

## Alternating residence and relocation A view from France

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### Introduction

Alternating residence of children is regulated by the Act of 4<sup>th</sup> March 2002 and is based either on the basis of parental agreement or, if it is impossible, on a judicial decision. Of course, joint physical parental authority<sup>1</sup> implies appropriate material circumstances, but it also refers to the mutual respect of the parents for each other and to their capacity to communicate with each other, thus ensuring that the child is educated and raised in an harmonious environment.

However, this type of arrangement for the child can be altered at any time as and when new circumstances arise, for example when one of the child's parents moves. The child's best interests must remain the paramount consideration in establishing, as well as when terminating an alternating residence arrangement.

Up until the 4<sup>th</sup> March 2002, legislation determined the scope of the joint exercise of parental authority. The Act of 4<sup>th</sup> March 2002 widened this ambit by establishing two additional rules. These rules apply to both married or unmarried parents equally, in accordance with the spirit of the United Nations Convention on the Rights of the Child (Article 18(1)).

The first rule is laid down by Article 372, French Civil Code (*Code civil*) which states that the 'father and mother shall exercise parental responsibility jointly'. This is the general rule, but it has been subject to a number of adjustments.

Firstly, the family judge (*juge aux affaires familiales*) can refuse to apply this principle in situations where its implementation would be impossible or contrary to the child's best interests. In these situations, the judge can entrust the exercise of parental authority to either the father or the mother. This solution, which remains rare,<sup>2</sup> requires a motivated decision and, if it is pronounced at the request of one of the parents, the decision must elucidate the very serious reasons that prevent exercise of joint parental authority.<sup>3</sup> It must, however, be noted that the pure

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1 Alternating residence is more than simple joint physical custody, since it not only means that the child spends *significant* amounts of time with both parents, but supposes *equal* amounts in an *alternating* manner, even if it does not systematically imply *strict shared* physical custody. Alternating residence can be seen as a sort of 'dual residence'.

2 See Cass. civ. 1, 14<sup>th</sup> November 2006, No. 05-18.116.

3 See, for example, in case of a parent's manifest and continuous lack of interest towards the child: Cass. civ. 1, 21<sup>st</sup> April, JCP G 2001, I, 332, obs. H. Blossie-Platière; in case of one parent's systematically conflicting behaviour, of hostility to the other parent or of permanent denigration of the other one: CA Rouen, 19<sup>th</sup> October 2006, Juris-Data, No. 2006-317494; in case of an existing risk of international kidnapping: Cass. civ. 1, 17<sup>th</sup> January 2006, *Bull. Civ. I*, No. 10.

physical distance is not sufficient to prevent the exercise of joint parental authority and that neither a parent's sexual,<sup>4</sup> nor religious orientation<sup>5</sup> may justify a denial of joint parental authority. If parental authority is exercised by a parent alone, the other parent has a right to contact (visiting and lodging rights), the terms of which are regulated by the judge. The parent who is not holder of parental authority cannot be deprived of these contact rights, except in exceptional cases.

Secondly, the scope of the general principle is restricted by Article 372(2), which applies to the children of unmarried parents after parentage has been established in respect of one of the parents and subsequently in relation to the other. This provision states that in two cases only one parent exercises parental authority, namely (a) if the parentage is initially established with respect to one parent and subsequently in relation to the other more than one year after the child's birth, the former remains the sole holder of parental authority and (b) if parentage with respect to the 'second parent' is established by a judgment. In these situations, Parliament has considered that it is non-expedient for the child to benefit from automatic joint exercise. However, Article 372(3) grants joint exercise of parental responsibility if both parents make a joint declaration before the court clerk of the court of first instance (*le greffier en chef du tribunal de grande instance*) (Article 1180-1, New Code of Civil Procedure (*Nouveau code de procédure civile*)). Moreover, one of the parents may submit a request to the family judge, who could also issue an order of joint parental authority in the child's best interests.

The second important rule is laid down by Article 373-2(1) and states that 'the separation of the parents has no consequence on the application of the rules concerning the allocation of parental authority. Consequently, the principle remains intact that parental authority is exercised jointly. Several new provisions form a common law of the exercise of parental responsibility by separated parents.

