

## Paternal responsibility in the Albanian judicial practice

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### Abstract

The purpose of this paper is to identify and analyze the problems that arise during the exercise of parental responsibility, seen in an interpretation of the legal norms that regulate this institute and local case law.

The paper aims to be mainly practical based on the legal practice of the Court of the Tirana Judicial District during the periods 2016-2019. In addition to parental responsibility, this paper also briefly addresses the problems of children's movement abroad, as a new issue for the courts of our country.

Parental responsibility is one of the institutes of family law, which is directly related to the highest interest of the child and as such it has a wide scope and appears several times in the Family Code. Parenting, like any other legal relationship, creates rights and obligations for the parties. Although the main principle of law in any relationship that is created between the subjects of law is the principle of equality of the parties, in this relationship (parenting) we notice that the highest interest of one party prevails, that of children.

**Keywords:** family code, parental responsibility, court, movement of children abroad, institute.

### 1. Parental responsibility

Parental responsibility includes the totality of rights and duties that are intended to ensure the emotional, social and material well-being of the child, caring for him, maintaining personal relationships with him, and providing him with upbringing, education, education, legal representation and administration of his assets (Mandro, 2009, 400).

Parenting, like any other legal relationship, creates rights and obligations for the parties. Although the main principle of law in any relationship that is created between the subjects of law is the principle of equality of the parties, in this relationship (parenting) we notice that the highest interest of one party prevails, that of children. This principle in fact describes all the provisions of the Family Code and fully complies with its spirit. This means that all relations of this kind will be conditioned by this principle, because it is higher and more primary (Mandro, 2009, 59).

According to the Family Code, the duty to respect this principle rests with the parents, the competent authorities and the court.<sup>1</sup>

The rights and obligations that parents have for their children can be grouped into two groups:

<sup>1</sup> Article 2 of the Family Code.

a- Rights and obligations of non-property character, related to the personality of the child

b- Rights and obligations of property character, which are exercised by the parents over the property of the children (Omari, 2010, 366).

The rights and obligations with non-property personal character in the parenting relationship are:

1. The right to name a child - this right belongs exclusively to the parents who decide it by agreement between them.

2. The obligation to care for minor children until they reach adulthood, enter into marriage, or reach the age of 25 if they continue their higher education. Parents who do not live together should agree on which of them the child will live with.<sup>2</sup>

3. Raising and educating the child. One of the functions of the family is to raise and educate children in the best possible way. In addition to a legal obligation to raise and educate children, it is an internal call that comes precisely from the parenting institute, an "institute" that creates unresolved connections and nodes between the parent and their children.

4. Parents have the obligation to create a family environment for children from birth to adulthood. The concept of family environment should be seen in two aspects: a) in the objective aspect - the creation of conditions and material goods that guarantee the rights of the child to have a normal life, this includes the provision of housing, clothing, food and in b) in the subjective aspect - the creation of a calm and warm family environment, characterized by love, care and avoidance of scenes of domestic violence. An environment that provides minors with a peaceful and trouble-free childhood. Despite the fact that parents are inclined to do the best for their children, their cultural, educational and economic level does not always favor them to make the right choice for their children.<sup>3</sup>

5. Natural and legal representation of minor children in the protection of their interests. Parents represent their minor child who has not attained the age of fourteen in all legal acts, except those which, according to the law, the juvenile may perform himself. The juvenile, who has reached the age of fourteen, commits the legal acts himself, but always with the prior consent of the parents, with the exception of those which, according to the law, he can perform himself. From the interpretation of the provisions we clearly see that parents are natural and legal representatives of children, in protection of their personal and property rights, without the need for a special act of representation.

Thus, in the decision no. 1415 dated 26.02.2019 of the Court of the Tirana Judicial District with the object of releasing the authorization for the alienation of the part in the immovable property in the name of the minor child E.Xh with address in Tirana. The applicant as a legal guardian requests the issuance of an authorization by the Court for the alienation of the corresponding part belonging to her child for immovable property, to which are attached the immovable property card and the indicative registration map, which shows that on this property neither the burden

<sup>2</sup> Article 197 of the Family Code "Obligation for food between parents and children".

