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## Dilemmas of shared custody in Polish family law<sup>1</sup>

### *Dylematy wokół pieczy współdzielonej w polskim prawie rodzinnym*

#### Abstract

*The subject of the paper is shared custody understood as a parenting arrangement where both parents spend a similar or equal amount of time caring for their children. This type of custody is most common in Northern European countries, Belgium, France, Spain, and Slovenia today. In contrast, in Poland, families practising shared custody remain quite rare. This can result from various factors, including social, cultural and legal ones. Shared custody has not, to date, been formally regulated in the Family and Guardianship Code. The issue raised is important from the practical point of view, and very topical, as the current Commission for the Codification of Family and Guardianship Law is actively working to enact regulations regarding shared custody. The paper identifies dilemmas of shared custody in Polish family law, with consideration to American experiences – for at least two reasons. Firstly, the US is considered the cradle of shared custody; secondly, the Polish legislator is inspired by American family law.*

**Keywords:** shared custody, child custody, parental authority after divorce or separation, parenting plan

#### Streszczenie

*Przedmiotem rozważań w niniejszej pracy jest piecza współdzielona rozumiana jako sposób uregulowania wspólnego wykonywania władzy rodzicielskiej po rozwodzie lub rozstaniu rodziców, w którym oboje rodzice spędzają równą lub porównywalną ilość czasu z dziećmi. Ten rodzaj pieczy cieszy się obecnie największą popularnością w krajach Europy Północnej, Belgii, Francji, Hiszpanii i Słowenii. W Polsce natomiast rodziny realizujące pieczę współdzieloną stanowią rzadkość. Może*

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to wynikać z różnych czynników, w tym socjalnych, kulturowych i prawnych. Piecza współdzielona nie została jak dotąd uregulowana w Kodeksie rodzinnym i opiekuńczym. Poruszone zagadnienie jest niezwykle ważne z praktycznego punktu widzenia oraz aktualne, z uwagi na trwające zaawansowane prace Komisji Kodyfikacyjnej Prawa Rodzinnego nad wprowadzeniem unormowań w tym zakresie. W niniejszej pracy omówiono dylematy towarzyszące dyskusji o pieczy współdzielonej w polskiej nauce prawa rodzinnego z odwołaniem się do doświadczeń amerykańskich – przynajmniej z dwóch powodów. Po pierwsze dlatego, że Stany Zjednoczone uznawane są za kolebkę pieczy współdzielonej, a po drugie z uwagi na to, że polski ustawodawca inspirował się amerykańskim prawem rodzinnym.

**Słowa kluczowe:** *piecza współdzielona, piecza nad dzieckiem, władza rodzicielska po rozwodzie lub rozstaniu, plan rodzicielski*

## 1. Introductory remarks

The subject of the paper is shared custody, which is one of children's living arrangements following parental divorce or separation. Specifically, shared custody is an emerging parental care arrangement in which children spend a similar or equal amount of time with both of their parents after family dissolution by living alternately in the two parental households. Although there is no official definition of the term, most empirical studies refer to shared custody when children spend between 30% and 50% of their time with each parent<sup>2</sup>. Two other terms for shared custody are joint physical custody, whereby both parents take care of children on a daily basis, and shared residence, whereby children live alternately in their mother's and father's homes. It seems, however, that the concept of shared custody captures the essence of this care arrangement better. In shared custody, both parents are highly involved and maintain an active role in their children's upbringing, sharing equal responsibilities and decision-making power<sup>3</sup>. The current Polish Commission for the Codification of Family and Guardianship Law likewise uses the term "*piecza współdzielona*", which literally means "shared custody". The point is that both parents not only have, but also share, the care and responsibilities for their children as equally as possible. Therefore, for the sake of clarity of discussion in this paper, the use of the term of shared custody has been uniformly adopted.

Shared custody is widely regarded as more favourable for the welfare of the child than sole custody and care. Empirical studies confirm that children who have shared custody are able to stay close to both parents, which reduces the negative impact of separation<sup>4</sup>. This type of care arrangement is increasingly being agreed upon by divorced or separated parents, as it allows children to maintain a meaningful relationship with both of them. Shared custody is currently most common in Northern European countries, Belgium, France, Spain, and Slovenia. Studies conducted by Mia Hakovirta in 2023 show that equal shared custody (also known as 50-50 custody, where children spend an equal amount of time with both of their parents) is most common in Sweden (42.5%), Finland (23.8%) and Belgium (19.6%). In Denmark, 26.2% of children have unequal shared custody, followed by Sweden (11.2%), Slovenia (11.1%), and Belgium (10.7%)<sup>5</sup>.

