at: Davitkovski, Buzarovska-Lazhetikj, Kalajdziev, Mickovik and Gruevska Drakulevski, *Comparative Review of Legislation in the Republic of Macedonia and the Convention on the Rights of the Child*, above n 11, p 108.

³⁸ The absence of a legal obligation for taking into account the opinion of the child when

The primary interest of child is paramount when the Court decides with which parent the child will remain for guardianship and upbringing after the divorce, while other elements, such as guilt for causing the divorce or the financial situation of the spouses, are not decisive in assessing whether the child or children are going to be entrusted to one or the other parent, or will be entrusted to a third person or a guardianship facility. In this regard, the Court Skopje 1 held that the Centre of Social Work unlawfully awarded the child to the father, on the grounds that the family home was in his possession, despite the fact that the father committed domestic violence against the mother in front of the child's eyes.³⁹ Such a decision by the Centre of Social Work is completely unacceptable because the perpetrator of domestic violence was awarded custody over the child on the grounds that he was the owner of the family home and therefore had better housing conditions.

One of the most important issues that arises when parents are divorced is the right of the non-resident parent to maintain personal relations and direct contact with the child. Legislation provides the possibility for parents to settle this issue by an agreement. But if the child's parents within 2 months do not come up with an agreement regarding personal relations and direct contact with the child, the Centre of Social Work shall decide upon this matter. This situation is very common, as a result of the disturbed relations between parents after divorce, which negatively influences the child's development. In the Macedonian Family Law Act there is no legal provision which regulates the issue of the extent of personal contact between one parent and the child, if the parents do not live together. This important issue is at the discretion of the Centre of Social Work, and its decisions frequently cause conflict, which

deciding which parent will be awarded custody of the child is a major omission by the Macedonian legislature, especially if we bear in mind that in the Family Law Act (art 79, para 2) it is provided that, when parents do not live together, the Centre of Social Work, when deciding on the arranging of personal relations and direct contact of the child with the parent, has an obligation to inform the child and is obliged to take into account the child's views and opinions, depending on the child's age and level of development. This means that the legislature stipulates an obligation to take into account the opinion of the child on maintaining personal contact with the parent with whom the child does not live, but does not provide an obligation to hear the opinion of the minor on a more significant issue such as the confining of the child's upbringing to one of the parents after divorce.

³⁹ After a conflict between the spouses happened the respondent was dragged by her hair down the stairs and literally was driven out of the apartment in which the family then lived. The respondent attempted to take the child away with her, but was prevented by the plaintiff. The respondent was forced to leave the child at home and go to her parents. The only reason according to which the professional team of the Municipal Centre of Social Work expressed the opinion that minor A should be entrusted for upbringing to the father was the better housing conditions, which was the only issue with the respondent that remained unresolved. But the court decided as stated in the text because it believed that the child's priority at this age was to be with the mother. This Court held that the act of expulsion of the mother from the home in front of the child's eyes was a violent act that the child will never forget, and will affect the formation of his conscience and subsequent understandings. If such violence, condoned by the Centre of Social Work, were subsequently acknowledged by the Court, in that situation the black image in the consciousness of the child would be complete – the child will realise that violence is beneficial, and that the mother's love is less important than having a children's room with a computer. Trial Court Skopje 1 – Skopje judgment 17.P1-862/11 from 4 January 2012.

negatively affects the children. Practice shows that the contact of the child with the non-resident parent (and it is usually the father) is very restrictively determined by the Centre of Social Work. This is contrary to the UN Convention on the Rights of the Child, which provides that a child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the best interests the child.⁴⁰ Therefore, we believe that, in the process of amending the existing family law, the issue concerning the extent and type of contact of the child with the non-resident parent must be precisely regulated, thus always keeping in mind the best interest of the child.

