

Parental Agreements on Children’s Parental Custody, Contact and Child Maintenance – High Requirements and Strict Standards versus the Child’s Interests

Abstract

The aim of the paper is to analyse the Hungarian family law rules regarding parental agreements on children’s parental custody, contact and child maintenance, including their high legal and judicial requirements and strict standards. Parents are regularly supported to agree on issues concerning their children in cases when they no longer live together, as this corresponds to the principle of autonomy. However, they must enter into agreements that meet the requirements of the child’s best interests regardless of whether they lived in marriage or de facto cohabitation. The agreements must serve the interests of the partners and those of the child but not only at the time of concluding the agreement but also later. The question emerges of how either partner may request the agreement to be modified if the parents cannot agree new terms. Several aspects of the regulation, such as the judiciary, need to be considered and envisaged to evaluate the legal environment of parental agreements. This investigation is validated by the fact that it is not only the parents’ but also the state’s task to support the conclusion of agreements that protect the parties and their child’s interests and, if necessary, make the amendment of agreements possible.

Keywords: parental agreements, divorce, parental custody, child maintenance, contact, judicial amendment, child’s interests, judiciary

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I Introduction

The analysis of the regulatory environment and the judiciary concerning parental agreements on children's parental custody, contact and child maintenance requires the several issues to be considered, also on a wider horizon. The Hungarian Civil Code (HCC), Act V of 2013, entered into force in March 2014. It is worth comparing the earlier family law rules, Act IV of 1952 on marriage, family and guardianship (Family Act) with the new ones to ascertain whether the effective rules have kept up with modern family law trends and have reflected the challenges of nowadays, especially in the field of parental custody and parental agreements regarding the child. The main issues to be envisaged are the differences between the parental agreements between spouses or former spouses and de facto cohabitants and other partners, if there are any, and, in addition, the possible content of parental agreements concerning the child's parental custody, contact and child maintenance. An issue is supporting parents to reach a proper agreement, the opportunity to access alternative dispute resolution during this process and availing of the court's competence to scrutinise parents' agreements, such as the possible judicial modification of them if the parties cannot agree on their amendment and safeguarding the child's interests and rights. The aim is to examine the judiciary as well. The final question to be answered is whether and how the child's interests prevail in the envisaged field. These issues reflected in the mirror of the Hungarian judiciary and literature. It is the topic of a further contribution to analyse what kind of solutions might be also in the context of European and international trends in the field of judiciary, special court structures (family law courts), alternative dispute resolution and some supportive methods.

II Difference between the Parental Agreements between Spouses and those of Other Partners in Case of Living Separately from Each Other

At the time of its enactment, the Family Act already made no distinction between parental agreements according to whether the parents lived in marriage or de facto cohabitation.¹ As parental custody was the consequence of filiation and maternal and paternal status, the agreements of parents' living separately could not differ based on the type of their partnership or even the lack of a marriage or de facto cohabitation. Although a legal difference existed as a consequence of that, only a marriage had to be terminated formally.

¹ It was obvious in the late 1940s and early 1950s that no difference can be made between children born in marriage and born out of wedlock. See in English Emilia Weiss, Orsolya Szeibert, 'National Report on Parental Responsibilities (Hungary)' in Katharina Boele-Woelki, Bente Braat, Ian Curry-Sumner (eds), *European Family Law in Action. Volume III Parental Responsibilities* (Intersentia 2005, Antwerp-Oxford, built into the volume according to the scientific questionnaire) 89–90.

The Family Act regulated divorce and later divorce by mutual consent, including the rules on the agreement on the accessory issues.² Besides, the Family Act contained provisions on the forms of exercising parental custody with regard to parents living separately. In the case of divorcing parents, both sets of rules had to be read together but, in the case of de facto cohabitation, only the rules on the forms of exercising parental custody had to be applied.

This difference has been maintained in the Fourth Book, on Family Law, of the Hungarian Civil Code. If parents terminate their marriage, they must follow the rules on divorce and those on parental custody, too. De facto cohabitation is regulated in the HCC but the general rules regarding the definition of an existing cohabitation and its property relations are contained in the Sixth Book, in the Book on Obligations and only some family law consequences are in the Book on Family Law. As parental custody is based upon maternal and paternal status, provisions on parental custody, its exercise and arrangement have to be applied to parents in general. The possible content of the parental agreements concerning children in the case of divorce can be read from both sets of rules together. However, it is a debatable question that if the parents are not married the conditions set out with regard to divorce (e.g. that parents do not have to agree on contact between the child and the separately living parent if those parents agree on joint parental custody, discussed below in detail) must be applied in their case as well.