In contrast, in Poland, families practising shared custody remain quite rare. This can result from various factors, including social and cultural ones. The current Family

<sup>2</sup> L. Augustijn, *Joint physical custody, parent-child relationships, and children's psychosomatic problems*, "Journal of Public Health: From Theory to Practice" 2023, No. 31, p. 756.

<sup>3</sup> K. Kamińska, *Pieczna naprzemienna a władza rodzicielska rodziców żyjących w rozłączeniu* [Joint physical custody and parental authority after divorce or separation of parents], Warszawa 2022, p. 528.

<sup>4</sup> M. Reimann, *Rodzina jako wspólna sprawa – opieka współdzielona w perspektywie dzieci* [Family as a common matter – joint shared custody in children's perspective], "Dziecko Krzywdzone. Teoria, badania, praktyka" ["Abused Child. Theory, Research and Practice"] 2023, Vol. 22, No. 1, pp. 108–109.

<sup>5</sup> The study included 9,102 children from 17 European countries, using data from 2021. See: M. Hakovirta, D.R. Meyer, M. Salin, E. Lindroos, M. Haapanen, *Joint physical custody of children in Europe: A growing phenomenon*, "Demographic Research" 2023, Vol. 49, No. 18, pp. 482, 487, available at: <https://doi.org/10.4054/DemRes.2023.49.18> [accessed on: 4 April 2025].

and Guardianship Code (hereinafter: “FGC”)<sup>6</sup> came into force on 1 January 1965. Since then, it has been possible for the court to keep the full parental authority of both parted parents – exercised as shared custody or sole custody. Despite this possibility, in practice physical custody has been usually awarded to one parent alone (in most of cases – the mother). It should, however, be emphasised that this practice has been often the result of the parents’ wishes, who in the majority of cases have applied for physical custody to be awarded to the mother<sup>7</sup>. It seems that Poland is still dominated by the attitude that regards the mother as the primary caregiver and the father as the primary breadwinner. This is reflected in an unequal division of parenting roles both before and after family dissolution.

On the other hand, for several years, Polish family law has been undergoing change, and there has been a steady increase in the interest of shared custody – most often parents work out this type of custody in the form of a settlement or parenting plan before a mediator. Shared custody is present in Polish court practice, but it implicates practical problems, as it has not, to date, been formally named or defined in the FGC. Shared custody is a subject of interest of the current Commission for the Codification of Family and Guardianship Law, so this problem is very important and topical. The aim of this paper is to identify several problems facing the Polish legislator in introducing regulations regarding shared custody. The paper refers to American family law, as shared custody has its origin in the US. Such type of care arrangement is subject to the regulations in 31 states, of which 17 have a legal definition of this term. A review of laws and procedures related to shared custody in American family law has set an example of good practice in this area for the Polish legislator. Besides, this would not be the first time the Polish legislator has ever inspired by American family law, and this is due to transferring the American concept of the parenting plan into the FGC in 2008<sup>8</sup>.

## 2. Parental authority after divorce or separation in Poland

First, it is necessary to provide the legal background for shared custody through a general description of the relationships between parents and children. In Poland the main law governing family matters is the FGC. The Code deals with, among others, parental authority (Article 93 et seq.), the consequences of divorce on parental authority (Article 58 § 1 and § 1a), and the consequences of separation of unmarried parents on parental authority (Article 107). The term “parental authority” means the entirety of parents’ rights and duties towards their child, aimed at providing them due care and safeguarding their interests. The elements that create parental authority in Poland are: custody over the child, custody (management) over the child’s property,

<sup>6</sup> Act of 25 February 1964 (consolidated text: Journal of Laws 2023, item 2809, as amended).

<sup>7</sup> M. Habdas, *The evolution of joint parenting in Poland: The legal perspective on lessons learned and still to be learned*, “International Journal of Law, Policy and The Family” 2019, Vol. 33, Issue 3, pp. 338–339, available at: <https://doi.org/10.1093/lawfam/ebz010> [accessed on: 4 April 2025].