<sup>3</sup> Article 22 of Law no. 69/2012 "On the pre-university education system in the Republic of Albania.

nor the leg is aggravated, as such an action, the alienation of the immovable property of the minor child exceeds the limits of a simple administration of the property, this and with reference to Article 293 / dh of the Family Code which provides that: "The guardian, without the authorization of the court, cannot: ... dh) alienate the property of the minor, except for fruits and movable goods that are easily damaged. Article 235 of the Family Code stipulates that "Parents may use the income from the child's property, which they administer, for his / her upbringing, education and upbringing. They can use this income to meet the essential needs of the family when they do not have enough wealth to meet it themselves. The remaining income is returned to the child's property.<sup>4</sup>

### 1.1 Duration of parental responsibility

As a rule, according to the Family Code in its Article 216, parental responsibility lasts from birth until the child reaches adulthood. However, there are some exceptions to the law when parental responsibility can end before or after reaching adulthood. Cases of termination of parental responsibility are divided into two groups as will be discussed below.

#### 1.1.1 Cases of termination of parental responsibility for natural causes

Parental responsibility ends for natural causes in the following cases:

1. With the arrival of the child in adulthood, which corresponds to the acquisition of the ability to act; A person over the age of 18 gains the ability to act but the parent still has responsibility over it while he or she is studying, up to the age of 25, but no longer in the full sense of the word, but only in terms of the obligation to feed the child.<sup>5</sup>
2. Before reaching the age of majority when the child enters into marriage before the age of 18 and in which case he acquires the ability to act, according to the provisions of Article 6 of the Civil Code. According to Article 311 of the Family Code, when a minor becomes an adult and has no capacity to act, the court assigns a guardian who may be one of the parents or another person. In this way the parent assumes the quality of guardian and refers to the principles of guardianship, provided in the Albanian legislation (Mandro, 2009, 412).
3. After reaching adulthood, in the case of children who pursue higher education, up to the age of 25, and in the case of children who due to mental illness or developmental disability have not acquired the ability to act.

#### 1.1.2 Cases of termination of parental responsibility for legal reasons

At the request of the interested parties, the court may decide on the removal or loss of parental responsibility, which are also the legal reasons for the termination of parental responsibility. Removal and loss of parental responsibility are a consequence of not fulfilling it.

##### 1.1.2.1 The loss of parental responsibility

Cases of loss of parental responsibility are provided for in Article 223 of the Family Code.<sup>6</sup>

<sup>4</sup> Decision No. 1415, dated 26.02.2019 of the Tirana Judicial District Court.

<sup>5</sup> Article 197/3 of the Family Code: "The obligation for alimony continues even for the time when adult children attend high or secondary school, up to the age of twenty-five.

<sup>6</sup> Article 223 of the Family Code.

Loss of parental responsibility is an irrevocable situation regarding the re-acquisition of parental responsibility by the parent who has previously lost it. Parents of a child may lose parental responsibility through a criminal decision that has convicted them as perpetrators or co-perpetrators of a criminal offense against their child, co-perpetrators of a criminal offense committed by their child or if they have been convicted of abandoning the family (Mandro, 2009, 400).

Checking in the legal practice of the courts of the Republic of Albania, i could not find cases of loss of parental responsibility. This may be due to the fact that we, Albanians, stand out for parents who always see the best interests of the child and cannot think of harming our children for any reason.

### **1.1.2.2 The removal of parental responsibility**

The removal of parental responsibility is provided for in Article 228 of the Family Code, the analysis of which, the reasons that may lead the court to removal parental responsibility are:

- a) parental abuse of parental responsibility,
- b) the parent shows gross negligence in exercising parental responsibility;
- c) the actions performed by the parent have a detrimental effect on the child's education.

