

# WHY IS JOINT CUSTODY AND ALTERNATING RESIDENCE IS SO EXCEPTIONAL IN HUNGARY?

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**Abstract.** As part of this work, in respect of a five-year long period, all the (3295) child custody cases before the Szeged District Court that ended with a final judgment were examined. It was the most conspicuous that in more than 90% of litigation cases the parties settled and they only requested the court to decide on the issue of child custody in an insignificant percentage of the cases. Also, to an extent approaching 90%, the child has usually been placed in the custody of the mother. This is, however, not the result of the partiality of the courts towards women but of parental agreement to that effect. In case the parties settle, the child is then placed in paternal custody only in less than 4% of the cases. If the court decides, this ratio demonstrates a significant difference: 60-40% towards the mothers. Therefore, the commonplace statement that the fathers do best to give up their children because the courts will no matter what support the mothers does not seem to be right.

As a result after looking into 212 expert's opinion, that during the formation of these opinions we should take into consideration new points of view, or implement new methods. Regarding these it was revealed my recommendations, with a help of which there will be formed much better opinions in the future. First of all the psychologist should spend much more time with the family together, just to see how they really behave in everyday life. It is also important to invest more in psychological testing, or use latest innovations. It can be suggested enter the German method. It also was found that the role of social carers and care takers is crucial to prevent family dissolution.

**Keywords:** family dissolution, marriage dissolution, child custody decision, family crisis, forensic psychological expert's opinion, family therapy

## Introduction

Statistical data from the past years attest to the fact that relationships – be it marital or civil partnerships – are more and more prone to dissolve, they lost their stability and thereby the family itself lost its ability to provide emotional security and support for the family members. We can only go into assumptions as to the long-term effects of the above; however, it seems to be sure, that the divorce of the parents has a negative effect on the emotional development of the child in most cases. These days, international conventions, recommendations, guidelines and even domestic regulations set it forth as a principle that in all cases concerning children, the proceedings shall primarily take into consideration their best interests. Most of the parents also know this and they tend to do everything in their power in order to ensure that this principle had real content. Taking the best interests of the child into primary consideration does not cause difficulties until the parents cohabit, and they exercise parental custody rights together. However, in the course of separation deciding with parent the child shall live with and who shall be entitled to exercise custody rights can be a source of serious conflict. In custody disputes, parents often forget about the interests of the child or they interpret them falsely.

As part of my work, in respect of a five year-long period, I examined all the (3295) child custody cases before the Szeged District Court that ended with a final judgment. Here I do not want to amplify the results of the examination and its statistical characteristics, I only would like to show my

conclusions in connection with necessary external help.

**Aim of the work** – to analyse why is joint custody and alternating residence is so exceptional in Hungary.

**Object of the work** – joint custody and alternating residence.

**Methods** – analysis of scientific literature, analysis of legal acts, statistical analysis systematic and comparative analysis, specification and generalization, logical abstract.

## Necessity of external help

In my point of view a man-woman relationship is the couple's privacy, however, in the case they have children the question cannot be treated as their private matter any longer. In cases in which the couple's relationship is so aggravated that they are unable to get divorced without having arguments, focusing on their children's best interest, an external intervention might be needed.

In the field of law they usually meet judges in the first place. The intervention of the Court is inevitable when there is a wish to dissolve the marriage, and the Court also has a significant responsibility regarding the child custody decision. To minimize their costs the couples principally do not turn to an attorney for being represented, they simply undergo the procedure without hiring a representative. In general they reach an agreement during the lawsuit, which, as a result, usually does not last for ages and does not aim to overcome each other.

Presumably, the reason why this is the general

opinion spread among the population and attorneys is that only the protracting and oftentimes heavily conflict-ridden dissolution cases require legal representation, and only these cases see the light of day and receive high publicity. Regardless of these few cases, otherwise the parties go through the proceedings rather peacefully and quickly, in most cases after two trial hearings, i.e. within 3-4 months at most a judgment is made.

According to my personal experience and judicial statistics the lawsuit lasts much longer and by the end of the procedure the relationship of the couple will have turned seriously aggravated as long as they have an attorney. The reasons can only be deduced. One possible reason could be the couple's relationship having been worsened. That is why they have asked for an attorney's help. Furthermore, it could be natural for an inexperienced person to turn to a lawyer in such cases, and later, during the procedure the attorney him/herself causes the aggravation. It is likely to happen that the lawyer, just to impress the client in the petition or in the claim form, distorts the facts. As a result, the other one would commission an attorney too, who would act similarly, and subsequently their unfair fight starts, the consequences of which would mostly affect the children.