III Divorce in Hungarian Family Law with Special Regard to Divorce by Mutual Consent

1 Regulation of Divorce by Mutual Consent until 2014

Divorce by mutual consent was introduced into the Hungarian family law in 1974. Act I of 1974 modified the then effective Family Act, Act IV of 1952 on marriage, family and guardianship. The 1974 Act stated that the only ground for divorce is the complete and irretrievable breakdown of married life and made it possible to divorce by the common consent of the spouses. The common consent of the spouses required the consent concerning the accessory issues enumerated in the Act, which indicate that the marriage had broken down completely and irretrievably.³ The consent on the divorce and on the accessory issues did not create a presumption of an irretrievable breakdown but the court did not have to investigate the reasons giving rise to the divorce. The spouses had to present their agreement on the custody and the maintenance of any child, the non-custodial parent's right of contact with their child,

² See in English Emilia Weiss, Orsolya Szeibert, 'National Report on Grounds for divorce and maintenance between former spouses (Hungary)' in Katharina Boele-Woelki, Bente Braat, Ian Sumner (eds), *European Family Law in Action. Volume I Grounds for Divorce* (Intersentia 2003, Antwerp–Oxford, built into the volume according to the scientific questionnaire) 50.

³ Weiss, Szeibert (n 2) 54.

if the claimant so requested, spousal maintenance, the right to use the matrimonial home after divorce and the distribution of common property, excluding immovable property. This agreement had to be judicially settled during the proceeding before the court.

2 Regulation of Divorce by Mutual Consent since 2014 – Unchanged Rules

The new Hungarian Civil Code, Act V of 2013 entered into force on 15 March 2014, and it contains family law rules in its Fourth Book. The main content of family law therein, such as the earlier structure of family law have been preserved. The rules on divorce were also maintained with some slight changes. Divorce remained a judicial process, as no administrative procedure for the termination of marriage has been enacted. Irretrievable breakdown has remained the sole ground for divorce, and mutual consent has not become an automatic ground for divorce, as divorce by mutual consent has maintained being embedded in irretrievability. If the spouses both agree on divorce and on all accessory issues, their request for divorce is not the result of undue influence and they declare it as their final decision, the court does not investigate the reasons giving rise to the divorce.⁴

The main and high requirements concerning mutual consent have not changed, as the spouses have to agree on all accessory issues to be divorced by mutual consent.⁵ The circle of the accessory issues has however changed. While spouses earlier had to distribute their property, with the exception of the termination of joint ownership of the immovable property, the distribution of their joint property does no longer belong to the accessory issues that spouses have to agree as the property relations of the spouses have become complicated and all-encompassing. Nevertheless, they have to agree on the use of the matrimonial home and spousal maintenance, if claimed. It has remained unchanged that the spouses have to agree on all issues concerning their minor child.⁶

IV Agreement on Parental Custody, Contact with the Parent Living Separately and Child Maintenance – Complexity of the Rules with Regard to Recent Changes

The structure of parental custody of divorced parents has changed in the HCC and its consequences have been drawn in its text with regard to the accessory issues in the case of divorce. The possibility of joint parental custody by parents living apart has been

⁴ See in English Orsolya Szeibert, 'Family Law' in Attila Harmathy (ed), *Introduction to Hungarian Law* (Wolters Kluwer 2019, Alphen aan den Rijn, 219–229) 220–221. In Hungarian see Emilia Weiss, 'A Ptk. Családjogi Könyvről' (2013) (9) *Jogtudományi Közlöny* 405–414.

⁵ Pál Szilvia, 'Tényállások a házassági bontóperben: a sehova kapuja?' (2016) (1) *Családi Jog* 17–23.

⁶ Art 4:21(3) HCC.

maintained. In case of divorce, parents can agree on joint parental custody, but also on the division on rights and obligations belonging to custody and their sole custody as well.⁷ In the case of an agreement on joint parental custody, the HCC does not require the agreement on contact with the child⁸ but required the agreement of the child's residence. In the case of sole custody, it was clear that the child resides with the parent exercising sole custody, even if both parents must decide together on the most important issues⁹ affecting the child's life.

The will of the legislator was obviously to promote joint parental custody by parents¹⁰ even if living apart from each other. The slogan of the recodification of family law was 'gradual progress,' covering the idea that rules should only be changed if it necessary.¹¹ In the spirit of the gradual progress, the only possibility of exercising joint parental custody was if the parents agreed on that and it was not provided that the parents could agree on the child's alternating residence. However, parents were not forbidden to agree on their child's alternative residence either. The HCC did not require the parents to agree on contact with the child if they agreed on joint parental custody. It was unambiguous that the parents had to agree on child maintenance, even in cases of joint parental custody.

