Legal rules on the exercise of joint parental responsibility – jointly or individually?

A comparative approach to the law and its impact on bargaining power

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The question

How is joint parental responsibility to be exercised when parents are living apart - jointly or individually?

Who can decide what, who can act alone and when do parents have to act jointly?

How does the law differ from a comparative perspective, and what are the commonalities?

The basic rules nowadays

... but jurisdictions differ

Different legal models
how to exercise joint parental responsibility (p.r.)

**Model A:** The power to act alone is the general rule, each parent with p.r. is authorized to exercise it individually (with some exceptions) England and Wales, Poland, Spain (for separated parents)

**Model B:** Joint exercise is the general rule, but a presumption applies that each parent acts with consent of the other. A parent can act alone, with some exceptions Belgium, France, Switzerland

**Model C:** Joint exercise is stressed; a parent can act alone only in ‘daily matters’, ‘usual matters’ or non-important decisions alone. Germany, Greece, Italy, Lithuania, Netherlands, Norway, Sweden

Commonalities of different jurisdictions

Core issues where parents have to act jointly

- put the child up for adoption
- change the child’s name or surname
- take the child for a longer stay abroad

Often, but not always a matter of joint decision-making

- change of residence
- choice of school
- religious affiliation
- major health treatment and medical intervention
Model A: the power to act alone as the basic rule

The *power to act alone is the general rule, with some exceptions*

Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility.

S. 2 (7) Children Act 1989

England and Wales, Poland, Spain (for separated parents)

Exceptions: by statute or court order
A dissenting parent can apply to the court

Model B: Joint exercise, but a legal presumption of consent allows to act alone

A *presumption of consent of the other parents allows to act alone*. There are differences how far-reaching the presumption is and to which type of legal acts it applies

Belgium: applies to all legal acts
France: applies to ‘routine decisions’
Portugal: applies generally, but not to issues enlisted by statute or acts of special importance
Russia: applies to all but a few enlisted major decisions

The *presumption is rebuttable* (*mala fide* third party)
A dissenting parent can apply to the court

Model C: Joint exercise is stressed, with a limited right to act alone in ‘daily matters’

*Joint exercise* is the general rule for *important decisions and legal representation*. A parent can act alone in ‘daily matters’, ‘usual matters’ or take not important decisions alone.

Germany, Greece, Italy, Lithuania, Netherlands, Sweden

*Germany: ‘daily matters’* are those happening frequently and without consequences on the child that are hard to reverse

*Sweden: no definition of ‘daily matters’, limited access to court decisions in conflict situations*

*Norway: extended right to act alone* of the parent with whom the child lives alone also in *important matters of care and major decisions of daily life*

Commonalities, differences, problems

Test the difference: typical conflicts

Advantages and disadvantages of models A, B, C

My preference: a *presumption of consent* (model B) - and why I don’t agree to the CEFL-preference for model C to act alone in ‘daily matters’

The need for empirical research: Do different rules how to exercise joint p.r. really make a difference in practice? How do they affect the bargaining power? What is the gender dimension?
References

- http://ceflonline.net/parental-responsibility-reports-by-jurisdiction/
- Research project 'Power and powerlessness of motherhood' (MOM) https://www.uni-hildesheim.de/mom-projekt/