<sup>8</sup> Act of 6 November 2008 amending the Family and Guardianship Code and some other laws (Journal of Laws 2008 No. 220, item 1431); came into force on 13 June 2009.

and representation. The most important attribute of parental authority is custody over the child, which means raising the child and guiding them. The legislator obligates parents to care for the psychical and spiritual development of the child. Beside parental authority, one of the essential elements of the relations between parents and children are also the right of access (contacts with the child) and the maintenance obligation. However, under Polish family law, these rights and duties are separate and therefore, regulated in different branches of the FGC.

In the doctrine there are proposals to replace the concept of parental authority with the term “parental responsibility”<sup>9</sup>. The need for change is justified with the necessity to give stronger emphasis to the child’s qualities as a subject in their relationships with their parents. Moreover, the term “parental responsibility” is used in international legislation<sup>10</sup>. This term is supported by the Commission on European Family Law. In 2007, the Commission published “Principles of European family law regarding parental responsibilities”. Parental responsibility is defined in Principle 3:1 as a collection of rights and duties aimed at promoting and safeguarding the welfare of the child. It encompasses, in particular: care, protection and education; maintenance of personal relationships; determination of residence; administration of property, and legal representation. The scope of parental responsibility proposed by the Commission is much more extensive than the concept of parental authority in the FGC. If the Polish legislator plan to introduce changes in terminology, such as the replacement of “parental authority” by “parental responsibility”, it is necessary to think over the legal content of the new concept.

When delivering a judgment on divorce, the court is required to resolve the question of parental authority and contacts with the common minor child of both spouses. The court also decides the amount in which each of the spouses is obliged to bear the costs of living and of raising the child. In its decision, the court takes into account a written agreement between the spouses on how to exercise parental authority and maintain contacts with the child after divorce, if it is consistent with the child’s welfare (Article 58 § 1). In the absence of a parenting plan, the court takes into account the child’s right to be raised by both parents and resolves for parental authority to be exercised jointly and for contacts with the child to be awarded equally to both parents. However, the court may also entrust parental authority to one of the parents, limiting the parental authority of the other to certain rights and duties in relation to the child, if the child’s welfare so requires (Article 58 § 1a). Similar regulations apply after separation of parents who have not been married (Article 107).

The wording of the existing legislation ensures an important starting point, which is that joint parental authority need to be retained after divorce or separation. This leads to the fact that parents share equal decision-making responsibilities. Both have the right to make important decisions about the child’s well-being, including

<sup>9</sup> K. Kamińska, *Komentarz do art. 107 k.r.o.* [Commentary on Article 107 of the f.g.c.] [in:] *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code. Commentary], M. Załucki (ed.), Warszawa 2023, p. 472.

<sup>10</sup> J. Slyk, *The legal content of parental authority in Polish family law*, “Prawo w Działaniu” [“Law in Action”] 2017, Vol. 32, p. 95.

decisions about health, education, and religion. In fact, the Polish legal model of joint parental authority resembles the American concept of joint legal custody. The above rule is borne out by the Central Statistical Office statistics according to which in 2023, 32,559 rulings were issued on divorce, including rulings on couples that have minor children. Among this, the exercise of parental authority was granted to both parents in 23,989 cases (73.7%). In turn, full parental authority was granted to the mother solely in 7,104 cases (21.8%) and solely to the father in 813 cases (2.5%)<sup>11</sup>. Joint parental authority does not automatically mean shared custody. However, there are still no official statistics on the number of judgments in which the courts, when deciding on joint parental authority, adopted the model of shared custody. So far, only Maciej Domański conducted research focused on court practice in divorce cases in which the judgments gave parents shared custody. His research covered 23 cases examined by 10 courts in Poland. This applied to judgments issued in 2014. The main conclusion from the research was that shared custody was present, but only rarely so, in the court practice across Poland<sup>12</sup>.