In January 2022, new rules passed in 2021 entered into force concerning parental custody of divorced parents.¹² Although the most important change has affected the court's competence on ordering joint parental custody and even alternating residence,¹³ a slight modification was introduced concerning the parents' agreements. According to the newly introduced rules, parents can exercise joint parental custody while providing alternating residence for the same periods of time for the child and, in this case, they are entitled and obliged to take care of the child in turn.¹⁴ No further regulation is provided for this case.

No exact normative guidance is provided for the parents agreeing on joint parental custody or alternating residence. In the case of joint parental custody, it is held that parents have to decide on all issues concerning the child, as opposed to when one parent exercises sole custody and they have to decide together on only the most important issues affecting the child's life. According to the HCC, the parents have to provide a balanced lifestyle for

⁷ Arts 4:164(1) and 4:165(1) HCC.

⁸ Art 4:21(4) HCC.

⁹ These are the determining and changing the name of the minor child, determining his place of residence if other than his place of domicile shared with the parent or his place of residence abroad for an extended period of time or for the purpose of settlement, changing the nationality of the child and choosing the school and career path of the child shall be considered to be substantial matters affecting the future of the child according to Art 4:175(2) HCC.

¹⁰ Emilia Weiss, 'A készülő Polgári Törvénykönyv családjogi Könyvének a Kodifikációs Szerkesztőbizottság által elfogadott koncepciója' (2001) (4–5) Polgári Jogi Kodifikáció 21–40, 31.

¹¹ The introduction of the phrase 'gradual progress' was used by happened in the periodical 'Family Law'. András Kőrös, 'Fontolva haladás – az új Ptk. Családjogi Könyve. I. Rész: A élettársi jogviszony szabályozásának szakértői javaslata' (2005) (2) Családi Jog 1–10, 1.

¹² Act No CXXXII of 2021.

¹³ Art 4:167(1) and Art 4:167/A. HCC.

¹⁴ Art 4:164(1) HCC.

their child and both of them have the right to act alone in the interest of the child, subject to notifying the other parent without delay.¹⁵ As joint parental custody means the ‘legal’ joint custody and not the ‘residential’ or ‘physical’ one, the child lives lifestyle-wise with one parent. However, contact between the child and the parent living separately has remained a completely unresolved issue.

The ‘original’ idea was that joint parental custody presupposes the parents’ total cooperation, which is why the HCC restricted joint parental custody to when the parents agree on that.¹⁶ The above-mentioned rule according to which it is not mandatory for the divorcing parents to agree on contact was in harmony with the theoretical idea that there is no need to agree on contact if parents are fully willing to cooperate. In the case of divorce, child maintenance was an accessory issue even when the HCC entered into force, and it was meaningful, as mere joint parental custody – without alternating residence – means that the child lives with one of the parents.

The circle of accessory issues and the relevant provisions in the case of divorce by mutual consent remained unchanged even after the modification of the parental custody rules in 2021. If the rules on accessory issues in the event of divorce and the new opportunity that articulates the agreement of alternating residence of the child are projected onto each other, a lot of normative gaps can be recognised. It is obvious from the regulation of alternating residence that it is a ‘subcategory’ of joint parental custody which can be either ‘joint parental custody without alternating residence’ as a mere legal togetherness of the parents or a ‘joint parental custody with alternating residence’ when the parents are entitled and obliged to take care of the child in turn for the same periods of time. The phrase ‘alternating residence’ or a similar wording is not found in the HCC.

The normative gaps mentioned are obviously recognised if we have a look at the rules whereby the court may order joint parental custody with or without alternating residence at the request of either parent. The court may order the joint parental custody if it is in the child’s interest, and it has to decide on contact, child maintenance and the child’s residence, too.¹⁷ The court may order that the parents shall be entitled and obliged to take care of the child in turn for the same periods of time with attention to the child’s interest. In this case, the court decides on the periods of time, the maintenance of the child (if there is such a need) and on the method of handing over and receiving the child covering the period of school breaks and holidays as well.¹⁸ If it is held by the legislator that the court has to arrange ancillary issues together with the ordering of joint parental custody and alternating residence, it seems logical to suppose that these are significant issues even if the spouses

¹⁵ Art 4:164(2)–(3) HCC.

¹⁶ Weiss (n 10) 31.

¹⁷ Arts 4:167(1) and 4:167/A(1) HCC.

