

## CHILDREN, PARENTS, PARENTAL RESPONSIBILITY AND THE CIVIL LIABILITY OF OTHER PEOPLE

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**Abstract:** Parental responsibility is a key concept of Czech Family Law. The Civil Code regulates the rules for administration of parental responsibility in harmony with the best interests of the child and his or her welfare and participations rights. As parental responsibility is vested with the legal parents of the child, it cannot be wholly “delegated” to other people (relatives, private personal caregivers, domestic workers etc.). However, the parents are free to conclude “contract for temporal personal care of their child”, which is not regulated as a typical contract by the Civil Code. Such a contract can be classified under “contracts for work” or “mandate copntract”. When relatives, private personal caregiver or domestic workers (in short “obligated party” or “obligor”) do not fulfil the rights and duties established by the contract then they are legally responsible for the wrong fulfilment.

**Keywords:** minor child, parents, parental responsibility, relatives, private personal caregivers, domestic workers, obliges party, contracts for temporal personal care of the child, wrong fulfilment, duties, liability

### I. INTRODUCTION

In 2012, after a long “transitory” period, the *New Civil Code* was adopted (the Act No. 89/2012 Coll., hereinafter “CC” or “Civil Code”) in the Czech Republic. The Civil Code came into effect on the 1<sup>st</sup> January 2014.<sup>1</sup>

The Civil Code regulates Family Law in its “Book Two” and respects *traditional values* of the European Christian-Jewish culture. However, the Civil Code also includes some important *novelties* that have been present in other European Codes for a long time, thanks to the Human Rights Covenants, the case law of the European Court of Human Rights and various academic activities originated especially in the Commission on European Family Law (hereinafter “CEFL”).<sup>2</sup>

*Parental responsibility* is a key concept of Czech Family Law.<sup>3</sup> The main authors of the New Civil Code, when writing the final version of the concept of parental responsibility, took into consideration a major part of the *Principles of European Family Law regarding Parental Responsibilities* made by the CEFL (in short “Principles”). According to the Principles, the parental responsibility regulated by the Civil Code is composed of the following categories of duties and rights of parents: (a) care, protection and education of the child;

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<sup>1</sup> For more see KRÁLÍČKOVÁ, Z. Czech Family Law: The Right Time for Re-Codification. In: Bill Atkin (ed.). *International Survey of Family Law*. Bristol: Jordan Publishing, 2009, pp. 157–173; KRÁLÍČKOVÁ, Z. New Family Law in the Czech Republic: Back to Traditions and Towards Modern Trends. In: Bill Atkin (ed.). *International Survey of Family Law*. Bristol: Jordan Publishing, 2014, pp. 71–95.

<sup>2</sup> For more information see <http://ceflonline.net/>.

<sup>3</sup> For details see KRÁLÍČKOVÁ, Z. Parentage, Parental Responsibility and Rights of the Child in the Czech Republic. In: *Essays in Honour of Penelope Agallopoulou*. Athens: Ant. N. Sakkoulas Publishers, 2011, pp. 829–840.

(b) maintenance of personal relationships; (c) determination of residence; (d) administration of property and (e) legal representation.<sup>4,5</sup>

The New Civil Code includes rules *for establishing, holding and administration of parental responsibility in harmony with the best interests of the child and his or her welfare*. As far as decision making is concerned, there are special provisions for daily matters and important issues concerning the child. The *agreement and cooperation* of both the parents are the key words of the New Civil Code, regardless whether they live together, never lived together or are separated or divorced. However, if the parents are not able to come to an agreement on important matters concerning the child, especially regarding the personal care (custody) of the child in particular, the court decides *ex offio* about (a) individual (sole) custody by one of the parents or (b) alternating (serial) custody. As far as (c) joint custody is concerned, both the parents must agree with the arrangement. Thanks to the Convention on the Rights of the Child, the child is not taken as an object of decision making but as an active person. His or her *participations rights* and the right to self-representation in legal proceedings concerning himself or herself are taken quite seriously.<sup>6</sup>

After dissolution or annulment of the marriage, the parental responsibility of one of the parents does not end by placing the child into the individual (sole) custody of the other parent nor does it end by the factual separation of the parents, or by placing the child into some form of substitute care, for instance, foster care, institutional care, etc. This issue must be considered in the light of its human rights dimension.<sup>7</sup> The child is *an integral part* of his or her family of origin. Both the parents have the right to exercise their parentage. The duties and rights belong to the parental responsibility not only theoretically, but also practically.

As parental responsibility arises from and belongs only to the legal parents of the child, parental responsibility *cannot be in the whole attributed to other people* (relatives, private personal caregivers, domestic workers, nannies etc.). However, parents are fully free to conclude *a contract for temporal personal care of the child*. Such a contract is not regulated by the Civil Code as a typical contract (“*typická smlouva*” in Czech). However, thanks to the key principles of private law – *autonomy of will* and *contractual freedom* – everybody is entitled to conclude any contract. For details see below, 7.

The Civil Code introduced a *new concept of liability* connected with wrong fulfilment of rights and duties from the contract (“*závazky z deliktů*” – “*porušení smluvní povinnosti*” in Czech). The liability is based on an objective principle and that is why it is liability for a result (“*za výsledek*” in Czech). It means that potential culpability (both direct or indirect) is not relevant in case of *a contract for temporal personal care of the child*. For more see below.

<sup>4</sup> Regarding national reports, see BOELE-WOELKI, K., BRAAT, B., CURRY-SUMMER, I. (eds.). *European Family Law in Action*. Parental Responsibility. Volume III. Antwerp – Oxford: Intersentia, 2005.