Article 372-2, which applies whether the parents cohabit or are separated, states that 'towards any other sincere persons, each parent is deemed to act with the agreement of the other parent when solely making an usual act on issues of parental authority regarding the person of the child'. Mentioned in almost all European legal systems to facilitate the everyday exercise of parental responsibilities, this presumption only benefits 'other sincere persons' and may only be utilised for 'usual acts' concerning the child itself. These conditions can be appreciated in relation to the parents' former practice and to the fact that this act does not seriously affect the child's future (*e.g.* registration in a school, sporting club or musical lessons; normal medical or dental treatment, or even, according to the *Conseil d'État*, a request presented by a parent for the registration of the child on his/her passport – which can be criticised).<sup>6</sup> On the contrary, the father and mother must in principle reach agreement on important decisions.<sup>7</sup>

Despite all the facilities provided by this presumption and the principle of joint exercise of parental authority for divorced or separated parents and for unmarried parents, even if the latter do not live together or separated (Article 373-2(1)), the implementation of the parents' rights, obligations and responsibilities requires particular appreciation of the specificity of each situation. In any case, the law is concerned about the relationship between the child and both

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4 ECtHR, Judgment of 21<sup>st</sup> December 1999, *Salgueiro Da Silva Mouta v. Portugal*, 2000 *Dr. Fam.*, Comm. No. 45, note A. Gouttenoire; 2000 *RTD civ.*, p. 433, obs. J. Hauser.

5 ECtHR, Judgment of 23<sup>rd</sup> June 1993, *Hoffman v. Austria*, D. 1994, jur. p. 327, note J. Hauser.

6 See *Conseil d'État*, référé, 4<sup>th</sup> December 2002, *Defrenois* 2003, p. 620, obs. J. Massip.

7 For example, participation of their children to a televised documentary: see CA Versailles, 11<sup>th</sup> September 2003, D. 2003, *AJ Famille*, p. 383, obs. F. Bicheron.

his/her parents when they separate. Since the child should not be deprived of any contacts with one of his/her parents, various measures have been established in order to preserve the principle of equality between parents (*e.g. coparentalité*). In this view, Article 373-2 states that ‘each parent shall maintain a personal relationship with the child and respect his/her bond with the other parent’. Thus each parent has a dual obligation: an obligation towards his/her child and an obligation towards the other parent.

As for the European Court of Human Rights, it has also been considered that at any rate, the familial private life of both the child as well as each of his or her parents must be preserved after the divorce. This implies that the relationship between the child and each of the parents should be maintained.<sup>8</sup> This is the global context in which the alternating residence hypothesis (when the parents are jointly holders of parental responsibility) has to be examined, together with the issue of one of the parents’ moving and relocation.

### 1. Conditions of setting up an alternating residence for the child

Before the Act of 4<sup>th</sup> March 2002, in divorce cases, the spouses jointly determined the child’s residence to be one of their homes. In the absence of any agreement, the child’s residence was determined by the judge and the other parent was entitled to maintain a personal relationship with the child and to benefit from visiting and lodging rights. The Supreme Court strongly condemned shared residence, but some lower courts were not entirely opposed to such a solution if the parents could agree upon the solution. In order to reach a similar result, the courts granted the parent with whom the child was not living sizeable visitation rights.<sup>9</sup>

The Act of 4<sup>th</sup> March 2002 explicitly permits alternating residence either at the mutual behest of the father and mother, or by virtue of a judicial decision in spite of the absence of parental agreement. Article 373-2-9, paragraph 1 indeed states that ‘the child’s residence can be fixed on an alternating basis at both parent’s domicile or at the domicile of one of the parents’. Parents can thus organize the consequences of their separation concerning the place where their child will live and, perhaps most notably, agree upon an alternating residence agreement without going to court.<sup>10</sup> However, they are also allowed to request judicial approval of a written agreement organizing the terms of the exercise of parental responsibility, *e.g.* a plan arranging the alternating residence for their child. The judge will officially authorise this agreement, unless it is contrary to the best interests of the child or if the consent of one of the parents was not freely given (Article 373-2-7, Civil Code).