¹⁸ Art 4:167/A(1)–(2).

agree on either joint parental custody or alternating residence.¹⁹ Even if it is assumed that the parents are willing to cooperate in exercising joint parental custody, it is essential to agree on the important issues even if the legal rules do not demand it.

An amendment in 2023²⁰ confirms the thoughts described above. In 2014, the HCC contained the rule that if the parents could no longer cooperate in exercising joint parental custody, the court shall terminate it at the request of either parent. This rule was maintained even in 2022. The essence of this judicial competence was in accordance with the perception that joint parental custody presupposed the parents' full cooperation. The court did not have any power of discretion as, in the absence of parental cooperation, it had to terminate the joint parental custody. The new rule, which entered into force in October 2023, has provided discretionary power to the court to terminate the joint parental custody if one parent requests it before the court. The reasoning of the amendment is to ensure that if the court orders joint parental custody at the request of either parent, neither parent may 'abuse' the rule. The essence of the 'abuse' seemed to be that the court had to terminate joint parental custody if one parent proved that they could not cooperate with the other. However, there is no difference between the case when the court ordered joint parental custody, or the parents agreed on that. If they cannot cooperate and one of them turns to the court, it may reject the petition on the termination of joint parental custody.

The rules regarding the accessory issues in the case of divorce by mutual consent require the parents' agreement on maintenance irrespective of how they wish to exercise parental custody. New provisions have been built into the regulations on parental custody. Although these concern the judicial decision on joint parental custody and alternating residence,²¹ the consideration of the legislator may be a guidance for the case of the parental agreements. According to these rules, if the court orders joint parental custody at either spouse's request, it has to decide on maintenance and also, if the child's alternating residence is ordered, the court decides about child maintenance if needed.

V Mediation as a Form of Support in the Civil Code

Mediation was not built into the divorce proceeding in the context of the Family Act. Act LV of 2002 on mediation – on mediation generally – entered into force in 2003. At that time, so-called 'divorce mediation' existed in Hungary, but it was not widely well-known and available.

¹⁹ See on thoughts on the possibilities of joint parental custody and alternating residence, Orsolya Szeibert, 'Új mérföldkő a hazai családjogi szabályozásban: a bíróság által elrendelhető közös szülői felügyelet és váltott gondoskodás' (2022) (3) *Családi Jog* 10–15; Károly László Simon, 'A közös szülői felügyelet bírósági elrendelésének mérlegelési szempontjai a hazai szabályozás tükrében' (2022) (4) *Családi Jog* 1–10.

²⁰ Act No XXXI of 2023.

²¹ Art 4:167/A HCC.

A novelty is that mediation is mentioned in the frames of rules on divorce.²² According to the HCC, spouses can use a mediation procedure to resolve their relationship and the disputed issues related to the divorce based on agreement, either by their own decision or at the initiative of the court before or during the divorce proceedings.²³ The agreement reached because of the mediation process can be included in a lawsuit settlement. This rule does not mean that the mediation process is built into the divorce proceedings, even if the court ‘initiates’ it. The court may only suggest that the spouses turn to a mediator, but it is not mandatory for them.

VI Requirements for the Accessory Issues in the Case of Divorce and their Scrutiny by the Court

The requirements concerning the existence of the consent on accessory issues and their appropriateness were also high in the Family Act.²⁴ The divorce court could not deliver a partial judgment, so the spouses had to agree entirely on all accessory issues and if one accessory issue was omitted then divorce by mutual consent was impossible. It was therefore clearly expected that the spouses must agree on the above-mentioned issues if they wished to divorce by mutual consent. The requirements concerning the agreement were high, as the court had to remind the spouses that they should not enter into ill-considered agreements merely to obtain a divorce soon.²⁵ The spouses had to be warned that the agreement would be binding on them, and they could ask for its amendment later if there were special circumstances or when it was in the interest of minor children to do so and then only within two years of the divorce decree.

The agreement on the accessory issues had to be scrutinised and approved by the court. Theoretically, the court had to investigate whether the agreement was in the interests of the minor children and whether it was detrimental to the interests of one of the spouses. Although it was obligatory for the court, experiences indicate the court did not scrutinise them very closely or in detail.

In the HCC, the requirements of consenting to the accessory issues in the case of divorce have remained high and there are gaps concerning the regulation of the exact legal details when the parents agree on joint parental custody and alternating residence, as has been mentioned above. There are several conditions for requesting the amendment of either part of the agreement later on, which is why parents are required to pay great attention to the accessory issues and consider them thoroughly before divorce.

