

Do Children Need Both Parents? Some Issues of Russian Law

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1. Divorce means the end of a marriage. Spouses become ex-spouses, what actually means that they become strangers towards each other. For them it means the end of the family. They divide their property, finalize their financial relations, and the sooner they do this the better they are.

However this is not the case with regard to children. First, for the children their parents' divorce does not mean the end of the family. Second, children cannot be divided. The ex-spouses continue to be the legal parents of their children at least until the children reach the age of majority. Nevertheless "division" of children is one of the most complicated and painful issues that the courts have to decide, and the "clean break" concept is not applicable here. One of the most negative results of divorce is that the children inevitably lose contact with one of the parents; only in rare cases both parents remain completely accessible as they were in a functioning marriage. The main task of the law in this regard is to create a mechanism that would protect the right of a child to have a family, to stay in touch with both of his parents (to the extent, of course, the law may interfere and influence the parents' behavior).

2. Under Russian law both of the parents have equal rights and duties to take care of their children and to raise them. The amount of their parental rights is not affected by their divorce and does not depend on their marital status. Both of the parents, irrespective of with whom of them a child resides and irrespective of their status vis-a-vis each other, are the legal representatives of their common child, and neither of them is considered at law as a "custodial parent", if we use Western terminology. However, Russian law does not know the concept of custody, whether physical or legal, as it is used in Western family law, and the term "custody", as a rule, is not applicable in the context of allocation of parental rights and duties.

At the same time disputes over children that arise between divorcing or divorced parents may be compared, with a certain degree of conventionality, with the disputes over physical custody. However, to repeat, it does not at all mean that a separately residing parent loses his "custody" over the child. It is obvious, of course, that a parent with whom a child physically resides has *de facto* "custody" over the child, or at least "much more custody" than a separately residing parent.

The absence of the concept of "custody" in Russian law significantly complicates settlement of disputes and makes relations between conflicting parents concerning their children even more confusing, because there is no precise allocation of parental rights and responsibilities in a legal sense.

3. The general rule is that when there is a child in the family, divorce shall be considered in court. The parents are encouraged to present their agreement concerning their children to the court. However it is still not generally accepted to provide detailed regulation of visitation rights of a separately residing parent. Failure to do that often significantly complicates relations between the parents over their children and sometimes even enforcement of the court's access orders (Moscow Ombudsman for Children's Rights, 2004).

If the spouses are silent with respect to their child, if there is no agreement between the parents or if the agreement, in court's opinion, infringes the rights of the children, the court, in an ideal situation, shall step in and make its own decision concerning child-related questions (on the child's place of residence and maintenance) (art.24 (1)). However the

courts, being overloaded, are too often satisfied with just the parties' formal declaration, which is made in a courtroom, that there is no dispute over the children between them. A question often remains whether their oral statement is the truth and whether the child's rights and interests receive proper protection.

It is interesting to note that when divorcing parents raise the issue about their child in divorce proceedings their main concern is usually the place of child's residence, but not visitation rights of a parent residing separately. The result of such a shortsightedness is usually the need to bring another suit on the performance of parental rights by a parent living separately from the child (Russian analog of visitation rights or access to a child claim), typically one year or one year and a half later, because the parent with whom the child lives has violated the other parent's right to access. As a rule by that time a child had been already seriously traumatized by the parents' divorce, by the parents conflicts over the child, and by the fact that he or she had lost contacts with one of the parents that accompany conflict situations. Studies show that children who had regular contacts with both parents after divorce are better adapt themselves to post-divorce situation: for them divorce did not bring the end of the family (Isaaks, Montalvo, Abelsohn, 2000).

4. When the court resolves issues related to a child's place of residence, access to a child or visitation rights, it should take all the facts of a particular case into account. The Family Code contains an exemplary list of circumstances that the court shall consider (art.65 (3)). These are the age of a child, attachment of a child to a particular parent, brother, or sister, moral and other personal characteristics of the parents, relations that exist between a child and each of the parents, potential to create the proper conditions for the child's upbringing and development, the parents' occupation and work regime, their financial circumstances, and family status, and others.

The court, when considering a particular divorce case or solving a dispute over a child between the parents, shall give preference to the parent who ensures or can ensure the most favorable conditions for the child's upbringing. The main guiding principle for the court is the interests of the child, with the child's opinion being taken into account. The practice, however, shows that the application of this principle causes a lot of difficulties, and it is often a hard task for the court to define what particular decision is in the best interests of a particular child.