<sup>5</sup> Regarding final version of principles and commentary, see BOELE-WOELKI, K., FERRAND, F., GONZÁLEZ-BEIL-FUSS, C., JÄNTERÄ-JAREBORG, M., LOWE, N., MARTINY, D., PINTENS, W. *Principles of European Family Law Regarding Parental Responsibilities*. Antwerp – Oxford: Intersentia, 2007.

<sup>6</sup> For more see SCHÖN, M. Postavení dítěte a jeho participační práva v rámci rodičovské odpovědnosti. In: S. Radvanová (ed.). *Rodina a dítě v novém občanském zákoníku*. Praha: C. H. Beck, 2015, pp. 36–45.

<sup>7</sup> See KRÁLÍČKOVÁ, Z. *Lidskoprávní dimenze českého rodinného práva*. Brno: Masarykova univerzita, 2009.

This article tries to formulate key questions regarding attributed caregiving in respect of the rights of the child and to answer them in the light of the new concept of liability. As regards a breach of duties under contracts, the wrongdoer is liable to pay for the material and non-material damage, including damage to the natural rights of a person, including mental suffering.

First of all, the article gives basic information about legal terminology regarding mutual duties and rights of parents and children. Further on, it describes the new concept of parental responsibility in more details and finally the new regulation of liability for wrong fulfilment of duties from *a contract for temporal personal care of the child*.

## 2. WHO IS THE CHILD'S MOTHER AND FATHER? AND WHO IS A MINOR CHILD?

The Civil Code regulates the establishing of parentage and provides who are the child's parents by mandatory rules. The child's *mother* is a woman who gives *birth* to the child (see § 775, CC) and the child's *father* is a man whose fatherhood is based on one of *the three legal presumptions of paternity* (§ 776 et seq., CC). This is legal parentage (*de jure*). However, biological, or genetic, parentage and social parentage (*de facto*) are of great importance, too. Generally, it is necessary to respect the *balance between legal, biological and social parentage*. Therefore, the law also protects the so-called putative fathers (e.g. § 783, CC).<sup>8</sup>

The child is a descendant in the direct line of the first stage (see § 772 and § 773, CC). A minor child is to be understood as a child who has not reached the age of majority, i.e. the age of eighteen (§ 30/1, CC). A minor fully non-capable child is a child who is under eighteen years of age and has not reached full legal capacity by a decision of a court or by marriage (§ 30/2, CC). Law provides special protection to minor fully non-capable children especially within the private-law concept of parental responsibility and through public-law instruments. For details see below.

## 3. ON THE DUTIES AND RIGHTS OF PARENTS AND CHILDREN IN GENERAL

The Civil Code gives a lot of attention to *mutual duties and rights* of parents and children (§ 855 ff., CC). The rules are built on *equality and reciprocity* of duties and rights of parents and children, regardless of their age or the level of legal capacity of both the parents and children. Many of the duties and rights form an integral part of the entire life of parents and children. A number of duties and rights of parents in relation to their children concern only new-born children, e.g. the duty and the right of parents to give the name to their child (§ 862, CC); some duties and rights arise just from parental responsibility and form the content of the legal relationship between the parents and a minor child who is not fully capable (§ 865 et seq., CC). Similarly, some of the duties and rights of children

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<sup>8</sup> For more see KRÁLÍČKOVÁ, Z. Tension between Legal, Biological and Social Parentage in the Light of the Best Interest of the Child. *Legal Studies and Practice Journal*. 2008, No. 3, pp. 275–282.

in relation to their parents concern only minor children. Others are established regardless of the age, for example, maintenance obligation.

Legal regulation of parental responsibility is *traditional* in many ways, cf. the provisions governing the obligation of the child to heed his or her parents (§ 857, CC), or mutual maintenance obligation between parents and children (§ 910 et seq., CC). A number of provisions are *entirely new*, as, during the process of recodification, it was necessary to meet international obligations of the Czech Republic, e.g. reinforcing the parents' and the child's right to mutual personal contact in the case of separation or divorce of the child's parents, etc. (cf. § 888, CC).<sup>9</sup>

Some of the mutual duties and rights are *permanent*, albeit with regard to the passage of time *varying in details*, e.g. the amount of the reciprocal maintenance obligation between parents and children (§ 910 et seq., CC), or the duty to respect each other's dignity (cf. also § 883, CC), or mutual assistance. Others, e.g. those belonging to parental responsibility (§ 865, CC) vary in relation to the gradual maturation of the child and disappear by the reaching of adulthood, or by the child's acquisition of full legal capacity. For details see below.

As mentioned above, the law emphasizes *equality and reciprocity*, or reciprocity of duties and rights. It stipulates that "*the parents and the child have duties and rights in relation to each other*" (§ 855, CC). The rights of one always correspond to duties of the other and *vice versa*. The same provision says that "*these mutual duties and rights cannot be waived; if they do so, it is disregarded*".

Neither the parents, nor the children can "get rid" of any of their duties or rights regardless of being personal or proprietary as they are established by law. Above all, the *status relationship* between the parents and the child *cannot be cancelled*, either unilaterally or by an agreement. There is only one legal exception: the parents have the right to give their consent to the adoption of the child (see § 809 et seq., CC).<sup>10</sup> However, the law protects the child against ill-considered or even illegal acts of his or her parents who do not want the child.