After nearly 10 years, sole custody is still the preferred arrangement, where only one parent is appointed by the court to be responsible for the child's day-to-day care. Nevertheless, across Europe, shared custody, particular a symmetric one – half of the time in the mother's home, half of the time in the father's home – is not the preferred care arrangement<sup>13</sup>. According to Hakovirta's research, of the children in separated families, 12.5% live in equal-share custody arrangements, 8.2% live in unequal-share custody arrangements, and 79.3% live in the more traditional sole-custody arrangement<sup>14</sup>. In practice, in most countries, shared custody will only be awarded where both parents seek the arrangement and the court has found it is in the child's best interests. Belgium is the only European country where shared custody has been the legal presumption since 2006<sup>15</sup>.

### 3. Shared custody in Poland – legal and practical problems

So far, shared custody has not been directly regulated in the FGC. This kind of parental care arrangement has not been named, defined or otherwise specified. The provisions

<sup>11</sup> In 306 cases the exercise of parental authority was granted separately to a mother and father – when parental authority was limited. In other cases, the child care was granted to an orphanage (66, approx. 0.2%), foster family (234, approx. 0.7%), and other person or entity (47, approx. 0.1%). See: *Demographic Yearbook of Poland 2023*, Warszawa 2023, available at: <https://stat.gov.pl/en/topics/statistical-yearbooks/statistical-yearbooks/demographic-yearbook-of-poland-2023,3,17.html> [accessed on: 4 April 2025].

<sup>12</sup> M. Domański, *Orzekanie o pieczy naprzemiennej w wyrokach rozwodowych* [Adjudicating alternating custody in judgments of divorce], "Prawo w Działaniu" ["Law in Action"] 2016, Vol. 25, p. 144.

<sup>13</sup> A. Steinbach, L. Augustijn, G. Corkadi, *Joint physical custody and adolescent's life satisfaction in 37 North America and European countries*, "Family Process" 2020, Vol. 60, No. 1, p. 153, available at: <https://doi.org/10.1111/famp.12536> [accessed on: 4 April 2025].

<sup>14</sup> M. Hakovirta, D.R. Meyer, M. Salin, E. Lindroos, M. Haapanen, *Joint...*, p. 483.

<sup>15</sup> L. Augustijn, E. Claessens, A. Miettinen, M. Hakovirta, D. Mortelmans, Q.H. Riser, A. Steinbach, *Joint physical custody and mother's life satisfaction in Belgium, Finland, and Germany*, "Journal of Family Studies" 2025, Vol. 31, Issue 3, p. 4, available at: <https://doi.org/10.1080/13229400.2025.2451192> [accessed on: 4 April 2025].

of the FGC, however, do not preclude the arrangement. When parents divorce or separate, they may agree on shared custody, using a parenting plan. Simultaneously, it should be emphasised that the courts will always put the welfare of children first when making the decision about child arrangements. Custody is not a one-size-fits all, and shared custody does not work for everyone. The key conditions necessary for the implementation of this form of custody are:

- 1) the child's age and needs (infants and toddlers often stay primarily with one parent, while older children can better transition between homes),
- 2) communication skills and respect between co-parents (shared custody can exacerbate conflict between parents when they have difficulty communicating or cooperating effectively, which can negatively impact the child's well-being),
- 3) the parents' work and life schedule flexibility (frequent transition require availability),
- 4) geographic distance between parents (shared custody becomes less feasible if parents live far apart),
- 5) history of domestic abuse (safety concerns may rule out shared custody).

Although the current FGC does not use the term "shared custody" at all, the equivalent of this term, namely "*opieka naprzemienna*", was introduced in the text of the Act on State Aid for Raising Children (hereinafter: "ASARC") in 2016<sup>16</sup>. No definition of this term has been given as well. The ASARC was the first and thus far the only piece of legislation that has used the concept of shared custody<sup>17</sup>. On the other hand, the Code of Civil Procedure (hereinafter: "CCP")<sup>18</sup> makes reference to a ruling where "the court rules that the child is to reside with each parent on an alternating basis" in Articles 582[1] § 4<sup>19</sup>, 598[22]<sup>20</sup> and 756[2] § 1 point 3<sup>21</sup>. These provisions, introduced in the amendment of the CCP of 25 June 2015, are intended to apply to shared custody. The CCP indicates such a care arrangement not directly (without naming it), but in a descriptive way. This is a situation in which the procedural regulations refer to some legal institution that does not arise from the substantive law, which should be considered as a legislative error. In the view of the above, the lack of regulations referring to shared custody generates many doubts. The need for regulation of shared custody has been reported by the doctrine for years, however, recently judges as well advocate implementing clear rules into FGC<sup>22</sup>.