There is no definition of the child's interests in the Family Code, and it is hardly possible to formulate a clear definition that will fit all cases. In order to form an idea of what may constitute "the child's interests" Family Code provisions, which concern children's rights, may be helpful (Sakhnova, 1999:315). Thus, the child has the right to live in the family, together with his parents (except in cases when it contradicts the child's interests), the right to parental care and to be brought up in the family and by his parents, the right to all-round development and education, his interests being ensured and his human dignity being respected, and the right to personal contact with both of his parents, grandparents, brothers, sisters, and other relatives. The Family Code stresses that separation or divorce of the child's parents does not affect the rights of the child. When the child's parents reside separately, the child has the right to contact with both of them. The child has the same right when the parents live in different countries (art. 54 (2), 55 (1)). Thus, it seems possible to state that one of the main child's "interests" is to see both of his parents and to stay in contact with each of them.

5. In contested cases, to make a correct decision that would be in the best interests of the child, the court can order a psychologist and/or psychiatrist to render an expert opinion (Dmitrieva, Safuanova, 2004:179-181). Psychological-psychiatric expertise in custody or access conflicts has not become routine practice yet; it is still a rare case, although the number of expert opinions that are ordered by the courts are increasing now.

6. The Family Code requires the court to take the child's opinion into account. Moreover, after the UN Convention on the Rights of the Child, it also states that a child is

entitled “to have a say” in all matters affecting him, the child has “the right to express his opinion when any matter affecting his interests is being decided in the family, as well as be heard in any judicial and administrative proceedings” (art. 57). It is mandatory for the court to take into account the opinion of a child who has attained ten years of age, if only it “does not contradict the child’s interests.” Practice, however, shows that in the majority of cases the courts, in fact, do not pay much attention to the child’s opinion and even ignore the opinion of a child who expressly prefers to stay with the father, using the child’s interests argument as a formal pretext (Maksimovich, 2005:67).

7. Too often the courts fail to investigate all the facts of a particular case. They are often reluctant to go deeply into all the details; they often rely on unreliable or meager evidence, and give inadequate reasoning in support of their judgments.

In Russia children of divorced parents, independently on their age, overwhelmingly stay with their mothers and not their fathers. This is not connected to any preferential right a mother has to raise her child, but on a court’s stereotype belief that it is the mother who usually can better look after the children, especially if they are young. Sometimes the courts go to another extreme, for example, when they place children under fathers’ custody only because of fathers’ much better financial and housing situation in comparison with that of their ex-wives’, ignoring that the mothers have been primary caregivers and the children were very much attached to them.

Because the courts often base their decisions on statements that have been made by the parents - the most interested persons in a dispute over children - without their due evaluation, and other evidence is absent, court decisions are often reversed and the cases reconsidered, and sometimes not only once (Sakhnova, 1999:315).

8. Though, under Russian law, divorce shall not affect child-parent relations, in the majority of cases children, in fact, lose contact with one of the parents. Only one third of separately residing fathers, in their opinion, see their children often and are involved in their upbringing. In mothers’ opinion, the number of such “good” fathers is even less. There is no clear explanation for this difference. One of the explanations that sociologists suggest, and I am inclined to agree with them, is that fathers and mothers understand the words “to see the child” differently (Rimashevskaya, 2002:199). Women most probably tend to interpret the words much wider than men, assuming by “seeing a child” more significant involvement into child’s life than just short walks with a child.

Irrespective of the differences between the parents’ estimation of a father’s participation in their children’s lives, it is obvious that in the majority of cases the children are deprived of their fathers, whatever is the reason of absence of contacts. It is well-known how important is the presence of both parents for the child. “A phenomenon of an absent father”, as sociologists often call this (Rimashevskaya, Vannoy, Malysheva, 1999:129), has far-reaching consequences. It influences child’s behavior and his achievements at school (Kühne, 2000:143.), it influence mother’s behavior, atmosphere in the family, and ultimately again the child him- or herself. Recent studies also show the importance of a father’s presence during the first four years of the child’s development, especially for the boys: absence of fathers during this tender period influenced the boys behavior and “gender socialization” much more than in older ages (Kluchko, 2002:59). It clearly refutes the common notion that the children of tender age irrespective of their sex need mothers as primary caregivers more than the fathers.

However it is equally wrong if children lose contacts with their mothers.

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