Of course, a lot of family agreements and contracts regarding the child can be concluded between the parents, between the parents and the other persons, and between the parents and their child. Parents must always keep in a mind the main purpose of the duties and rights in relation to the child, which is to ensure the moral and material welfare of the child. Regarding the content of *agreements of big importance* for the child, these must be

<sup>9</sup> See KORNEL, M. Přímý a nepřímý styk rodiče s dítětem. *Sborník příspěvků z konference Cofola*. 2008, [2019-04-18]. Available at: <[https://www.law.muni.cz/sborniky/cofola2008/files/pdf/civil/kornel\\_martin.pdf](https://www.law.muni.cz/sborniky/cofola2008/files/pdf/civil/kornel_martin.pdf)>.

<sup>10</sup> There are some special provisions according to which the child can be adopted without the consent of the parents (see § 818 and § 819, CC). Beside that, the child's mother can ask her identity to be hidden according to the special regulation, the Act No. 372/2011 Coll., on Health Services. See also the older one, Act No. 422/2004 Coll., so-called Act on Hidden Births. On the fierce critical comments see HRUŠÁKOVÁ, M., KRÁLÍČKOVÁ, Z. Anonymní a utajené mateřství v České republice – utopie nebo realita? *Právní rozhledy*. 2005, No. 2, p. 53ff. And finally, the Czech Republic faces reality of so called baby-boxes. On the history, the contemporary state and unfortunately also the future of the boxes for abandoned children see ZUKLÍNOVÁ, M. Několik poznámek k právním otázkám okolo tzv. baby-schránek. *Právní rozhledy*. 2005, No. 7, pp. 250 et seq. However, the above mentioned specific situations are not analysed in this article.

*assessed by courts.* As an example we can mention an agreement on the exercise of parental responsibility for the period after divorce or various agreements on child's property.

As regards the main topic of this article, *a contract for temporal personal care of the child*, or upbringing or education of the child, the parents can, in principle, enter into such a contract without going to the court or another authority. Such an agreement *does not have to be approved or decided by any competent authority.* For details see below.

Private law provisions of the Civil Code are supplemented by the public law regulation because it is necessary to protect the children (see Act No. 359/1999 Coll., on Socio-Legal Protection of Children, hereinafter "ChildA"). The state has primarily a *negative obligation not to interfere in family life.* But with due regard to the principle of the best interests of the child and his or her welfare it is sometimes necessary to *intervene* in very fragile family relationships. The legal theory and the case law of the International Court of Human Rights talk about a *"positive obligation to protect family life."* Then it is always necessary to respect the principle of *proportionality* of the aim and the means. By doing so, the state and its institutions must always proceed from less invasive interventions to more radical ones. First of all, everybody must respect the child's right to live with his or her parents (and *vice versa*) in the family of origin. Therefore, the child may be removed from the family of origin only under the law, by the competent authorities, and for the strictly necessary period.

## 4. PARENTAL RESPONSIBILITY AS A KEY CONCEPT OF PARENTAGE

### 4. 1 General notes

As mentioned above, the new concept of parental responsibility ("rodičovská odpovědnost" in Czech) is understood differently than in the previous Code ("rodičovská zodpovědnost" in Czech), even though it may seem, at first sight, that only the letter "z" was deleted. First of all, a difference is made between *holding* of parental responsibility (§ 865, CC, cf. wording "... *every parent* ...") and *exercising* the duties and rights resulting from parental responsibility (both during the cohabitation of the child's parents and in the case of their divorce or separation; see § 906, CC). It is necessary to emphasize that the new regulation takes into account also the specific situation of not fully legally capable parents of the child and provides them always with holding of parental responsibility (§ 868, CC).<sup>11</sup> For details see below section 4.2.

The term parental responsibility should be seen primarily as a package of legal duties and rights and moral rules at the same time. The essence and meaning of parental responsibility lies in the value of parentage itself, in conjunction with the value of the welfare of the child. The child is also a *weaker party*, especially for the lack of "full age", and usually because of his or her lesser mental and moral maturity.<sup>12</sup>

The private law concept of parental responsibility is *civil liability* aiming to the future in *an objective normative significance* of an order to provide *proper care*: here it is a legal

<sup>11</sup> See SCHÖN, M. Výkon rodičovské odpovědnosti rodičem s omezenou svéprávností. *Právní rozhledy*. 2014, No. 13–14, pp. 492–495.

<sup>12</sup> For details see KRÁLÍČKOVÁ, Z. Ochrana slabší strany v rodinném právu. *Právník*. 2011, No. 4, pp. 362–377.

order for an adequate child care or for the best parental child care in accordance with *the best interests of the child*.

To act as a *responsible* parent means to act *appropriately with regard to the welfare of the child as best* as it can be *objectively required* from the parents according to their emotional, cognitive and volitional properties, or their best parenting skills. The terms of parentage and parental responsibility have, as a legally recognized value, the absolute legal importance with the effects *erga omnes*.

The legal effects of parenting affect – apart from the effects of the relative duties and rights contained in commitments between some parents and the child – anyone, not only some specific parents and the child. Parents can therefore, within the application of their parentage, or within the exercise of their parental responsibility, *require the delivery of the child from any party* that (un)reasonably restrains the child, including an obligated party to whom they have entrusted their child voluntarily via *a contract for temporal personal care of the child*.

The legal rule governing parental responsibility is a coercive mandatory legal norm, because it implements the principle of legal parentage concerning the legal status. That is why the duration and the extent of parental responsibility may be changed only by a court.