The Centre of Social Work has extremely wide powers in the supervision of the performance of parental rights, and maintenance of personal relations and direct contact with the child. In this sense, the Centre of Social Work can take the child from one parent, and entrust the guardianship and upbringing of the child to the other parent, or any other person or adequate institution, when parents or the parent with whom the child lives neglects the child in terms of upbringing and education, or when there is a serious danger to the child's proper development and upbringing.⁴¹ Such a solution is contrary to the UN Convention on the Rights on the Child which provides a judicial review when decisions are made by which a child is separated from one or both parents. This solution is contrary to the Law on Non-Litigation Procedure of the Republic of Macedonia, which envisages that the Court, and not the Centre of Social Work, is authorised to revoke or restrict parental rights.

If the non-resident parent has not provided maintenance for the child for more than 3 months, the Centre of Social Work may decide to limit his right to maintain personal relations and direct contact with the child.⁴² In a time of economic crises, when poverty and unemployment are common in Macedonian society,⁴³ this legal solution which gives priority to material values seems illogical and inhuman. This legal solution represents a sanction against the parent, but it is a punishment for the child as well, because the child has a right and interest to maintain personal relations and direct contact with both parents. In order to respect the interests of the child, the state should find other suitable solutions for providing alimony in cases where the parent does not pay child support, rather than envisaging bans on parents in maintaining personal contact with the child.⁴⁴

⁴⁰ Article 9, para 3 of the UN Convention on the Rights of the Child.

⁴¹ Article 87, para 1 of the Family Law Act.

⁴² Article 87, para 2 of the Family Law Act.

⁴³ Unemployment and poverty are the two biggest problems which Macedonia faces nowadays, due to the fact that almost 30% of the population is unemployed, and the same is the percentage of poverty in the country.

⁴⁴ A good example of a legal solution in cases when the parent is not paying for child support is found in the Bulgarian Law, where it is envisaged that in this case the burden of the child's support falls on the State Budget, which has the right to require execution against the property of the parent who has not paid the support. More on this can be seen at: Mateeva, *Family Law Act of Republic of Bulgaria* (VSU 'Chernorizec Hrabar' Sofia, 2010) pp 476–496; Cankova,

The Family Law Act provides other situations where the Centre of Social Work is authorised to limit contact of one parent with the child after divorce. The Centre of Social Work may make a decision to limit the right of the non-resident parent to maintain personal relations and contact with the child in cases where the parent has not respected the decision of the Centre of Social Work for more than three consecutive times without justification.⁴⁵ Thus, the legislation leaves a broad discretionary authority with the Centre of Social Work to determine if the reasons for which the parent has not respected the decision were justified or not, which nonetheless affects a child's right to maintain personal relations and contact with the parent. In practice, major problems are caused by the legal solution under which the Centre of Social Work may make a decision to limit or to ban the parent's right to maintain personal relations and contact with the child for a period of time, but no longer than 6 months, if the parent has not returned the child in the time scheduled by the decision, or if the parent has retained the child longer than the time specified in the decision.⁴⁶ So, the legislature opted to entrust very wide powers to an extrajudicial authority to limit the contact of the child with the non-resident parent.

Considering the above, it is necessary for the legislature to review the role and responsibilities of the Centre of Social Work, and to transfer its authorities concerning the exercise of parental rights after divorce to the court's jurisdiction.⁴⁷ Otherwise, instead of resolving the problems connected with the exercise of parental rights after divorce, the decisions made by the Centre of Social Work will continue to cause problems in practice, to the detriment of the interests of children.⁴⁸

(b) The Court

When the Court reaches a decision about divorce, it must decide to which parent the children will be entrusted for guardianship and upbringing. When

Markov, Staneva and Todorova, *Comments on the New Family Code* (IK 'Labour and Law', Sofia 2009) pp 420–421; Markov, *Family and Inheritance Law* (Sibi, Sofia, 2009) p 161.

⁴⁵ Article 87, para 3 of the Family Law Act.

⁴⁶ Article 87, para 5 of the Family Law Act.