Apart from judges and attorneys mediators have a substantial role, primarily at the beginning of the procedure or prior to it. They are expected to help avoid the aggravation of their relationship. The chief aim of mediation is not to save the marriage, so it is usually necessary when the couple have already decided on divorce.

In order to save the marriage or the whole family unit social careers and care givers could do a lot. It is they who are regularly in touch with the family and so they can recognize it if there is some kind of disorganization. I suggest care givers should attend a family therapy training in order to improve their problem recognition skills.

Unfortunately, there is only very few search for the help of family and couple therapy. The reasons can be numerous. On the one hand, not many know about this opportunity, on the other hand, its availability for free is highly limited. What is more, most therapists are unaffordable for the average citizen. In addition, there is a global (I mean in Hungary) attitude still today saying that only the "stupid" see psychologists. It will take a very long time for the Hungarian society to overcome these prejudices, and realize the necessity and effectiveness of mental help.

Forensic psychological experts do not participate in the mental treatment of the couple, although, as the duration of the lawsuit is one of the most sensitive and important periods, it is crucial how the expert performs his/her assignment. Their role is not negligible, because usually it is

the expert's opinion on which the family's future will depend.

### **The role of the forensic psychological experts in child custody decisions**

Parents only move for a court decision in respect of child custody in a very small number of cases, and in cca. 90% of the cases they come to an agreement in this respect. Should they be unable to agree on with whom the child shall live following the termination of their relationship, the court is then faced with a hard task. This is mostly because in most cases, they shall choose between two equally fit parents, who both have close ties with the child and the child has close ties with both of them vice versa. Thus, it is necessary to conduct broad-spectrum evidentiary proceedings, as part of which environmental case studies based on home visits, witness testimonies as well as opinions offered by kindergartens and schools are also secured, in addition to party statements. As far as reaching the judgment is concerned, the opinion of the child and the expert opinion of the forensic psychologist expert are the most emphatic; therefore, I closely examined these two as the primary pieces of evidence.

I recommend that courts uniformly declare clear expectations in terms of expert opinions and require compliance with these expectations so that the parties can be precluded from feeling that the judgment was reached based on a rough, evasive expert opinion and that courts could also be sure that they have sufficiently uncovered the facts of the case and made their decision taking into account the best interests of the child as a primary consideration.

In litigation concerning child custody, if the parents do not enter into a settlement agreement, then the court shall decide the fate of the child. To determine which parent's custody ensures the most the child's physical, moral and psychological development, the court can make use of the psychologist expert opinion in addition to conventional evidence. In general, it can be determined that in those trials where both parents move for sole custody in their care, they mostly have similar qualities and they both are fit to raise the child. However, for the court to be able to make a decision in the matter, they shall examine two important factors: the child raising aptitudes and abilities of the parents and the relationship of the child and the parents, the extent of their bond. Given that judges do not dispose of the necessary professional knowledge to make such a determination, they will appoint an expert in accordance with Article 177 of the Hungarian Civil Procedure Code. Trust is of outstanding significance between the judge and the expert because the judgment, which con-

tains provisions of the further living arrangements of the dissolved family, will most of the time be based on the determinations of the expert opinion. This is exactly why I deem it to be of quintessential importance that the expert opinion should possess sufficient persuasive power, since the court – in accordance with statistical data described above – bases its judgment thereon in quite many cases.

On the part of the judge, beyond, the procedural commandment, trust is also a given, since it is conventional in every type of civil litigation that if special professional knowledge is necessary to decide on a debated issue, then this specific professional knowledge will be provided to the court by the expert appointed thereby. If a real estate property or chattel is subject to litigation, then the expert will determine fair market value. In a litigation to recover damages the expert might determine the extent of the damage incurred, what were the circumstances of the accident and who caused it, and what could have been done in order to avoid the damage. The court can safely rely on the findings of the expert opinion in the course of assessing the facts and circumstances so determined. On the contrary, in a child custody case, the issue is much more complex; the judge nonetheless dares to rely on the expert opinion, just as if it was one issued by a real-estate expert. Trust is of course very important, if the expert also knows this, albeit I think that psychologists fail most of the time to measure the weight of the findings of their expert opinions. I do not mean by this that they take their task less seriously, but that they act under the impression that it is not their duty to decide the dispute and that the judgment will be made by the court by the assessment of many other pieces of evidence beyond the expert opinion, in which task they only assist the court. I consider it a serious mistake that experts do not receive any feedback on the extent to which their opinion has influenced the reaching of the judgment. In case experts would receive the judgment in every case then they could experience that their findings are included therein with a considerable, determinative weight. Should the experts be in a position to feel that they indeed have a determinative role in deciding on the issue, it might lead to the issuance of more thorough expert opinions.