Regarding the revocation of parental responsibility due to the abuse of parental responsibility by the parents, I have taken into consideration the decision no. 5541 of 26.04.2019 of the Court of the Tirana Judicial District. Plaintiff VW and the respondent RL, with the object of the lawsuit The removal of parental responsibility for the respondent R. L due to abuse of parental responsibility, shows serious negligence in its exercise and its actions adversely affect the education of children KL and S.L. In conclusion, the court, assessing that the defendant with his behavior towards children, as well as with his effective absence in their lives for a long time, so much so that the boy does not even remember his face, has neglected for no legal reason the parental responsibility for a long period of time. Through his actions, he has had a detrimental effect on their upbringing, and especially on the son, these circumstances which have passed due to the intervention and exercise of parental responsibility in full by the mother, who through her actions has shown that all the time it has seen and has as primary the highest interest of children.<sup>7</sup>

The cases brought below deal with the removal of parental responsibility due to the actions performed by the parent which have a detrimental effect on the child's education.

Thus, in the decision no. 10410, dated 21.12.2016 of the Court of the Tirana Judicial District, with object Objection of parental responsibility for the minor child F.Gj born on 19.10.2003, the respondent A.Gj and the assignment of full custody of the plaintiff ( mother of the minor), M.M. From the study of the file and the criminal decisions administered during the trial, it results for the criminal and premeditated actions of the citizen A. Gj, who shows his personality with criminal tendencies and is rightly required to limit the parental responsibility towards his minor child. to meet and communicate in the current conditions where the defendant is in a high security prison. Referring to Article 228 of the Family Code, which deals with the

<sup>7</sup> Decision No. 4551, dated 26.04.2019 of the Tirana Judicial District Court.

removal of parental responsibility, it is stated: *“at the request of the other parent, the child’s relatives or the prosecutor, parental responsibility may be waived. The revocation of parental responsibility is done by a court decision, being called as the defendant’s parent, for whom this removal is required.”*<sup>8</sup>

Decision no. 4003, dated 03.06.2019, of the Tirana Judicial District Court with plaintiff A.D. and defendants F.S. with the object *“regulation of the relationship of grandfather and grandmother with grandson and niece”*, where the court states that: *“In the conditions when the mother of two minor children K.D. and K.D. has passed away after being killed by her husband, while their father is in prison after killing his wife, the mother of his two children, who have been left without parental care. Currently, the only person who cares for them is the defendant F.S, their maternal grandmother, who has cared for and continues to care for their upbringing and education from birth onwards .... From this moment on (murder) the children have been taken into custody “de facto” by the respondent. The court decided to allow the grandfather to meet with the children. The practice in these cases has been directed by removing the parental responsibility to the parent, at the request of the interested parties, such as the prosecutor or the grandparents and relatives of the child.*<sup>9</sup>

In the decision no. 6496 dated 20.07.2016, the Court of the Tirana Judicial District, with the object of the lawsuit for the Abolition of the parental responsibility of the respondent Xh.M against the minor child O.M of the birthday 03.10.2011. *If the parents do not agree with what the child’s interest demands, they can go to court, which decides after trying to resolve the issue amicably.*<sup>10</sup>

Decision No. 1494 dated 28.02.2017 of the Tirana Judicial District Court with the object of the lawsuit the removal of the parental responsibility of the citizen SH.C against the minor Xh.C. The court, based on Article 228 of the Family Code, *considers that the parental responsibility should be removed from the defendant Sh.C., due to the serious act he has committed to the detriment of the upbringing and education of the minor. Due to the high social risk and the action taken, the respondent does not represent the highest interest in the minor and cannot bear this responsibility.*<sup>11</sup>

Also, in the decision no. 4020, dated 03.06.2019 of the Court of the Tirana Judicial District with the plaintiff F.S and the defendant A.D with the object of revoking the parental responsibility of the defendant on the minor children K.D dated 23.08.2010 and K.D. During the trial, the representative of the plaintiff claimed that: - The criminal offense committed by the defendant has damaged the family relationship, leaving the orphaned children without the necessary presence of their mother. This action of the defendant has brought strong shocks to the emotional state of the minor children, for whom, based on the age at which they are, it is necessary to raise them in a warm family environment, for a better upbringing and education. their sound. This misfortune has affected the emotional state of adopted children, making children feel afraid and insecure about their lives. The defendant, with the action he has committed, has shown serious negligence in exercising parental responsibility, not

<sup>8</sup> Decision No. 10410, dated 21.12.2016, Court of the Tirana Judicial District.

<sup>9</sup> Decision No. 4003, dated 03.06.2019, of the Court of the Tirana Judicial District.