²² András Kőrös, ‘Fontolva haladás – az új Ptk. Családjogi Könyve. 2. Rész: A házasság megszűnésének szabályai’ (2005) (3) Családi Jog 12–19, 18–19.

²³ Art 4:22 HCC.

²⁴ Ottó Csiky, ‘A házasság megszűnése’ in András Kőrös (ed), *A családjog kézikönyve 2007*. I. (HVG-ORAC 2007, Budapest, 60–91) 80–83.

²⁵ Csiky (n 24) 83.

The requirement that the court theoretically has to scrutinise the spouses' agreements has not changed. However, according to the experiences, how deep it investigates whether the agreements meet the affected child's interests and the spouses' interests, or it really investigates it at all depends on the court. The judicial attitude seems to have much to do with the trust of the reasonableness and amicability of the parents and their relationship. To date, no empirical research has actually been conducted on the judicial scrutiny of the spouses' agreements.

VII The Amendment of the Spousal Arrangements Affecting the Former Spouses' Minor Child

1 *Clausula Rebus Sic Stantibus* concerning the Agreements Affecting the Child in the Event of Divorce in the Effective Family Law Rules

The reminder to the spouses that it will be complicated to amend their agreements after the court has incorporated them into a judgment rests on real foundations. In each case when either former spouse wishes to request for the modification of the agreement, his or her petition has to meet the requirements of the *clausula rebus sic stantibus*. The court strictly judges whether the claim is an adequate one. The requirements of amendment of agreements regarding the minor child are only slightly differ from each other.

The court may be requested to modify the exercise of parental custody if the circumstances under which the parents' agreement (or the court's decision) was based subsequently changed significantly, and consequently, the modification serves the interest of the child.²⁶ The legal rule adds that the parent who was at fault in causing changes in the circumstances, in particular by unlawfully taking or retaining the child, may not rely on the interests of the child with regard to the changes in the circumstances. As mentioned above, if the parents are unable to cooperate any longer in exercising joint parental custody, the court may terminate joint parental custody at the request of either parent.²⁷ There is no such definite requirement in the HCC concerning the amendment of the agreement on contact but the Hungarian Curia declared that the rules on the amendment of the agreement/decision on parental custody have to be applied analogously to the modification of agreement/decision on contact (as detailed below).

There is no special rule on the modification of the agreement or judicial decision on child maintenance but the general rule on modifying the level of maintenance has to be applied to child maintenance as well. This general rule²⁸ concerning the modification of the level of maintenance distinguishes between the requirements for modification depending

²⁶ Art 4:170(1) HCC.

²⁷ Art 4:170(2) HCC.

²⁸ Art 4:210(1) HCC.

on whether the previous one was based on an agreement between the parties or a court decision. If either parent wishes to ask for the modification of the level of child maintenance, it is possible if any of the circumstances that served as basis for determining maintenance based on the court judgment has changed in such a way that the unchanged provision of maintenance would violate a substantive legal interest of either party. If the parents agreed on child maintenance, the modification of the level of maintenance may be requested if any of the circumstances that served as a basis for determining maintenance based on the agreement has changed in such a way that the unchanged provision of maintenance would violate a substantive legal interest of either party, but the parent who had to expect the possibility of a change in the circumstances at the time when the agreement was concluded or who is at fault regarding the change in the circumstances may not apply for the modification of the maintenance based on an agreement. The possibility of requesting the modification of an agreement on child maintenance has been made deliberately²⁹ harder.

2 The Justification for the Rigid Requirements during the Codification of the Hungarian Civil Code

The codification process of the HCC lasted for approximately fifteen years, from 1998 until 2013. The draft of the family law rules was elaborated in the very early 2000s and the first draft of the normative text became ready in 2005 and 2006.

a) Family law as an independent legal branch and rules for the judicial amendment of the agreements concerning the child in the Family Act

The Family Act was an independent legal act for 60 years. Therefore, even if connections were assumed and maintained between the Family Act and the then effective Civil Code (Act IV of 1959) – especially in the field of matrimonial property law –, the rules of the Civil Code of 1959 were not applied to the family law relationships regarding child maintenance, parental custody and contact. The Family Act included some rules on the amendment of the parents' agreements. It was held in connection with the parents' agreements on rendering their relationship in the ancillary issues that the court had to inform the parents, and it could approve the spouses' agreements concerning their minor child if it met the child's interests. The Family Act prescribed that, within two years of the approval of the agreement, the court could only request a change to the agreement governing the long-term legal relationship between the parties if it served the interests of the spouses' minor child, or if, due a change in circumstances, the agreement seriously harms the interests of one of the parties.³⁰

²⁹ András Kőrös, 'Fontolva haladás – az új Ptk. Családjogi Könyve. 8. Rész: A rokontartás' (2007) (1) Családi Jog 1–10, 9–10.