<sup>16</sup> Act of 11 February 2016 (consolidated text: Journal of Laws 2024, item 1576, as amended).

<sup>17</sup> Judgment of the Voivodship Administrative Court in Cracow of 2 March 2017, III SA/Kr 1728/16, LEX No. 2249111.

<sup>18</sup> Act of 17 November 1964 (consolidated text: Journal of Laws 2024, item 1841, as amended).

<sup>19</sup> "The provision of § 3 shall apply *mutatis mutandis* where the court rules that the child is to reside with each parent on an alternating basis" (translation - K.K.).

<sup>20</sup> "The provisions of this Subchapter apply *mutatis mutandis* where the court rules that the child is to reside with each parent on an alternating basis" (translation - K.K.).

<sup>21</sup> "(...) custody of a minor so that the child is to reside with each parent on an alternating basis" (translation - K.K.).

<sup>22</sup> H. Janik-Skowrońska, *Prawno-społeczne uwarunkowania pieczy współdzielonej (naprzemiennnej) w Polsce. Studium prawno-socjologiczne* [Legal and social determinants of shared (alternate) custody in Poland. A legal and sociological study], Warszawa 2024, p. 183.



The first problem concerns the difference between shared custody and shared (alternating) parental authority. The latter does not appear now, nor has it ever appeared, in the FGC. In the case of shared parental authority, a child would have to spend a certain amount of time, e.g., half a year or a whole year, with only one of the parents and then this parent would exercise sole and independent parental authority. Under shared custody, it is not parental authority that is divided, but the time when the child lives or spends with each of the parents. In this case both have legal authority to make major decisions with respect to their children. Inadmissibility of shared parental authority has already been confirmed by the Supreme Court of Poland<sup>23</sup> and doctrine<sup>24</sup>.

Another issue is that in Poland, shared custody is mainly associated with a symmetric care arrangement, in which the children's time is divided equally between the two parents in every case. Shared custody does not need to include an exactly equal division of time, although it usually is close to 50-50. As already mentioned, time sharing in shared custody arrangements can range from 30% to 50% of the year. Therefore, if children are living less than 30% of the time with one of their parents, the family is classified as practising sole custody. Unfortunately, some courts in Poland refuse to grant shared custody, because courts misunderstand this concept by equating it with shared parental authority, or courts associate shared custody only with the symmetric care arrangement (50-50).

The lack of legal regulations regarding shared custody may imply further consequences in, e.g., granting the "Family 500+" benefit. The "Family 500+" is a state program that was launched by the Polish government on 1 April 2016, to support families with children through regular, monthly benefits. As the name suggests, the amount of the benefit was, until recently, PLN 500 per month. Starting 1 January 2024, the amount was increased to PLN 800 per child. For divorced parents, the benefit is given to the parent who actually takes care of the child (Article 4 section 2 point 2 of the ASARC). If the parents, on the basis of a court decision, have shared custody, both have the right to apply and receive the benefit, taking account of the period they actually provide care for the child (Article 5 section 2a of the ASARC). The interpretation of these provisions raises doubts in practice among the paying authorities as to whether they can share the "Family 500+" benefit between divorced parents who have (and actually exercise) shared custody, but the term "shared custody" has not been included in divorce judgment. The paying authorities have different interpretations of "shared custody" ("*opieka naprzemienna*" within the text of the ASARC) across Poland.

The dominant position in the jurisprudence of administrative courts is that shared custody, within the meaning of the ASARC, is constituted by the three following

<sup>23</sup> Judgment of the Supreme Court of Poland of 22 April 1952, C 414/52, OSNCK 1953/2, item 47; judgment of the Supreme Court of Poland of 4 November 1953, II C 481/53, PiP 1954/3, item 553.