Alternating residence can also result from a judicial decision pronounced in the child’s best interest in cases of parental disagreement concerning the child’s accommodation, since French law does not require parental agreement to implement an alternating residence arrangement. Under the Act of 4<sup>th</sup> March 2002, a temporary alternating residence arrangement can be imposed by courts, the duration of which is determined by the court. At the end of this period, the judge will determine the child’s residence, either providing for the continuation of the alternating residence arrangement, or providing that the child live at the home of one of the parents (Article 373-9, paragraph 2, Civil Code). The alternating residence period is regarded as a trial period and as a ‘litmus test’ that can help parents to cease their conflict and adapt to the new circum-

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8 See, for example, ECtHR, Judgment of 30<sup>th</sup> June 2005, *Bove v. Italy*, No. 30595/02; ECtHR, Judgment of 28<sup>th</sup> June 2005, *Fourchon v. France*, No. 60145/00.

9 See P. Hilt, ‘La résidence alternée’, 2001 *AJ Famille*, p. 43.

10 See for example: CA Bordeaux, 15<sup>th</sup> March 2005, 2005 *Dr. Famille* 2005, No. 130, note P. Murat.

stances.<sup>11</sup> Nevertheless, when facing parental disagreement with regards a child's alternating residence, the judge can also order such a measure without a trial period.<sup>12</sup>

In practice 80% of requests for an alternating residence arrangement are requested jointly by the parents and the judge agrees to these arrangement 95% of the time. On the other hand, when the parents disagree, an alternating residence arrangement is ordered in only 25% of the cases. Before deciding in such cases, judges generally order a social investigation in order to take the necessary precautions in order to implement their decision.

More concretely, an alternating residence arrangement obviously requires favourable circumstances. Parent's homes have to be close enough in order to ensure that regular and stable lifestyles are not disrupted. Only a few decisions have ordered an alternating residence arrangement for pre-school age children (*i.e.* under the age of six), although this solution does entail registration at two different schools. Moreover both parents have to be able to offer living and lodging conditions that are suitable for the child, as well as being willing to cooperate and communicate with each other in order to meet the child's educational needs. Furthermore, this sort of joint physical custody may neither be contrary to the best interests of the child, nor unbalancing for the child. The appreciation of the child's interest is also generally linked to his/her age and to the corresponding needs. As a consequence, an alternating residence arrangement is seldom ordered for very young children (*i.e.* younger than two or three). In this case, the residence is most often fixed at mother's home.

In case law, physical distance refers to the distance from one city to another, or from one neighbourhood to another,<sup>13</sup> but also a distance of ten to twenty kilometres between each of the parent's homes. The alternating residence arrangement can be organised according to each parent's professional situation, the school schedule or to the child's after school activities. The alternating residence arrangement can work on a weekly basis (every other week at each parent's home), on a monthly basis (every other month), on a yearly basis (every other year at each parent's home), or even on a daily one.<sup>14</sup> Finally, judges are also concerned about ensuring that affective links between the child and his/her half-brothers and sisters are maintained. For example, a court decided that it was in a boy's best interests to rotate between his parents' homes in order not to be separated from his half-brothers and sisters.<sup>15</sup> Sometimes the child him or herself will request such an alternating residence arrangement.<sup>16</sup> In these present circumstances, the only legal reference point is the best interests of the child criterion. The court pays great attention to this criterion. It is for this reason that one is only able to provide indications with regards the main tendencies, since one can find diverging decisions. When ordered, alternating residence obviously entails consequences with regards the evaluation of each parent's contribution to the child's maintenance.

The effects of an alternating residence in other fields, such as the fiscal and social fields, is also specified in special legislative provisions. With regards income tax, unless stated to the contrary, parents will share the benefit of the family general tax allowance (Article 196 of the French Tax General Code (*Code général des impôts*)). Under the Act No. 2006-1640 of 21<sup>st</sup> December 2006 concerning Social Insurance Financing (*JO* 22<sup>nd</sup> December 2006) the parents are

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11 See C. Moreau *et al.*, *La résidence en alternance des enfants séparés devant le juge aux affaires familiales, Enquête sur un échantillon de décisions prononcées par les JAF du 13 au 24 October 2003*, Ministère de la Justice, Cellule Études et Recherches, December 2003.