³⁰ Art 18(3) Family Act.

When the recodification process of the Civil Code began, it was disputed whether the family law rules should be incorporated into the Civil Code and at last it was decided that it should be so.³¹ The first draft mirrors the wish of the drafters to find the connecting points between the general contract law rules and family law agreements.

b) Clausula rebus sic stantibus principle in modifying the parents' agreements

The draft aimed to maintain the rule that such an agreement should only be changed in very justified cases but did not hold it important to include a general rule in this regard as the law was drafted to contain provisions among the specific rules that the agreement on custody and contact could only be changed if it served the interest of the minor child of the parents.³²

According to the draft text, two conjunctive requirements were planned to be included in the regulation concerning the possible modification of the exercise of parental custody, firstly that the circumstances upon which the parents' agreement (or the court's decision) was based subsequently changed significantly, and consequently, the modification serves the interest of the child.³³ As such, the earlier provision was upheld. However, it changed the requirements of the judicial modification of the agreement on child maintenance. The reasoning of the draft articulated that the extra requirement in the case of an agreement, according to which the parent who had to expect the possibility of a change in the circumstances at the time when the agreement was concluded or who is at fault regarding the change in the circumstances may not apply for the modification of the maintenance that is based on agreement, had to be included in the model of judicial modification of the contract in the Book on Obligations.³⁴ Although the agreement on the exercise of parental custody and contact was discussed as an 'agreement' and exactly a 'contract', the agreement on child maintenance seemed to be held as a 'contract' or at least an 'agreement' that operates as a 'contract'. It has not been discussed in the Hungarian legal literature whether such an agreement was a contract but, as the family law rules were incorporated into the Civil Code, this issue might understandably emerge.

³¹ András Kőrös, 'A Ptk. és a családjog kapcsolata – a gyakorló jogász szemével' (1999) (1) Polgári Jogi Kodifikáció 3–9, 5, 8; Emilia Weiss, 'Az új Polgári Törvénykönyv és a családjogi viszonyok szabályozása' (2000) (2) Polgári Jogi Kodifikáció 4–13, 12–13.

³² Kőrös, A házasság megszűnésének szabályai (n 22).

³³ Art 72/A(2) Family Act. András Kőrös, 'Fontolva haladás – az új Ptk. Családjogi Könyve. 7. Rész: A szülői felügyelet III. fejezet' (2006) (4) Családi Jog 1–9, 5.

³⁴ Kőrös, A rokонтartás (n 29) 9–10.

VIII The Amendment of the Agreements regarding Children in the Judiciary in Recent Years

1 Parental Custody

It had been crystallised in the judiciary that a request of either parent to amend the decision (either based on the parental agreement or a judicial arrangement) on parental custody could be found justified under the Family Act if there had been a substantial and significant change in the previous circumstances affecting the exercising of parental custody.³⁵ If the change in circumstances had taken place, an additional essential requirement was that the change was in the interest of the child. It was uniformly followed that the fundamental change of the circumstances had to be examined from the point of view of the child's interest and a defining aspect was the requirement of legal stability regarding the child's residence with either parent, if it was not the result of abuse.

The commentary literature has repeated these phrases word by word, insisting that both conditions, namely the significant change of the circumstances and that the amendment serves the child's interest, must prevail.³⁶ It was actually in line with the idea developed during the codification that the thorough justification of the amendment should be maintained.³⁷

In a recent case³⁸ adjudged by the Hungarian Curia (Hungarian Supreme Court) one parent of a child over the age of 14 initiated a lawsuit for the amendment of the parental custody. The child had a wish, consistently expressed before the courts, to live with the other parent, who initiated the proceedings. While the court of first instance had the opinion that no real change in circumstances happened in this case, the court of second instance did not agree with this conclusion, as they held that the fact in itself that the child would have liked to live in a different environment must have been regarded as a significant change in circumstances and, as the child was over 14, the proceeding court had the task of considering whether the child's choice endangered his development.³⁹ The Hungarian Curia repeated the legal rule consisting of two conjunctive conditions as a basis of its own reasoning and summarised that the courts that acted on the first and second instances differed on whether the child's longing for the former environment could be evaluated as a change in circumstances that established the amendment of the earlier decision.⁴⁰

³⁵ Edit Bencze, 'A szülői felügyelet és a gyermekvédelmi gondoskodás' in András Kőrös (ed), *A családjog kézikönyve 2007*. II. (HVG-ORAC 2007, Budapest, 625–801) 671–673.