⁴⁷ Under the Croatian law, through the narrowing of the competences of the Centre of Social Work, the jurisdiction of the Non-Litigation Court has significantly increased. In this respect, the Non-Litigation Court is competent to decide with which parent the child will live, personal relations and direct contact and the manner and timing of their realisation, as well as the restriction and prohibition of such relationships. For this, see more at: Alinčić, Hrabar, Jakovac-Lozić and Korać-Graovac, above n 32, pp 267–280.

⁴⁸ In the Republic of Macedonia, children after divorce are usually entrusted for upbringing and education to the mother. The competence of the Centre of Social Affairs to restrict the contact of the child with the father has serious negative implications for the proper development of the child. According to McLanahan, who did an overall analysis of several researches dedicated to the children's welfare after divorce, the lack of contact with the father after divorce is associated with achieving poorer results at school among observed male and female children, higher unemployment among boys and higher number of juvenile pregnancy cases among the girls. See Bauserman, 'Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements, A Meta-Analytic Review' (2002) 16(1) *Journal of Family Psychology* 91.

making the decision, the Court is guided by the best interests of the child, and thus takes into account all the facts and circumstances of the particular case. One fact or circumstance will not always by itself be determinative for the Court in reaching its decision. In this respect, the Supreme Court of the Republic of Macedonia reached a decision that the beneficial financial situation of one of the parents is only one of the touchstones, but not a sufficient criterion, for the award of the child to such a parent for upbringing, education and maintenance.⁴⁹ Fault for the divorce should not affect the decision to which parent the child will be entrusted for upbringing after divorce. In this regard, the Supreme Court of Macedonia has accepted the standpoint according to which fault for the disruption of marital relations by one of the spouses cannot be an obstacle for that spouse to be entrusted with the right to bring up and educate the child, if this solution is in the best interests of the child.⁵⁰

The parent to whom the child is not entrusted for upbringing and education has the right to maintain personal relations with the child in a manner and extent agreed by the parents, or as has been decided by the Centre of Social Work. Considering that for normal psychological development the child needs both a mother and a father, modern family legislation introduces the concept of joint execution of parental responsibilities after divorce.⁵¹ The concept of joint participation of parents in the care of the child is provided in the most important international documents related to the rights and interests of children.⁵² Despite the fact that the child's custody is given only to one parent, the joint exercise of parental rights involves joint decision-making on all important issues related to the life, health, education, upbringing and representation of the child. The basic assumption for the joint exercise of parental rights by both parents after the dissolution of marriage is their willingness to make decisions that are in the best interest of the child.

⁴⁹ See: Review of the Supreme Court of Republic of Macedonia 99/89 VSM III decision 28.

⁵⁰ See: Supreme Court of Republic of Macedonia Gzh 497/65, Zb VSM I decision 3.

⁵¹ The joint exercise of parental rights after divorce is a general tendency in modern legislation. According to Patrick Parkinson, in many countries laws have been changed in order to allow the joint exercise of parental rights after divorce. In some countries, such as Sweden, the court may decide on the joint exercise of parental rights after divorce contrary to the will of the parents. See Parkinson, above n 3, p 8. In the Netherlands in 1997, 34% of parents decided on the joint execution of parental rights after divorce, and after legislative reform 93% of parents opted for the joint execution of parental rights in 2001. See Jeppesen de Boer, *Joint Parental Authority* (Intersentia, Antwerpen, Oxford, Portland, 2008) p 4. In Austria, after the reform of 2001, 50% of parents opted for joint execution of parental rights after divorce. See more in Kränzl-Nagl, *Joint Custody after Divorce: Austrian Experiences*, Policy Brief, November 2006, European Centre, p 3. According to Irène Théry the family does not cease after the divorce, but is only experiencing transformation. According to Théry 'divorce is a transition between the original family community and the reorganization of the family, which remains the community, but bipolar'. Irène Théry, 'The Interest of the Child and the Regulation of the Post-Divorce Family' (1986) 14 Int'l J Soc L 341.