<sup>24</sup> J. Ignaczewski, *Komentarz do spraw o określenie sposobu wykonywania władzy rodzicielskiej* [Commentary on cases to determine the exercise of parental authority] [in:] *Komentarz do spraw rodzinnych* [Commentary on family cases], J. Ignaczewski (ed.), Warszawa 2014, pp. 255–256.



elements: the parents are divorced; the decision was issued in the case regarding child custody; (physical) custody ordered by it is shared (alternating)<sup>25</sup>. Some administrative courts, however, hold that the *sine qua non* condition for granting “Family 500+” benefit to the child’s parent is that the child lives together with that parent and is dependent on them<sup>26</sup>. Therefore, the introduction of regulations on shared custody to the FGC could put end to this type of unequal treatment and set equal conditions for all divorced parents.

The last but no less important note is that contrary to some opinions, the ruling on shared custody does not terminate the maintenance obligation. The legal practice has shown a solution consisting of bearing the costs of living and raising children by both parents equally, 50-50. No specific sums are indicated in the judgment, and this is up to the parents to agree as to how larger expenses, which are not directly related to the child’s staying with either parent, will be covered. These may include the costs of medical treatment, medicines, extracurricular classes, and hobby. This is not a universal solution. It seems that there is no need for child maintenance only in cases where both parents have exactly the same or very similar amount of income, and both spend equal or nearly equal amount of time with their child. There are situations, however, where one parent must provide child maintenance. Even if the child spends 50% of time with each of the parents, their personal, professional and financial situation may differ. It is difficult to require that the parent with a smaller income is to bear the same costs of the maintenance just because they agreed to shared custody, having the child’s welfare as their primary aim. This would lead to unequal and unfair treatment, especially of that parent who, prior to divorce, was the primary custodial parent, and who, e.g., quit their job and/or career exercise their custodial responsibilities.

#### 4. Shared custody in the US – general overview

It can be said that shared custody originated in the US and was the first to begin using this type of parental care arrangement. Nonetheless, shared custody in the US is not as popular as, e.g., in Northern European countries. What distinguishes the US from other countries is the quantity and quality of empirical research concerning child custody carried out for decades, which is useful for the evaluation of shared custody. This research demonstrates, *inter alia*, what kinds of factors the courts consider in granting child custody, what the effects of shared custody and what the benefits of shared custody are, what the disadvantages of shared custody are, and when shared custody is not advisable.

<sup>25</sup> Judgment of the Voivodship Administrative Court in Szczecin of 29 September 2022, II SA/Sz 353/22, LEX No. 3437269; judgment of the Voivodship Administrative Court in Cracow of 4 June 2020, III SA/Kr 469/20, LEX No. 3035814; judgment of the Voivodship Administrative Court in Łódź of 11 March 2020, II SA/Łd 968/19, LEX No. 2973581.

<sup>26</sup> Judgment of the Voivodship Administrative Court in Gliwice of 25 November 2022, II SA/Gl 1152/22, LEX No. 3441295.

In the US, as in Poland, the rule is that parents share the authority to make decisions for and about the child after the breakup. The most common arrangement is joint parental authority and sole custody to one of the parents<sup>27</sup>. Shared custody is becoming more popular, but there are still no recent nationally representative data. There are some data (although not the latest) available from specific states. As an example, data from Wisconsin indicate increasing levels of shared custody in divorce cases – from 7% in 1986 to 45% in 2008<sup>28</sup>.

The legal system in the US is based on federal law, but extended by regulations passed by state legislatures. There are 50 states and the District of Columbia, and each has its own system of laws and courts that handle child custody matters. Shared custody is subject to the statutory regulations in most states<sup>29</sup>, while in some states, just as in Poland, there are no regulations (statutory term, definition, etc.) on shared custody at all<sup>30</sup>.

The lack of provisions does not mean that this type of custody is forbidden by law. Moreover, the legislators in some states use the term “shared custody” or similar, but they do not define it<sup>31</sup>. There are also states where shared custody is “named”, but has not been legally defined yet<sup>32</sup>.

As regards the term, there are different names for the above-mentioned parenting arrangement where both parents spend a similar or equal amount of time caring for their children. Most states use the concept of joint physical custody<sup>33</sup>. The same

<sup>27</sup> D. Vuri, *Joint custody law and mothers' labor market outcomes: evidence from the USA*, “Journal of Population Economics” 2018, Vol. 31, No. 4, p. 1207, available at: <https://doi.org/10.1007/s00148-017-0680-x> [accessed on: 4 April 2025].