³⁶ Katalin Makai, 'A szülői felügyelet' in András Kőrös (ed), *Polgári Jog. Családjog* (HVG-ORAC 2013, Budapest 233–299) 266. This is held later, see Katalin Makai, 'A szülői felügyelet' in András Kőrös (ed), *Polgári Jog. Családjog* (HVG-ORAC 2018, Budapest, 291–368) 328.

³⁷ András Kőrös, Katalin Makai, Orsolya Szeibert, 'Negyedik Könyv' in Lajos Vékás, Péter Gárdos (eds), *A Polgári Törvénykönyv magyarázatokkal* (Complex 2013, Budapest, 237–360) 334.

³⁸ Decision of Hungarian Curia Kúria Pfv.I.20.052/2023/5. BH 2023.9.212.

³⁹ Decision of Hungarian Curia Kúria Pfv.I.20.052/2023/5 [32].

⁴⁰ Decision of Hungarian Curia Kúria Pfv.I.20.052/2023/5. [38]-[39].

2 Child Maintenance

The earlier case was based upon a former judicial decision, but the Hungarian Curia's interpretation of the rule concerned did not depend on whether the former method of exercising the parental custody had been based upon an agreement or a judgment. In child maintenance cases, mentioned above, the requirements of an amendment of the level of maintenance are even higher if it is based upon a parental agreement. The conjunctive conditions are interpreted very strictly, as the Hungarian Curia reinforced in a recent judgement⁴¹ that that the change of the former circumstances has to be objective, with the consequence of a serious legal injury to the interested party.⁴² The mentioned novelty of the maintenance rules, namely that the parent who had to expect the possibility of a change in the circumstances at the time when the agreement was concluded or who is at fault regarding the change in the circumstances may not apply for the modification of maintenance that is based on an agreement.

The commentary literature confirmed that the aim of the new provision was to introduce more rigid regulation⁴³ in order to bring it, as a permanent legal relationship, closer to the conditions for modification of a judicial contract.⁴⁴ It has been since the new rules entered into force that the parents' agreement, or any agreement between a claimant and the obligor in the family maintenance context, is a contract in the legal sense. The Hungarian Curia implemented these strict requirements into practice, underlining that if the parents definitely and clearly articulated their will in the agreement with regard to several aspects of the maintenance, including the time period of the maintenance obligation, this 'contractual will' cannot be ignored.⁴⁵ In its reasoning, the Hungarian Curia added that the legislator drew the conclusions of the fact that the family law rules had been integrated into the Civil Code and gave priority to achieving the right to self-determination.⁴⁶ Although the contractual character was originally model for the spouses' agreements regarding the use of the common dwelling and the determination of the property relations for the future, the Hungarian Curia refers in its reasoning to the arrangement of exercising parental custody as well as an example of the agreement ensuring the partner's autonomy. The reasoning declares that the contractual arrangement means that the general rules of obligations have to be applied to these agreements with certain legally determined exceptions.⁴⁷ The expectation that parents have to behave responsibly also plays a role here.

⁴¹ Decision of Hungarian Curia Kúria Pfv.II.21.474/2019/8. BH 2020.11.330.

⁴² Decision of Hungarian Curia Kúria Pfv.II.21.474/2019/8. [50].

⁴³ Kőrös, Makai, Szeibert (n 37) 349.

⁴⁴ Orsolya Szeibert, 'A rokontartás' in András Kőrös (ed), *Polgári Jog. Családjog* (HVG-ORAC 2013, Budapest 300–333) 317. This is held later, see Orsolya Szeibert, 'A rokontartás' in András Kőrös (ed), *Polgári Jog. Családjog* (HVG-ORAC 2018, Budapest, 370–423) 390–393.

⁴⁵ Decision of Hungarian Curia Kúria Pfv.II.20.804/2018/12. BH 2019.7.204

⁴⁶ Decision of Hungarian Curia Kúria Pfv.II.20.804/2018/12. [31].

⁴⁷ Decision of Hungarian Curia Kúria Pfv.II.20.804/2018/12. [31].