The *purpose* of parental responsibility is, on the one hand, the implementation of parenting by the child's parents, and, on the other, the protection of the rights and legitimate interests of the child, his or her moral and material benefits, as well as ensuring his or her care, protection, education and upbringing in the broadest sense of the word.

The *exercise* of parental responsibility *by both the parents of the child*, which is a common and desired state of the affairs, assumes *the parents' agreement that obliges them*, although it is subject to changes in circumstances (*clausula rebus sic stantibus*), for instance, regarding the scope of personal contact with the child in relation to his or her age, maturity, desires, etc.

## 4.2 Origin and duration of parental responsibility

Parental responsibility arises *ex lege* for each parent *at birth* and ceases as soon as the child acquires *full legal capacity* (see § 30, CC). It is not relevant whether the child's parents are married or not, whether they live together or not, or never lived together etc., although these factors can play a significant role, especially in the case of the exercise of individual duties and rights arising from parental responsibility. The duration and extent of parental responsibility may be changed only by the court (§ 856 *in fine*, CC).

## 4.3 Holders of parental responsibility

Under the new concept, *every legal parent* is the holder of parental responsibility, or the holder of duties and rights arising from it, unless he or she was deprived of it by the court (see § 865, CC). The holder of duties and rights arising from parental responsibility is even the minor parent of a child, or the parent limited in his or her legal capacity in this respect by the court because of a mental disease.

However, not every parent has the right, or the duty to exercise the parental responsibility. With regard to the principle of the best interests of the child and his or her welfare, the law provides for *suspension* of the exercise of parental responsibility (“pozastavení

výkonu rodičovské odpovědnosti” in Czech) *ex lege* because of immaturity or mental disorders of the parents (§ 868, CC).

As mentioned in the introduction, parental responsibility as a whole *cannot be transferred* to another person, since the law in general provides that parents and children cannot waive their mutual duties and rights (§ 855/1, CC). The law does not give such a privilege to a court, either. The holder of duties and rights arising from the parental responsibility is neither a spouse (step-parent) or a partner of the child’s parent, although the law allows him or her to participate in the upbringing of the child (§ 885, CC).

The holder of parental responsibility is neither a guardian, although the law stipulates that he or she has basically all the duties and rights as the parent in relation to the child; however, the law stipulates that the court exceptionally provides a range of duties and rights otherwise (§ 928, CC). So, any other third person different from the child’s parents cannot be the holder of parental responsibility. Does not matter it is the child’s relative, private personal caregiver or domestic worker, nanny etc.

#### 4.4 Content of parental responsibility

As it was briefly mentioned above, the Civil Code in relation to the *Principles of European Family Law regarding Parental Responsibilities* sets out the content of the duties and rights of parents wider than its predecessors. Contents of parental responsibility is defined as the duties and the rights of parents consisting in (a) caring for the child, including, without limitation, care for his or her health, his or her physical, emotional, intellectual and moral development, (b) the protection of the child, (c) maintaining personal contact with the child, (d) ensuring his or her upbringing and education, (e) determining the place of his or her residence, (f) representing him or her and (g) administering his or her assets and liabilities (see § 858, CC).

With regard to other provisions of the Civil Code and the nature of things we must understand the exercise of all the above mentioned duties and rights *as the exercise of important duties and rights* on which the parents must *agree* (with the exception perhaps of trivial, daily matters with respect to the child’s property, see § 897 and 898, CC). It is not relevant that the non-exhaustive list of important issues includes explicitly only unusual medical and similar treatments, determining the place of residence and choice of education or employment of the child (see § 877, CC).

We can say that, for instance the choice of a private personal caregiver or nannie, especially for children at an early age, or of a private driver taking children to school or hobby groups, or a private afternoon teacher of foreign language or of a personal trainer of tennis, is an essential thing on which parents must reach an agreement.

With regard to the wording of the law, the parental responsibility does not include: (a) maintenance duty and right to maintenance, because their duration is not dependent on reaching maturity or full legal capacity by the child (§ 859, CC), and (b) the right to consent to adoption of a child (§ 809, CC).

## 5. TOWARDS DUTIES OF THE PARENTS TO PROVIDE THE CHILD WITH THE CARE AND TO PROTECT AND BRING THE CHILD UP

The care for the child in the broadest sense of the word is a key part of parental responsibility. It includes in particular care of his or her health, and his or her physical, emotional, intellectual and moral development. It should be distinguished from *personal care* within individual (sole) custody, alternating (serial) or joint custody after divorce or separation of the child's parents. By definition, even the parent who is not the so-called primary caregiver has for instance duty and right to care for the child's health and so on.<sup>13</sup>

The law provides for a series of partial duties and rights (from § 880 to § 886, CC), especially as follows:

- the parents are required to help and support each other respecting the dignity of the child;
- the parents exercise parental responsibility concerning the child in a manner and with respect to the level of the child's development;
- the parents have the duty and the right to have a child by themselves and exercise supervision over the child;
- if they do not have a child by themselves, they have the duty and the right to have person contact with the child;
- the parents are allowed to entrust the child's care and protection, the performance of his or her upbringing, or some of its parts, or supervision of the child, to another person; if the care of the third person should be longer, or permanent, they are obliged to inform the authority of the child protection (see § 10a, ChildA);
- the parents have the right to request their child back if another person unlawfully detains the child; this also applies to the parents themselves;
- a person who unlawfully detains a child shall duly hand over the child to the care of his or her parents or a person who has a right to provide the care according to the law.