In my view, presently, psychologist expert opinions are not sufficiently well-founded in order for the entirety of the further course of the lives of people in crisis situations to be based on them. The court never questions the methodologies applied, but what grounds would it have to do so? It especially asked for the assistance of the experts because of lack of competence. Parties often criticize the opinions, but it is taken for granted since they always contain findings detrimental to one of them.

## **Recommendations to create a new guideline**

Firstly, I consider it to be the most important issue that the expert should spend substantially more time on the examination of the families. Consequently, and also pursuant to other elements of the recommendations – we shall take into account the fact that the creation of the necessary financial, human resources and material conditions will not take place without obstacles; however, given the social significance of the issue I feel that costs only may not divert us from treating this problem that has been acute for a long time now.

In the course of preparing expert opinions in child custody litigation the second very important question is the correct asking of questions. Most of the time, courts either mechanically repeat the questions enumerated under Section III.2.1 of Methodological Letter No. 20 or rephrase those in their own words, transformed only to some extent. However, every case is different, unique in their own way; therefore, it would be desirable to tailor the questions to the given family in issue. For this to happen, it is indispensable that the judge be clear (or at least almost clear) on what the court needs to know from the expert in order to decide the case. A further prerequisite of this is that the judge should possess basic information on the opportunities lying in psychology, i.e. questions that could not be answered even by professionals with the most extensive experience should not be asked, albeit questions which might bring the court closer to the right decision should. In my opinion it does not move the case along one bit if the expert routinely answers the judge's template-like, stereotyped questions with previously written replies. Consequently, experts should not be appointed at the first trial hearing but at a time when the court already has certain knowledge of the parties and the case giving them insight into what are the most crucial issues worthy to be entrusted to the expert for the sake of clarification.

In the course of putting the questions together, courts should assess what the essential elements are that will guide their hands in reaching the decision. Courts should also assess what conduct is to be expected from the parents and the child after the decision is made, what effects the decision will have on the relationship of those concerned, what kind of developments is expected in their relationship, will the decision at all bring any peace of mind or it will further increase the tensions? These questions can only be answered by the expert; although, if they do not even surface as part of the appointment, they shall remain unanswered forever.

It can also cause problems during putting the questions together that rational and pragmatic thinking fundamentally characteristic to lawyers falls far from the slightly more abstract and emotional world of psychologists. It is very hard to find the

correct wording. For judges, it would be the most satisfactory if they could ask concrete, definite questions to be given unambiguous and exact answers to by the expert. This is however impossible in a child custody case, we shall thus be satisfied with bringing these two ways of thinking closer to each other as much as possible in order for judges to know what they want to know and for the experts to be able to provide approximately accurate answers.

Human personality can be objectively measured, whether it has any conditions or disorders, but the extent of bonds and its general human or parental qualities can only be determined based on their own statements, and obviously way more time is necessary to determine the truth of these statements.

Asking correct questions pairs up with correct appointment, i.e. that the inclusion of all persons concerned shall actually take place. Obviously the main roles are that of the mother and the father along with the children. The inclusion of others might also be substantiated if they currently do or later on will play a determinative role in the life of the child or the family. Grandparents, aunts, uncles (if they live together) shall thus be subject to examination, the new partners of the parents, eventually their children if the child is going to live together with them as step-siblings following the custody decision. The courts and experts clearly see the necessity of this, however, in many cases in order to save time and money they will fail to carry out these examinations. Notwithstanding all this, it is my opinion that these are indispensable for the complete discovery of the facts of the case and for a right decision to be made.

Following the thorough and circumspect appointment of the expert I also consider it to be significant that the examination extend over several interviews. Currently, examinations take place in a manner that the experts invite those concerned into their offices, the mother and the child together – supposing they live together – and the father on his own to a later appointment. It is the best case scenario that the expert can spend 1 to 3 hours with them, but no more. In total, the expert will spend 10 to 12 hours preparing the opinion, along with document review and test assessment. This is obviously not little work but it is certainly scarce in terms of really getting to know the family. I think that in order to be able to map all the personal characteristics, the truthfulness of the attachment to the child, the emotional relationship of the child and the parents and their ties as well as family dynamics even an expert needs at least one week (!).