⁵² Article 5 and Art 9, para 1 of the UN Convention on the Rights of the Child; Recommendation on parental responsibilities of the Council of the Europe from 1987.

The parent who is not living with their children has the right to maintain personal relations and direct contact with them unless the court decides otherwise after taking into consideration the child's interests.⁵³ In this regard, the Supreme Court of the Republic of Macedonia reached the decision that the parent who has been given care of the child has authority to allow the other parent, despite regular weekly contact (one day per week), to take a child for a weekend once a month for a period of 2 to 3 days, and during the holidays, to spend 2 to 3 weeks with child.⁵⁴ At the request of one of the divorced parents or the Centre of Social Work, the Court may modify the decision on the upbringing of the children and the relations between the divorced parent and the children, if it is required by the changed circumstances.⁵⁵

V EXERCISE OF PARENTAL RIGHTS IN MACEDONIAN FAMILY LAW DE LEGE FERENDA

In the Macedonian Family Law Act there is no precise legal provision under which the parents jointly perform parental rights after divorce. The joint performance of parental rights arises from the provisions laid down in art 45 of the Family Law Act,⁵⁶ as well as from art 76 of the Family Law Act.⁵⁷ Hence, the legislature has foreseen the joint exercise of parental rights as a basic principle in family law. However, there is a need to explicitly predict the joint exercise of the parental responsibilities after divorce. In real life in Macedonia the parent to whom the children have been entrusted for upbringing after divorce makes all the important decisions concerning the rights and the interests of the children, and the other parent is awarded only the right to maintain personal relationships with the children and the obligation to pay child support. This negatively influences that parent's willingness to engage in maintaining a personal relationship with the child, because he is practically excluded from the opportunity to decide on the matters that are crucial for the future of the child. The joint exercise of parental rights after divorce is in the mutual interest of the father, of the mother and of the children.⁵⁸ In this context, it is important to amend the Family Law Act and to provide that the

⁵³ Article 80, para 3 of the Family Law Act.

⁵⁴ See: Supreme Court of Republic of Macedonia 1251/77, VSM II decision 149.

⁵⁵ Article 80, para 4 of the Family Law Act.

⁵⁶ According to art 45 of the Family Law Act: 'The parental right belongs equally to the mother and the father.'

⁵⁷ According to art 76 of the Family Law Act: 'The parents carry out the parental right mutually and by agreement.'

⁵⁸ According to Marjorie Lindner Gunnoe and Sanford L Braver the benefit for the father in the case of joint exercise of parental rights after divorce consists of feeling less emotional loss and depression, anger and discontinuity in performing the parental role. The benefit for the mother consists in a father's greater willingness to pay child support, more assistance in taking care of the child and more time for professional development. The benefits for the child are better relationships with both parents, better cooperation between parents in the exercise of parental responsibilities and better child adjustment after divorce. See more at: Lindner Gunnoe and Braver, 'The Effects of Joint Legal Custody on Mothers, Fathers, and Children Controlling for Factors That Predispose a Sole Maternal versus Joint Legal Award' (2001) 25(1) *Law and Human Behavior* 26, Special Issues on Children, Families, and the Law (February 2001).

joint exercise of parental rights after divorce should be a fundamental principle. The law should provide that the court may entrust the exercise of parental rights to one of the parents only if that is required by the interests of the child.

In addition, the law should be amended where it lists the competences of the Centre of Social Work in relation to the exercise of parental rights after divorce and the supervision over the exercise of parental rights. The Centre of Social Work has an extremely large competence when deciding about the exercise of parental rights after divorce. Under Art 6, para 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, in the determination of civil rights and obligations (including personal and family rights), everyone is entitled to a fair and public trial within a reasonable time by an independent and impartial tribunal established by law. Considering this, and the fact that court decisions provide a higher level of legal certainty, impartiality and flexibility in decision-making, we think that in the prospective amendments of the Family Law Act it needs to be underlined that the Court and not the Centre of Social Work should be competent to decide on issues related to the exercise of parental rights after divorce.