<sup>28</sup> M. Cancian, D.R. Meyer, P.R. Brown, S.T. Cook, *Who gets custody now? Dramatic changes in children's living arrangements after divorce*, “Demography” 2014, Vol. 51, No. 4, p. 1383; M.H. Weiner, *Thinking outside the custody box: Moving beyond custody law to achieve shared parenting and shared custody*, “University of Illinois Law Review” 2016, No. 4, pp. 1547–1548.

<sup>29</sup> Including the following states: Alabama, Alaska, Arkansas, California, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia.

<sup>30</sup> It concerns the following states: Arizona, Colorado, Delaware, Florida, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Montana, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Washington, Wisconsin, Wyoming.

<sup>31</sup> It concerns the following states: Alaska, Connecticut, District of Columbia, Hawaii, Kentucky, Nevada, North Dakota, Oregon, South Dakota, Tennessee, Vermont.

<sup>32</sup> It concerns the following states: Alabama, Arkansas, California, Georgia, Idaho, Iowa, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Pennsylvania, Utah, Virginia, West Virginia.

<sup>33</sup> Including: Alabama (Section 30-3-151 of the Alabama Code), Alaska (Section 25-24-150 of the Alaska Statutes), California (Section 3004 of the California Code), Connecticut (Section 46b-56a of the Connecticut Code), District of Columbia (Section 16-914 of the Code of the District of Columbia), Georgia (Section 19-9-6 of the Georgia Code), Hawaii (Section 571-46.1 of the Hawaii Revised Statutes), Idaho (Section 32-717B of the Idaho Statutes), Minnesota (Section 518-003 of the Minnesota Statutes), Mississippi (Section 93-5-24 of the Mississippi Code), Missouri (Section 452.375 of the Revised Statutes of Missouri), Nebraska (Section 43-2922 of the Nebraska Revised Statutes), Nevada (Section 125C.0035 of the Nevada Revised Statutes), New Jersey (Section 9:2-4 of the New Jersey Code), South Dakota (Section 25-4A-24 of the South Dakota Codified Laws), Tennessee (Section 36-6-101 of the Tennessee Code), Utah (Section 30-3-101 of the Utah Code), Virginia (Section 20-124-1 of the Code of Virginia).

type of child custody is also referred to as: shared physical custody<sup>34</sup>, joint custody<sup>35</sup>, shared physical responsibility<sup>36</sup>, equal residential responsibility<sup>37</sup>, equal parenting time<sup>38</sup>, equally shared parenting time<sup>39</sup>, and joint physical care<sup>40</sup>.

## 5. Definitions of shared custody in the state regulations

From the point of view of the topic discussed in this paper, even more important seems the question about definitions of shared custody in various American states, even though they offer differing names for the same care arrangement. For the analysis, statutory definitions from 17 states have been chosen and described by grouping them topically. Legislators in Michigan, Minnesota, Nebraska and New Jersey emphasise the residential aspect of shared custody. According to Section 722.26a(7) of the Michigan Compiled Laws, shared custody implies that the child resides alternately for specific periods with each parent. In Minnesota, this term means that the routine daily care and control and the residence of the child is structured between the parents [Section 518.003(d) of the Minnesota Statutes]. As for Nebraska, shared custody refers to mutual authority and responsibility of the parents regarding the child's place of residence and the allocating of continuous blocks of significant periods of child parenting time to both parents [Section 43-2922(12) of the Nebraska Revised Statutes]. The interpretation of Section 9:2-4(a)(1) of the New Jersey Revised Statutes leads to the conclusion that the concept of shared custody is a residential arrangement in which the child resides alternatively with each parent in accordance with the needs of each of the parents and the child.

Other states, such as Alabama, California, Georgia, Mississippi and Pennsylvania focus on frequent and substantial contact between the child and each of the parents. It follows from Sections 30-3-151 and 30-3-152 (a)(5) of the Alabama Code that in the model of shared custody, physical custody is shared by the parents in a way that assures the child frequent and substantial contact with each of them. This does not always mean custody of equal durations of time. Furthermore, awarding shared custody, the court takes into account many factors, e.g., the geographic proximity of the parents to one other. In California and Mississippi shared custody gives each of the parents the right to have significant periods of physical custody, and shared custody is "shared" by the parents in such a way so as to assure the child of frequent and continuing contact with both parents [(Section 3004 of the California Code; Section 93-5-24(5)(c) of the Mississippi Code)]. Similarly, in Georgia, shared custody is

<sup>34</sup> Including: Massachusetts (Section 208 § 31 of the Massachusetts General Laws), Pennsylvania (Section 5322 of the Pennsylvania Consolidated Statutes), West Virginia (Section 48-1-241a of the West Virginia Code).