12 See French Supreme Court, civ. 1, 14<sup>th</sup> February 2006, 2006 *Dr. Fam.*, Comm. No. 158, note P. Murat.

13 See for example CA Aix-en-Provence, 27<sup>th</sup> May 2004, *Juris-Data* No. 2004-251010.

14 See for example CA Lyon, 8<sup>th</sup> March 2005, *Juris-Data* No. 2005-273912, for a four-year-old child, when as a result of a parent's move the distance between their respective homes is more than 800 kilometres.

15 See CA Paris, 7<sup>th</sup> May 2003, 1<sup>st</sup> case, 2003 *Dr. Fam.*, Comm. No. 144, note A. Gouttenoire.

16 See CA Paris, 7<sup>th</sup> May 2003, 2<sup>nd</sup> case, 2003 *Dr. Fam.*, Comm. No. 144, note A. Gouttenoire.

allowed to share child benefit equally, unless they agree otherwise or if they cannot agree upon the beneficiary (Article L.521-1 of the Social Insurance Code (*Code de la sécurité sociale*)).

Similarly, if circumstances change and the alternating residence arrangement cannot be maintained, for example if it does not work properly,<sup>17</sup> this measure must be brought to an end. The same also applies when one parent decides to move. However, the mere change of the parent's residence does not imply the systematic cessation of the alternating residence arrangement; it all depends on concrete circumstances.

## 2. The consequences of the change of one parent's residence

The debate regarding the maintenance of the child's links with each of his or her father and mother when one of them moves was intense. According to Article 373-2-13, 'the rules contained in the approved agreement and all judicial decisions related to parental responsibility can be modified or supplemented at any time by the family judge on request of one or both parents, or of the prosecutor who can be called by a third person, child's relative or not'. Indeed, measures related to the exercise of parental authority are traditionally considered to be temporary, whether they are ordered by a judicial decision or included in a judicially approved agreement. They can therefore be changed at any time provided that circumstances require this to be done. This solution of course applies to judgments as well as to judicially approved agreements specifying the details of the child's residence.

The Act of 4<sup>th</sup> March 2002 aimed at preventing any difficulties, but it also invited the most diligent parent to submit a case to the family judge in cases of disagreement or dispute. This parent can request judicial amendment of the exercise of parental authority to the new circumstances, including the details of the child's accommodation, the fulfilment of the maintenance obligation and the payment of travel expenses due to the distance of one parent's home. To achieve this, it is stated in Article 373-2, paragraph 3:

'The parent who changes his/her residence, in so far as this modifies the way the parental responsibilities are exercised, shall inform the other parent in advance and in due time.

In case of disagreement, the most diligent parent can call the family judge who will make a decision based on the child's best interest.

The family judge decides on how parents share the travel expenses and consequently adjusts the contribution to the child's maintenance and education.'

The aim of this provision is to prevent a parent from attempting to appropriate the child and to remove him/her from the other parent.<sup>18</sup> This complies with the spirit of Article 373-2 stating that both the father and mother have the duty to respect the bonds between the child and the other parent. Some judgments punish an abrupt change of residence by one parent in cases of non-compliance with the law and without informing the other parent; judges will modify the child's residence and determine it to be at the other parent's home. The parent who disregards the child's right to contact with the other parent could furthermore be punished by a criminal court (Article L.227-6, Criminal Code (*Code pénal*)).

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17 For example, because of young child's stress when separating from her mother: CA Dijon, 26<sup>th</sup> November 2002, Juris-Data No. 2002-199966; or because of need for stability of a ten-year-old child, whose school results were declining and whose behaviour expressed anxiety: CA Lyon, 6<sup>th</sup> June 2006, Juris-Data No. 2006-317910.

18 See Cass. civ. I, 4<sup>th</sup> July 2006, *Bull. Civ. I*, No. 339.

Nevertheless, as highlighted by case law, implementing an alternating residence arrangement ‘cannot compel parents to live near each other’, whether this was determined by a parental agreement or decided by judge,<sup>19</sup> since each of them has the right to freely choose the place where he or she lives.