<sup>10</sup> Decision No. 6496, dated 20.07.2016, Tirana Judicial District Court.

<sup>11</sup> Decision No. 1475, dated 28.02.2017 of the Tirana Judicial District Court.

thinking about the consequences that may happen to minor children. Under these conditions, the defendant is unable to exercise parental responsibility towards his children due to the deprivation of his liberty with 35 years of imprisonment. In this case, the court decides to accept the claim filed against A.D.<sup>12</sup>

## 2. Problems of child relocation abroad

### 2.1 Displacement of a child abroad

The decision to dissolve the marriage also determines the manner of exercising parental responsibility. The court decides to leave the upbringing and education of the child to one of the spouses, taking into account the best interests of the child. The dissolution of the marriage does not affect the rights and obligations of the parents towards their children. The other spouse has the right to meet with him and consult on the most important choices related to his life.<sup>13</sup>

Often after the dissolution of the marriage, a situation of enmity develops between the parties, which makes it difficult for the other spouse to obtain consent for the relocation of the child abroad, sometimes for fear of permanent relocation and non-return of the child. In the case of a temporary need to relocate to another country, it is of course required to prove the reason for the move and an authorization decision by the court must have immediate effect, as if the case is to be appealed to the appellate court. a possible final acceptance decision would lose its relevance.<sup>14</sup>

Thus, decision no. 2403 dated 03.04.2019 of the Tirana Judicial District Court examines the case between J.A. and B.P with the object: "granting the right to travel abroad and to make decisions or perform legal actions in favor of increasing the education and well-being of the child". From the cohabitation between J.A. and B.P. a child E.P. was born in 2013. In 2017 the parties terminated the joint living. As a result of the violence of the cohabitant during this period, the citizen J.A together with the child are sheltered by a court decision at the National Center for the Treatment of Victims of Domestic Violence. During the examination of the case, this citizen and the child are in a hospital in Turkey in order to cure him. The plaintiff claims that the father did not show special care to the child and was an obstacle to their movement abroad. The court, based on Article 58 of the Family Code, decides to accept the claim. The court decides to issue the authorization on behalf of the plaintiff J.A., to travel outside the territory of the Republic of Albania with her minor child E.P. for health reasons of the child. Delay in this case can cause irreparable damage.<sup>15</sup>

Decision No. 1761 dated 27.02.2016 of the Court of the Tirana Judicial District, with the plaintiff A.GJ and the respondent CA, with the object of Changing the parental responsibility of the defendant against the child MK regarding its movement outside the borders of the Republic of Albania and the issuance of an authorization by the court to the plaintiff to allow him to move outside the borders of the Republic of Albania for the child. The court, fully assessing the evidence taken at trial as well

<sup>12</sup> Decision no. 4020, dated 03.06.2019, Tirana Judicial District Court.

<sup>13</sup> Article 158 of the Family Code.

<sup>14</sup> Article 317 of the Code of Civil Procedure.

<sup>15</sup> Decision no. 2403 dated 03.04.2019 of the Court of the Tirana Judicial District.

as the recommendations of the psychologist, the age of the child, fully established the internal conviction that the highest interest of the child was to move the state, without obtaining the father's approval for the following reasons: the movement of the child, as a fundamental right of the child. Freedom of movement of the child is as important as the right of the parent to oversee the exercise of parental responsibility by the other parent to consent to the movement of the child abroad. In the case under trial, the child's right to travel abroad is closely linked to the right to rest, leisure, and participation in cultural and artistic activities under the Convention "On the Rights of the Child."<sup>16</sup>

In the case of the need to move permanently to another country, the issue becomes more complicated. The court must investigate whether this is in the best interests of the child, taking into account the child's relationship with the other parent.

In these cases, the court is required not only to have an authorization to cross the border, but also to change the decision on how to exercise parental responsibility. With the relocation abroad, the other parent who has the right to meet with the child can no longer do so, and the court must decide on new ways of contact or communication between them.