Moreover, I think that it is important that psychologists meet the parties not only in sterile circumstances, in their offices. Given the unnatural setting and the short time, and because everyone would like to paint a better picture of themselves than they really are, it is not possible for the experts to see be-

neath the surface. However, this is exactly what the experts' duty would be. The court is aware of the criticism voiced against the other parent and the parents own virtues that they talk about since these are mentioned many times in trial and in their submissions to the court. It defeats the purpose of appointing an expert, if what the experts do is merely limited to describing in long pages that the parents and the child have said in their offices. Significantly more time is necessary in order for a well-founded expert opinion to be put together; however, for this to take place, it is necessary that the experts could meet those involved in their natural habitat, where they will behave more naturally.

Accordingly, the child should be visited in school or kindergarten, upon corresponding with the school and the teachers. Experts may even spend half a day there, have a talk with the teachers, ask them about their experiences, whether there are any changes in the behavior of the child, what mood the child is in, how they behave, how diligent they are, how their performance is. We can see that the kindergarten or school opinions are most of the time vague and template-like. In the course of an in-person conversation the expert might get a much clearer picture on the state of the child. The expert – if finds it to be necessary – can ask for the drawings and essays of the child, can talk to the classmates, friends and gather surprisingly useful information this way. The expert can turn to the children with adequate professionalism, thus it is not uncomfortable at all to the children who are examined. If this methodology became accepted and conventional, then it would be natural to have a nice psychologist show up in school from time to time and talk to them.

I do not recommend visiting the parents at their place of work, I consider this to be a serious invasion of their privacy; however, at-home visits are quintessential. In Germany, experts can spend as long as a week in the home of the family being examined (so it is no accident that the cost of preparing expert opinions is that high). In my opinion, we can only get an authentic picture on the personality of the family members if we observe their behavior in their natural setting and we talk to them in everyday, conventional situations. During an exploration lasting 1-2 hours a person can paint any picture they want about themselves; however, nobody can show a face different of their own in their own homes during several days. Obviously, I do not recommend that the psychologist move in with the family but rather to spend with them a few hours every day during a week or a few days: if the parents cohabit, then in their joint residence; if not, then with both of them respectively in their own homes. By doing so, the expert might find the answers to a lot of questions and can get to know the personality of the parties, their good and bad traits, their attitude towards

the child, and the child as well.

Through this methodology of visits, the expert can simultaneously overtake certain responsibilities from the local government authority as well, by preparing the environmental case study at the same time. Official case studies have thus far been quite vague and meaningless; they much rather resemble an inventory of assets or the records of a forfeiture. By staying in the house, the expert can assess to what extent the installations of the apartment tend to the needs of the residents, since not the number of bathrooms is the important thing but rather the fact how the ones that are available correspond to the needs of the family.

A further advantage of family visits is that they are the means to avoid a primary deficiency of expert opinions. I think it is a serious flaw in the present practice that a lot of experts meet with family members separately, on their own, but they fail to see the whole family together – especially not for a sufficient amount of time, although mapping family dynamics is impossible without doing so. This method is most effective in those cases if the parents still cohabit but its significance cannot be discarded in cases where they do not. In these cases it is possible for the expert to observe the individual attitude of the child towards the respective parents, and that which parent demonstrates a higher level of attention, care of the child.

Being there shall not be limited to mere observation; opportunities need to be provided for an actually thorough, invasive conversation. Thus, exploration needs to last significantly longer than before. The creation of an adequate and trustworthy environment is significant as part of the interrogation and this can be more easily achieved within the confines of the home. These conversations might provide occasions for the bottled up emotions in the parents to surface, to talk them over and to resolve them. I emphasize that the expert can never adopt the mindset of a therapist; however, if during the examination suppressed emotions are released, the parents themselves can decide to discuss their problems or to see a therapist, who helps them find a solution. They do all this so that after the divorce they could cooperate with each other in a resolved manner without emotions and more efficiently, in the interest of the child.

Following the family visits only the psycho-diagnostic examinations would be conducted in the offices. The reliability of the presently applied methods is acceptable; there is no need to change relevant protocols only in terms of when, which and how many to apply. We always apply the test and method justified in the given situation, and the choice might be easier based on the time spent with the family. Let me underline that it is necessary to apply more methods together in every case so that we could compare the results thereof to one another

and thereby get an accurate picture from the hidden dimensions of the parties' personalities. The premise of "one test is no test" is considered a long-standing principle of psychology, albeit a lot of people do still base their opinions on one test, which is not to reliable on its own. It is important moreover, that psycho-diagnostic data be recorded with adequate accuracy in order to avoid bringing them into question in the case of an eventual supervisory opinion. I think, however, that attaching them to the expert opinion is pointless; it only confuses the court and the parties. Furthermore, I would like to emphasize that the wording needs to be comprehensible, with discarding the use of terms incomprehensible and disturbing to laypersons; the opinion is prepared not for those in the profession but lay parties.