The parents have the duty and the right to protect their child from the outside world, depending on his or her level of development, maturity, age, temperament, etc. It is the traditional content of parenting, or parental responsibility. Protection may be understood as anything that is in the best interests of the child. This could be, for instance, protection against negative effects of the Internet, against persons who are prone to commit paedophilia and violent crimes, or against persons who do not fulfil their contractual obligations properly. For details see below.

The law stipulates in particular that the parents play a crucial role in the child's care and upbringing and that they are supposed to be all-round role models for their children, especially with respect to the way of life and behaviour in the family (see § 884, CC).

This is a very important content of parental responsibility.

The child is required to heed his parents (see § 857/1, CC). Until the child acquires full legal capacity, the parents have the duty and the right to guide their child's behaviour using

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<sup>13</sup> See KRÁLÍČKOVÁ, Z. Pěče o zdraví nezletilého dítěte – Providing Health Care to Minors. *Časopis zdravotnického práva a bioetiky*. 2016, Vol. 6, No. 2, [2019-04-18]. Available at: <<http://medlawjournal.ilaw.cas.cz/index.php/medlawjournal/article/view/117>>.

methods of education as appropriate to the developing abilities, including restrictions in order to protect the morals, health and child rights and the rights of others and public order. The child is obliged to conform to those methods (§ 857/2, CC).

The parents also decide on child's education or his or her career paths within exercise of parental responsibility. They always take into account the child's opinion in relation to his or her participatory rights, his skills and talents (see § 880/2, CC).

## 6. ON EXERCISE OF SOME DUTIES AND RIGHTS BY AN OBLIGATED PARTY: CHILD RELATIVES, PRIVATE PERSONAL CAREGIVERS, DOMESTIC WORKERS, NANNIES ETC.

The Civil Code stipulates (inter alia) partial rules relating to the exercise of duties and rights arising from the parental responsibility in relation to third parties. It is necessary to mention mainly *legal representation* of the child by his or her parents. The law provides that the parents represent the child together, however, each of them is allowed to act independently (see § 892, CC). There are also other provisions (see § 879, CC), according to which:

- when making juridical acts concerning the child who lacks the capacity to independently make juridical acts in a given matter, it shall suffice to make acts towards one of the parents as the child's representative;
- it is of legal significance whether or not the child, who lacks the capacity to independently make juridical acts in a given matter, acts in good faith, the good faith of both parents needs to be considered; however, if the child is in the care of only one parent, good faith of only that parent is considered;
- it is of legal significance whether or not a child, who lacks the capacity to independently make juridical acts in a given matter knew or should have known of the matter, and both parents' knowledge of the matter needs to be considered as well; however, if the child is placed in personal care of only one parent, only that parent's knowledge of the matter or fact is considered.

The above mentioned rules also apply to *a contract for temporal personal care of the child*.

As mentioned above, if the child is entrusted to the care of the obligated party with the intention of *permanently* not taking care of the child, this fact must be *notified* by the parents to the authority of child protection (see § 10a, ChildA). Only *the court* may decide on some of the forms of substitute or *substitute family care*. Such entrustment does not affect the holding of parental responsibility. Even when a child is placed in the care of another person, the parents have the duty and the right to decide on important matters and have fundamentally the visiting rights, but also the duty to maintain the child. Of course, the exercise of parental responsibility is *de facto* modified by the fact that the parents do not have a child in personal care by themselves (in custody) and personally do not care about him or her.

However, there is *a different situation* when the parents entrust their child into the personal care of obligated party for *a short term*. Various forms of *babysitting, tutoring, bringing children to school and to sport clubs* etc. may be involved (hereinafter "personal childcare by an obligated party"). For the purpose of this paper it is not relevant whether

the caregivers are relatives, close persons to the child or to the parents or complete strangers, for instance, paid private caregivers or domestic workers, nannies. Also, it does not matter where the personal care takes place, whether in the family home or in the homes of the obligated party, or in other places.

This paper is not devoted to the education of children in pre-school and school facilities and to childcare in health facilities under the Act on Medical Services (see Act No. 372/2011 Coll., § 43 et seq.). Here we only emphasize that the child's age is relevant. In particular, it is necessary to distinguish between children under the age of three and older children, especially between the ages of three and six.

For the purposes of this paper, it is necessary to mention briefly personal childcare by the obligated party according to the *Trades Act* (see Act No. 455/1991 Coll.). This Act allows the personal childcare operated within the *notifiable trades* (i.e. within “ohlašovacích živností, tj. nikoli koncesovaných” in Czech), especially under *regulated trades* (under “živností vázaných” in Czech) according to the specific requirements set by the Trades Act and specified in its Annex No. 2. It is necessary to respect the child's age.

It is thus established that children younger than three can only be cared by the people who are entitled in particular

(a) to pursue the profession of a general nurse or a medical assistant or a nurse or a midwife or a rescuer under special legislation, or

(b) to work as a social worker or a social services worker under specific legislation, or

(c) to exercise the profession of a kindergarten teacher under a special law or

(d) to work as a nanny for children before their starting compulsory school attendance under a special law, etc.

It is also necessary to mention *free trades* (“volné živnosti” in Czech) listed in Annex No. 4, under No. 79 *Provision of services for families and households* (“Poskytování služeb pro rodinu a domácnost” in Czech). By definition it *excludes* care for children *under three in the day mode*. The content of this trade may be cleaning, cooking, washing, ironing, individual care for children over three in families, occasional short-term babysitting (even up to three years of age), taking care for persons requiring extra care, shopping and other matters related to the running of the household and other *procurement activities* (“obstaratelská činnost” in Czech).<sup>14</sup>

The Trades Act regulates also trades focused on non-formal (non-school) upbringing and education, organising courses, training courses, etc.