In the decision no. 2403 dated 03.04.2019 of the Court of the Tirana Judicial District, in the case between B.D and Xh.D with object: Changing the conditions of exercising parental responsibility for the minor child U.D dated 30.10.2006. Exercise of parental responsibility only by the plaintiff B.D and Issuance of authorization to travel outside the Republic of Albania. Both parties have entered into a new marriage outside Albania, while only the mother has taken care of the child. She demands that the child be left to her to raise and educate her and be authorized by the court to go out with the child abroad. The court decides to accept the claim, leaving the child to the mother B.D. ; the father's right to meet the child once a week and during the holidays; his obligation to pay alimony to the child, as well as to authorize the mother B.D. to be allowed to move abroad with the child, without the authorization of the father XH.D. The court states in the decision that telephone or electronic contacts with the father, if he wished, would have a positive impact, but there is no such definition in the enacting clause of the decision.<sup>17</sup>

In the decision no. 1253, dated 22.02.2017, in the Court of the Tirana Judicial District, with the object of issuing an authorization for the child D.Gj, of the date of birth 14.03.2015 born and resident in Tirana, represented by the applicant (his mother), to be allowed by father to travel abroad. The Court considers it important to emphasize that the primary interest of the child is paramount, given that the child must grow up in a family environment, in an atmosphere of joy, love and understanding, pursuant to Articles 2, 5 and 6 of the Family Code. Pursuant to Article 159 of the Family Code, depending on the change of circumstances, the decision regarding the exercise of responsibility is variable by the court. In adjudicating the change of the manner of exercising parental responsibility, the court, in addition to the provisions of the Family Code, is guided by the principles of the Convention on the Rights of the Child (approved by the General Assembly of the United Nations, November 1999, and the

<sup>16</sup> Decision no. 1761 dated 27.02.2016 of the Court of the Tirana Judicial District.

<sup>17</sup> Decision no. 897 dated 12.02.2019, of the Court of the Tirana Judicial District.

Declaration). For the rights of the child, international acts have become part of our domestic legislation. This statement states that “the child due to his physical and intellectual immaturity needs special protection and care, including legal protection of appropriate before and after birth” is the principle that takes precedence in court decision-making, arguing what is the best alternative to welfare and maintenance that a parent can provide you are a child and that serves the best interest of the child for his upbringing and education.<sup>18</sup>

Decision No. 4148 of 10.06.2019 of the Tirana Judicial District Court has as its object the granting of authorization to mother E.N to leave the territory of the Republic of Albania, with the child B.Z, born on 19.10.2010, without the authorization of the father B.Z. In this case, the court considers that the highest interest of the child is characterized by the capacity and predisposition of the plaintiff to give the child love, security, leadership and continuity in education and upbringing, to provide the child with food, clothing, medical care, continuity and her peaceful living in a satisfactory environment, her sound moral principles as well as the will and ability to facilitate contacts with the other parent, which are possible to be realized by the plaintiff.<sup>19</sup>

### Conclusions

From our case law, it is concluded that the processes for removing parental responsibility usually occur after the dissolution of the marriage. Mostly, the reasons for which the removal of the child from responsibility is required are negligence / removal of one parent, non-fulfillment of the obligation for alimony and the health condition of the child. In our practice it is not easy to find decisions where parental responsibility has been removed during marriage.

This decision should in fact be the last step that should be taken, because as a rule, if the state mechanisms were to work, the path to be followed first is to take measures for the rehabilitation of the child / family and their protection. An important role in this process is played by the report of the psychologist to whom the court must clearly assign tasks in order to receive full and professional answers and in cases where the report is incomplete or the court has doubts about any possibility of manipulation of opinion. The child should re-examine the expertise and even ask the child himself in the presence of the psychologist, to accurately establish his inner conviction. The abolition of parental responsibility should be seen as a protective measure for the child rather than as punishment for the parent and always the common denominator in such trials is the best interest of the child.

There is still uncertainty in legislation and case law regarding the relocation of a child abroad. It would be necessary for the legislator to intervene by establishing a special provision in the family code, by which certain orienting criteria for the temporary or permanent relocation of the child abroad were determined. It is also very important that the court's decision in urgent cases be taken within a short time and be immediately enforceable.

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<sup>18</sup> Decision No. 1253, dated 22.02.2017 of the Tirana Judicial District Court.

<sup>19</sup> Decision no. 4148, dated 10.06.2019, Tirana Judicial District Court.

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