3 Contact between the Child and the Parent Living Separately

Although the Family Act prescribed requirements for the amendment of agreements concerning parental custody and child maintenance, it did not regulate it⁴⁸ regarding contact, presumably because the arrangement of contact cannot be like a contract. The commentary literature did not say a word about the need to apply a similarly strong set of conditions.⁴⁹

However, the Hungarian Curia has introduced them. In a case,⁵⁰ the divorcing spouses had agreed on the exercising of parental custody, child maintenance and contact before the proceeding court. As it turned out later, the contact between the children and the separately living parents was fraught with problems from the beginning. The other parent requested the rearrangement of the agreement on contact from the court and ordering a controlled contact. Although the court of first instance rejected the petition, the court of second instance considered the concerned child's interests crucial, deemed the further deterioration of the contact as a change of circumstances and held it decisive that the earlier arranged contact could not function.⁵¹ The Hungarian Curia agreed with the reasoning of the court of first instance. The court articulated that, in the absence of a special legal provision, the legal rule concerning the rearrangement of parental custody had to be applied to the rearrangement of contact, which meant that both conjunctive conditions had to be applied.⁵² The court of second instance argued that the lack of well-functioning contact injured the child's interests and achieved the change of circumstances in itself.⁵³ The Hungarian Curia stated in its reasoning that the Book of Family Law provided wide autonomy to the parents to arrange their family relationships in a contract⁵⁴ and it was their responsibility that the interests of their child were taken properly into account.

IX Conclusions regarding the Child's Interests

Some issues emerged at the beginning of the codification in connection with incorporation of family law rules into the Civil Code. Although all aspects of family law were reconsidered and discussed during the codification, the issue of how to rearrange or amend the parents' agreements regarding children did not attract huge attention. It is understandable, as theoretical and complex issues and drafts were continuously debated for years. However, we can recognise that these opportunities, or the lack of them, play an enormous role in

⁴⁸ Kőrös, Makai, Szeibert (n 37) 338–339.

⁴⁹ Makai, 'A szülői felügyelet' (n 36) 280–285. This is held later, see Makai, 'A szülői felügyelet' (n 36) 348–354.

⁵⁰ Decision of Hungarian Curia Kúria Pfv.II.20.913/2017. BH 2018.4.115.

⁵¹ Decision of Hungarian Curia Kúria Pfv.II.20.913/2017. [31]–[32].

⁵² Decision of Hungarian Curia Kúria Pfv.II.20.913/2017. [28].

⁵³ Decision of Hungarian Curia Kúria Pfv.II.20.913/2017. [32].

⁵⁴ Decision of Hungarian Curia Kúria Pfv.II.20.913/2017. [35].

everyday life. The Hungarian Curia took steps to approach the judgment of these cases to the contractual situations and the role of the parents' exercising self-determination and autonomy to that of contractual partners.

It is worth envisaging whether it is legally provided that the child's interests must be taken into account. The answer is, of course, yes.

According to a family law principle in family legal relationships, the interests and rights of the child shall be granted increased protection.⁵⁵ This is confirmed in the provisions on the judicial dissolution of marriage. The HCC declares that, upon the dissolution of marriage, the interests of the common child shall be considered and that, when agreeing on the exercise of parental custody, contact arrangements between parent and child and child maintenance, the interests of the child shall prevail. It is required from the parents that they shall exercise parental custody with a view to ensuring the child's appropriate physical, mental and moral development and inform the child of any decisions affecting them.⁵⁶ Theoretically, the family law rules provide that the child's interests are considered both in the divorce proceedings and when agreeing on the accessory issues affecting the child. It is a further issue how the realisation of the interests of the concerned child is guaranteed. This question deserves to be said more because the parents' autonomy is protected, there is no built-in mediation, and the court does not always examine the parents' agreement in depth.

Furthermore, the strict insistence on the conjunctive conditions being realised inevitably results in putting the child's interests in the background, especially if the child's interests cannot be considered as a change of circumstances. A reasoning was articulated during the codification and also in the judiciary when applying the family law rules that it has to be avoided that the parents act to each other's disadvantages. It is an aim worth being supported but it cannot be disadvantageous for the child.

A challenge is the application of the substantive law rules on parental custody, as recent modifications have raised some questions on their proper application and no crystallised judiciary has been shaped yet. A further challenge that has become permanent is that circumstances are in constant change. Children are developing; their capacities are evolving and their families including their parents are exposed to changes. Even if it is not possible and desirable to follow up the changes in a daily basis, opportunity must be provided for the follow up of the mutating living conditions.⁵⁷ It is a challenge for practising lawyers and legislator.

⁵⁵ Art 4:2 HCC.

⁵⁶ It is a principle of the Fourth Book of the HCC, Art 4:147(1) HCC.

⁵⁷ See Ingeborg Schwenzer, Mariel Dimsey, *Model Family Code from a Global Perspective* (Intersentia 2006, Antwerpen – Oxford) 147–148.