The autonomy of will and freedom of contract of the parents when concluding *the contract for temporal personal care of the child*, or for his or her upbringing and education, is limited by the above mentioned public law limits.

## 7. A CONTRACT FOR TEMPORAL PERSONAL CARE OF THE CHILD

An agreement between the parents and the obligated party is the key term in this case. As mentioned above, the Civil Code does not regulate *any typical contract* for this purpose (“pojmenovaná smlouva” in Czech).

<sup>14</sup> For more BAYEROVÁ, M. Varianty péče o děti v předškolním věku. *Právo a rodina*. 2009, No. 7, pp. 16–19.

At first glance *the contract for temporal personal care of the child* can be seen as a *mandate contract* (see § 2430 ff., CC, “mandátní smlouva” in Czech). This concept puts emphasis on *an activity* then on a result.

However, regarding the purpose of *the contract for temporal personal care of the child*, such a contract can be classified as a typical *contract for work* (see § 2586 et seq., CC, “smlouva o dílo” in Czech). Its essence is *an activity with a result*. The Civil Code provides that a work is to be understood as the making of a particular thing which is not subject to a contract of sale as well as the maintenance, repair or alteration of a thing, or *an activity with any other result*; a work is to be understood as any construction, maintenance, repair or alteration of a structure or part thereof (see § 2587, CC).

A choice of *a mandate contract* or *a contract for work* would depend on *autonomy of will* of the contractual parties. They decide if there should be some *result or not* within *the temporal personal care of the child* by the obligated party.

As mentioned above, the regulation of *contract law* in Civil Code is based on the key principle of private law that *everything is allowed that is not prohibited*. The Civil Code enables the parents to create their contracts according to their *needs, wishes, workload, interests, age*, and the *age of their children* and their *needs, hobbies* etc. In the context of contract law, this principle is developed further by saying that *the contract is concluded when the parties agree on its content*; within the rule of law it is under the discretion of the parties to freely negotiate a contract and determine its content (§ 1725, CC).

The Civil Code provides further that if the contract is not concluded *expressly in words*, the will to stipulate its elements must be obvious *from the circumstances*; in doing so, what is taken into account is the *conduct of the parties* as well as the issued price lists, public offers and other documents (§ 1756, CC).

However, no freedom is infinite, *nota bene* in the case of minors and their protection. The Civil Code therefore reasonably establishes in “Book Two” called *Family Law* that parental responsibility as a whole cannot be attributed to another person. The law generally provides that parents and children cannot waive their mutual duties and rights (§ 855/1, CC). The holding of parental responsibility and of all the duties and rights that are associated with it is not transferable. For details see above sections 4.1. and 4.3.

However, regarding the exercise of parental responsibility, or partial duties and rights belonging to it, the situation is different. Even here, however, there are *legal limits*.

So, what can be *included* in *the contracts for temporal personal care of a child*? In particular, it should contain *the scope of the duties and rights of obligated party, the time and place of the performance of personal childcare*, and the *reward*, which would not be typical among the relatives and close persons thanks to family solidarity (with some exceptions, of course). The contract may be concluded for *a fixed period*, e.g. for a particular school year, for the period until reaching the age of 12, etc. It can also be formulated for *an indefinite period*, e.g. for the period of the child’s disease, or injury such as broken leg, etc.

Regarding *the form* of the contract, it may be concluded *informally*, i.e. orally.

As mentioned above in general terms, the legal effects of parenting – apart from the effects of the relative duties and rights contained in commitments between parents and obligated party – affect anyone, i.e. *erga omnes*. However, *the contract for temporal personal care for the child* obliges only the contract party.

Although the principle “*pacta sunt servanda*” is the key principle of contract law and the Civil Code expressly contains the words “*a contract obliges the party*”, the contract can be *changed or cancelled* only with *the consent of both parties* or for *statutory reasons* (§ 1759, CC). The contract can be also cancelled *unilaterally*, for instance *by termination*, if the parties have agreed so or if it is determined by the law in relation to contracts of indefinite duration or for life or for a specified period, but not less than 10 years (see § 1998 et seq., CC). The law also allows cancelling an obligation based on the payment of compensation and withdrawal from the contract, if the parties have agreed that in advance, which is not too common in these matters (§ 1992, CC).<sup>15</sup> There is no doubt that a good agreement will protect both the minor child and his or her parents.

However, *fundamental change of circumstances*, caused for instance by *illness of the child*, may be the reason for *a change of duties and rights*, or for *termination* of the contractual relationship. The parents can therefore, within performance of their parentage, or while exercising parental responsibility, for instance *claim the delivery of a child* from anybody who detains the child with or without authorization, i.e. even from the persons to whom they entrusted their children voluntarily.

Furthermore, both parties can claim, in relation to a fundamental change of the circumstances, *the renegotiation of the contract* (§ 1765/1, CC), and if no agreement is reached, they can go to the *court* which may decide about *a change or revocation* (§ 1766, CC). The contract is also terminated as a result of *a subsequent impossibility of performance* (§ 2006, CC), *death* (§ 2009, CC), etc.