As a result, when one parent moves to a place located too far away from the other parent, it is necessary to change the details of the exercise of parental authority in order to adapt them to the new situation. Most often the alternating residence is abandoned, simply because it has become impracticable due to the physical distance; if the circumstances favouring an alternating residence arrangement come to an end, more often than not this system will no longer be applied, regardless of each parent’s educational abilities. The child’s need for stability is the main consideration when determining his or her best interests. For example, it has been decided that a father moving forty kilometres away from his previous residence for a work-related transfer implied that the alternating residence had to be replaced by a permanent residence arrangement at the mother’s home in order to preserve the child’s lifestyle and education; the physical distance in this case became too important.<sup>20</sup> Similarly, when a mother planned to move hundreds of kilometres, the alternating residence of her four-year-old child was deemed to be no longer possible and his habitual residence was fixed at his father’s home, after considering both the respective abilities of each parent, most notably the financial impact on and accommodation possibilities for the child, and this child’s family and affective environment which was centralized at his father’s residence.<sup>21</sup>

If this leads to litigation, judges must always decide in the child’s best interest, even in cases of parental disagreement with regards to a change of the details of the residence. The motivation of their decisions is under the ultimate control of the French Supreme Court (*Cour de cassation*).<sup>22</sup> Judges considering the merits then specify, according to concrete circumstances, new circumstances of the child’s life that ensure his or her stability, taking into account the maintenance of the relationship and the affective links between the child and the parent from whom he or she will no longer live with in the future.

More generally, the alternating residence arrangement is retained, despite a parent’s move, only if the new homes of both of them are close enough to enable their school-age child to be registered at one school. In situations in which a parent’s move brings him or her closer to the other parent’s home and in which the habitual residence of the child has been previously fixed, an alternating residence may be implemented if all the circumstances of the case are favourable to this decision. This will be the case if the father and mother are able to communicate well and to agree on the educational needs of their child. On the contrary, when a parent moves far away from the other parent’s home, replacing an habitual residence at one parent’s home by an alternating residence has been sometimes considered as an appropriate solution to this new situation. In one particular case, this solution was approved in so far as it permitted a three-year-old child to preserve a close relationship with both his parents, which was deemed necessary for the development of his personality, and he was not yet of compulsory school age.<sup>23</sup>

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19 See CA Paris, 23<sup>rd</sup> February 2005, Juris-Data No. 2005-268955.

20 See CA Douai, 16<sup>th</sup> October 2003, Juris-Data No. 2003-236164.

21 See CA Montpellier, 26<sup>th</sup> January 2005, Juris-Data No. 2005-278547.

22 See Cass. civ. 1, 13<sup>th</sup> March 2007, 2007 *Dr. Fam.*, Comm. No. 125, note P. Murat.

23 See CA Lyon, 8<sup>th</sup> March 2005, Juris-Data No. 2005-273912.

## Conclusion

In conclusion, it has to be stressed, at first, that judges do not hesitate to approve any alternative residence arrangement agreed upon by the parents or, in the absence of agreement, to order such an arrangement if it does not destabilize the child and, moreover, enables him or her to be close to both parents. Nonetheless, judges do not hesitate to reprimand a parent who moves without previously informing the other parent or prevents the other parent from organizing new living arrangements and accommodation for the child, in accordance with his or her needs, as well as the affective relationships between the child and the other parent.

Judges deciding on the merits have in any case a ‘sovereign power’ (*pouvoir souverain*) when determining the facts of the case. Accordingly, the child’s best interests are decided on a case-by-case basis in determining whether to implement an alternating residence arrangement, as well as whether to maintain this system or to replace it with a residence order at one parent’s home and, at the same time, to adjust the details of his or her relationship with the other parent in the best possible way. The proximity of the parents’ homes and the child’s age (which in turn determines his or her schooling obligation) are important elements in the judicial determination. These issues can also be combined with any other specific circumstances. Nevertheless, the main consideration always remains the best interests of the child, in the spirit of the New York Convention.<sup>24</sup>

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