There have been many recommendations made so far concerning the psychological knowledge of judges; I have described some of these: teaching psychology as part of continued education for judges, applying psychologist assessors in trial, and favoring family law judges who have a psychology qualification. In my opinion, should expert opinions be sufficiently well-founded because the opportunity to get to know the parties was provided, then judges would not be in need to have a broad-spectrum knowledge of psychology, they could be free to rely on the findings of expert opinions. Well-founded and professional psychologist expert opinions are suitable to form judicial conviction.

### **Further recommendations to help the families**

As a result of my research I made two further recommendations. On the one hand, the creation and establishment of a support service, through which parents would receive legal and psychological assistance for the resolution of their conflicts and to cope with loss, in order to facilitate moving forward and future cooperation. Family therapy, couple's therapy, legal assistance and mediation would be accessible to anyone as part of the service.

On the other hand, I recommend – if not in every litigation, then only in those cases where the court finds that the parents are not able to take into consideration of their child due to their emotions against each other – the inclusion of a representative for the child based on the pattern of the German *Anwalt des Kindes*, who as an outsider might indeed be able to protect the interests of the child. This person could be anyone who is a professional, who knows the child, and who the child trusts (but not a family member). This person can also assist the court in hearing the child – which could happen either through this person or in their presence – who would thus feel in adequate security and the possibility of any influencing by the parents could also be avoided this way.

## Conclusions

1. A man-woman relationship is the couple's privacy, however, in the case they have children the question cannot be treated as their private matter any longer.
2. The procedure the relationship of the couple will have turned seriously aggravated as long as they have an attorney.
3. We can come to the clear conclusion based on all written above, that neither the law nor psychology can provide assistance on their own. Yet, combining these two fields of science we can reach dramatic advances. But, to achieve this it is inevitable to change the social attitude, the family's falling apart should not be private, rather be handled as a social issue.
4. In order to save the marriage or the whole family unit social careers and care givers could do a lot. It is they who are regularly in touch with the family and so they can recognize it if there is some kind of disorganization.
5. Furthermore, it is necessary each professional working with these families would become aware of the fact that without their cooperation and their common support it is impossible to reach the required changes.

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## KODĖL NUOLATINĖ GLOBA IR KINTAMA GYVENAMOJI VIETA YRA TOKIA IŠSKIRTINĖ VENGRIJOJE?

### Santrauka

Šis darbas parašytas, panaudojus penkerių metų patirtį šioje srityje, taip pat buvo išnagrinėta 3295 Segedo apygardos teismo vaikų globos bylų, kurios baigėsi su galutiniu sprendimu. Tyrimo metu paaiškėjo, jog daugiau nei 90% iškeltose bylose šalys, turinčios gyvenamąją vietą prašė teismo priimti sprendimus dėl vaiko globos. Be to, beveik 90%, vaikų buvo skiriama motinos globa. Tai ne teismų šališkumo prieš moteris atvejai, bet tėvų susitarimų su minėtų teismo sprendimų rezultatas. Atvejai, kai vaiko globa buvo paskirta vaikui tėvui jei šalys sudarė mažiau nei 4% visų teismo išnagrinėtų atvejų.

Išanalizavus 212 eksperto nuomonę, reikėtų atsižvelgti į naujus požiūrius, ar įgyvendinti naujus metodus vaiko globėjo skyrimo atveju. Vadovaujantis psichologų rekomendacijomis, reikia praleisti daug daugiau laiko su šeima kartu, pamatyti, kaip šeimos nariai iš tikrųjų elgiasi kasdieniame gyvenime. Taip pat svarbu daugiau investuoti į psichologinius testus arba naudoti naujausias inovacijas. Gali būti siūloma įvesti vokiečių metodą. Taip pat buvo nustatyta, kad yra labai svarbus socialinių slaugytojų ir priežiūros specialistų vaidmuo, siekiant užkirsti kelią šeimos iširtpti.

Raktiniai žodžiai: šeima, santuokos nutraukimas, vaiko globa, šeimos krizė, teismo psichologinis ekspertas šeimos terapija.

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