Besides that, the parties are allowed to *withdraw* from the contract because of *other statutory reasons*, especially if there is a *fundamental breach* of the contract. The Civil Code provides that if a party fundamentally breaches the contract, the other party may withdraw from the contract without undue delay. A fundamental breach means such a breach of which the breaching party, at the conclusion of the contract, knew or should have known that the other party would not have concluded the contract had it foreseen such a breach; in other cases, a breach is presumed not to be of fundamental nature; a party may withdraw from a contract without undue delay after the conduct of the other party undoubtedly has indicated that the party is about to commit a fundamental breach of contract and fails to provide a reasonable security after being requested to do so by the obligee (see § 2002, CC).

The above mentioned fundamental breach of duties arising from any contract, including *the contracts for temporal personal care of the child* causes a new obligation – *civil liability for wrong fulfilment*, which must be distinguished from criminal liability. It is not the subject of this paper, though.<sup>16</sup>

<sup>15</sup> For details see HULMÁK, M. et al. *Občanský zákoník V. Závazkové právo. Obecná část (§ 1721-2054). Komentář*. Praha: C. H. Beck, 2014, p. 1158 ff.

<sup>16</sup> Towards more aspect of child's public law protection see ELISCHER, D. *Zásahy státu do rodičovské zodpovědnosti a rozhodnutí Evropského soudu pro lidská práva. Právo a rodina*. 2011, No. 4, pp. 1–12.

## 8. TOWARDS WRONG FULFILMENT OF CONTRACTUAL DUTIES

A breach of duties and rights of obligated party, i.e. a caring person, is the most serious problem in this case. What if “something happens” to the child, e.g. the child is hurt or falls ill due to insufficient or poor care, *nota bene* if an obligated party intentionally harms the child, etc.? This problem should be given its true name, i.e. “*faulty performance of the contract*” or “*wrong fulfilment of duties*”, having its legal consequences.

In such a case the approach of the Civil Code is different from the concepts of the previous codes. The term “responsibility” is not intentionally used. However, the Civil Code regulates, within *obligations from civil delicts* (torts), *compensation for pecuniary and non-pecuniary harm* (§ 2894 et seq., CC). If there is a breach of any contract, including duties from *a contract for temporal personal care of the child*, the obligated party must give *compensation for the damage* to the other party (i.e. the parents) or even to the person in whose interest the agreed obligations should be (i.e. the child, see § 2913, CC). Any fault, whether in the form of negligence (*culpa*) or intent (*dolus*), is irrelevant. The law is based on *an objective concept*. Nevertheless, there is a possibility of liberation. The Civil Code provides that a tortfeasor is released from the duty to provide compensation if he or she proves that he or she was temporarily or permanently prevented from fulfilling his or her contractual duty due to an extraordinary, unforeseeable and insurmountable obstacle created independently of his or her will; however, an obstacle arising from the tortfeasor’s personal circumstances or arising when the tortfeasor was in default when performing his or her contractual duty, or an obstacle which the tortfeasor was contractually required to overcome shall not release him or her from the duty to provide compensation (see § 2913/2, CC).<sup>17</sup>

The caregiver is also responsible for any “helper” in the performance of his or her duties. The Civil Code establishes that a person who, in his activities, uses an agent, employee or another helper, shall provide compensation for the damage caused by such a person as if he or she himself or herself caused it; however, if, in the case of a performance provided by another person, someone has undertaken to carry out a particular activity independently, he or she is not considered to be a helper; however, if such other person has chosen him or her carelessly or exercised inadequate supervision over him or her, then that other person is liable as a surety for the fulfilment of his or her duty to provide compensation for damage (§ 2914, CC).

The Civil Code provides that it is necessary to pay for both property (material) damage and damage to the natural rights of man, including mental suffering (§ 2956, CC). The tortfeasor pays the costs associated with health care (§ 2960, CC).

In this case, the *parents’ fault* can play an important role. For example, it can be failure to inform the child’s caregiver about the child’s allergies or his or her illnesses. If such a case is brought to the court, the matter should be decided with regard to the specifics of that particular case. The Civil Code provides that if damage has incurred, or if it has in-

<sup>17</sup> For more see MELZER, F., TĚGL, P. at al. *Občanský zákoník. Svazek IX. (§ 2894-3081). Velký komentář*. Praha, Leges, 2018, p. 314 ff.

creased as a result of the circumstances attributable to the victim, the tortfeasor's duty to compensate for damage is *proportionately reduced*; however, if the circumstances which are to the detriment of one or the other party have contributed to the damage only to a negligible extent, the damages are not divided (see § 2918, CC).

There are some provisions that deserve special attention. The *court may reduce* the *compensation* because of special reasons. It is established that for reasons deserving special consideration, a court shall proportionately reduce the compensation of damage; in doing so, the court shall in particular take into account how the damage occurred, the personal and property situation of the individual who caused, and is liable for, the damage, as well as the circumstances of the victim; compensation *may not be reduced* if the damage was caused *intentionally*. However, the above mentioned rule does not apply if the damage was caused by a person who offered to provide *professional performance* as a member of a particular vocation or occupation, or by a breach of professional care (see § 2953, CC).

Finally, if a tortfeasor caused damage by *an intentional criminal offence* from which he or she gained property benefit, the court may, on the application of the victim, decide on satisfaction from the things which the tortfeasor has acquired under the property benefit, even if the things are not otherwise subject to enforcement of the decision. Until the right to compensation for damage has been satisfied, the tortfeasor may not dispose of the things specified in the decision (§ 2954, CC).<sup>18</sup>

## 9. ON MARGIN: PARTICIPATION RIGHTS OF THE CHILD

As mentioned above, the parents must exercise duties and rights arising from parental responsibility in accordance with the best interests of the child, his or her well-being and with respect to his or her participatory rights.<sup>19</sup>

The child is not “a property” of his or her parents, nor “a passive object” of parental responsibility. The child has participatory rights guaranteed by international treaties, mainly by *the Convention on the Rights of the Child*, especially its Article 12. The legal doctrine lists them as follows: (a) the right to be informed; (b) the right to express his or her views and wishes; (c) the right to influence, by his or her opinion, the decisions and (d) the right to completely determine, by his or her opinion, the decisions.

In order to realise the participatory rights, the child must have *relevant information*.

In this spirit, the Civil Code also provides that before making a decision that affects the interests of the child, *parents shall inform the child* of everything that is necessary for the child to form his or her own opinion on a given matter and communicate it to the parents; this does not apply if the child is unable to properly receive the message, or form his or her own opinion, or communicate it to his or her parents; the parents shall *pay due attention to the child's opinion* and take the child's opinion *into account when making a decision* (§ 875/2, CC).

<sup>18</sup> See HULMÁK, M. at al. *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055-3014). Komentář*. Praha: C. H. Beck, 2014, p. 1697ff.

<sup>19</sup> Regarding the concept of the rights of the child see VAN BUEREN, G. *Children Rights in Europe*. Strasbourg: Council of Europe, 2007.

The court has an *information duty* towards a child, if it decides the child's case, too (see § 867, CC). It is also necessary to note that the child must receive information about the possible consequences of compliance with his or her view, or the possible consequences of any decision in the case or matter that concerns him or her.

To ensure that the child could express his or her opinion and wishes, it is necessary that he or she is always given an opportunity by the parents, or the court (see § 875 and § 867, CC).

In this context, the Civil Code provides that if the court finds that a child is unable to properly receive the information or form his or her own opinion or communicate it, the court shall inform and hear a person who is able to protect the interests of the child; the person's interests must not be in conflict with the interests of the child (§ 867/2, the first sentence, CC).

The child's parents usually defend the best interests of the child. If there is a *conflict of interest*, the court shall appoint a *guardian ad litem* to the child (§ 948 et seq., CC).

To strengthen the participatory rights of the child the Civil Code establishes a *rebuttable presumption of the law*, according to which a child over twelve years of age is presumed to be able to receive the information, make his or her own opinion and communicate it (§ 867/2, the second sentence, CC). The court pays due attention to the opinion of the child. However, the court must always pursue the best interests of the child, or his welfare.

The principle of the best interests of the child is indeed crucial, but it should not be applied mechanically as the "*primary and only one*" but measured by the *proportionality test*. A consistent and well-balanced solution in the spirit of the proposition "*maximum benefit to the child and minimum harm to others*" should be found.

In practice, the participatory rights of the child are performed especially in relation to the court's deciding on custody of the parents after their divorce or separation (§ 906, CC). However, the child should be given an opportunity to express himself or herself at the court proceedings *concerning damages*, or *non-pecuniary damage* and *mental suffering*. Similarly, the participatory rights of the child should be respected in administrative proceedings, or in all possible proceedings.

The child has the right to participate in decision-making regarding his or her cases. However, such a right should be distinguished from a *partial capacity* of the child to act alone (see § 31, CC).

## CONCLUSION

The parents usually know very well what is the best for their child.<sup>20</sup> If they cannot temporarily provide personal care of the child, bring him or her up or educate him or her, it is up to them to decide who will do it instead of them, or with them. Of course, they should respect the opinion and wishes of the child if he or she is able to speak or otherwise express his or her opinion. The good and detailed *contract for temporal personal care of*

<sup>20</sup> For more see KORNEL, M. Některé problematické aspekty principu nejlepšího zájmu dítěte. *Právní rozhledy*. 2013, No. 3, pp. 88–93.

*the child* between the parents and the obligated party is very important. As mentioned above, the Civil Code does not regulate *any typical contract* for this purpose. A choice of *a mandate contract* or *a contract for work* would depend on *autonomy of will* of the contractual parties. They decide if there should be any *result or not* within the temporal personal care of the child by the obligated party.

It is necessary to protect each child because of his or her immaturity, sometimes even against his or her parents, or against their decision to entrust an obligated party with personal care of them, which may be inappropriate, etc. It should be added, that fundamental breach of duties arising from any contract, including *the contracts for temporal personal care of the child* would cause according to the Civil Code a new obligation – *civil liability for wrong fulfilment*.

Besides civil law delicts there are *public law sanctions*, too. Everyone – even the child itself – can apply to the competent Authority of Socio-Legal Protection of Children for help (hereinafter “Authority”, see § 7 and § 8, ChildA). The Authority must act accordingly. There are a lot of different measures, from a warning of the parents or the other people to the supervision or restrictions (see § 13, ChildA). As a novelty, the special Act enables the Authority to impose on the parents the duty to use the professional help or to attend mediation.

Finally, the Authority may, actually must, submit an application to the court. The court may take the same measures as the Authority. And, if the situation is serious and the child's health and life is in danger, the court may, actually must, order removal of the child from the family of the origin and place him or her into some other form of substitute (family) care. The court also may, or must, modify the scope of the parental responsibility of the parents (see § 870, CC). In extreme cases, the court shall deprive the parents of parental responsibility (see § 871, CC) and even apply criminal law sanctions.<sup>21</sup>

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<sup>21</sup> See RADVANOVA, S. (ed.). *Rodina a dítě v novém občanském zákoníku*. Praha: C. H. Beck, 2015.