<sup>35</sup> In Arkansas (Section 9-13-101 of the Arkansas Code) and Michigan (Section 722.26a of the Michigan Compiled Laws).

<sup>36</sup> In Vermont (Section 665 of the Vermont Statutes).

<sup>37</sup> In North Dakota (Section 75-02-04.1-08.2 of the North Dakota Century Code).

<sup>38</sup> In Oregon (Section 107.102 of the Oregon Revised Statutes).

<sup>39</sup> In Kentucky (Section 403.270 of the Kentucky Revised Statutes).

<sup>40</sup> In Iowa (Section 598.1 of the Iowa Code).

when physical custody is shared by the parents in such a way as to assure the child of substantially equal time and contact with both [Section 19-9-6(6) of the Georgia Code]. A short and concise legal definition of shared custody is set out in Section 5322(a) of the Pennsylvania Consolidated Statutes, namely this is the right of more than one individual to assume physical custody of the child, each having significant periods of physical custodial time with the child. In addition, the Pennsylvania's legislator distinguishes primary physical custody, which means the right to assume physical custody of the child for the majority of time, and partial physical custody – the right to assume physical custody of the child for less than a majority of the time.

In comparison, the definition of shared custody included in the Arkansas Code pointed out not “frequent and substantial contact”, but an approximate and reasonable equal division of time with the child between both parents [(Section 9-13-101(a)(5)].

The legislators of Idaho, Massachusetts, Missouri, and West Virginia pay attention to the above-mentioned aspects of shared custody, specifically, alternating residence and frequent contact, but also to the supervision of each of the parents. Section 32-717B(2) of the Idaho Statutes provides that shared custody is an order awarding each parent significant periods of time, in which the child resides with or is under the care and supervision of each parent. Section 452.375(3) of the Missouri Revised Statutes is very similar to the provision set forth in Idaho, with the difference that significant periods of time do not have to be equal. In Massachusetts and West Virginia, if the parents have shared custody, their children have periods of residing with and being under the supervision of each parent (Section 208 § 31 of the Massachusetts General Laws; Section 48-1-241a of the West Virginia Code).

Iowa, Virginia and Utah have their unique definitions of shared custody that are not similar to other states. On the one hand, Virginia stands out as having the most concise definition of this type of custody, i.e., where both parents share physical and custodial care of the child (Section 20-124.1 of the Code of Virginia). Utah, on the other hand, has adopted a more comprehensive and detailed definition. In Utah, shared custody means that the child stays with each parent overnight for more than 30% of the year, and both parents contribute to the expenses of the child in addition to paying child maintenance. Shared custody can mean equal or nearly equal periods of physical custody and access to the child by each parent. However, the Utah Code stipulates that shared custody may require that a primary physical residence for the child be designated, so in other words, the court may specify one parent as the primary caretaker and one home as the primary residence of the child [Section 30-3-10.1.(3)]. The developed definition of shared custody has been adopted by the legislature in Iowa as well. According to Section 598.1(4) of the Iowa Code, shared custody is an award of physical care of the child to both parents under which both have rights and duties towards the child, including shared parenting time, maintaining a home for the child and providing routine care for the child, and under which neither parent has physical care rights superior to those of the other parent.

On that note, it is worth mentioning South Dakota's solution for shared custody. The lawmakers in this state have yet to define shared custody, but according to

Section 25-5-7-1 of the South Dakota Codified Laws, if the court awards joint legal custody, it may also order shared custody in such proportions as are in the best interests of the child. The lawmaker in Section 25-4A-24 of the South Dakota Codified Laws introduced exhaustive list of factors (as many as 23) for courts to take into account in addition to the traditional factors for determining the best interests of the child when considering a request for shared custody. These include, *inter alia*, whether each parent is a suitable custodian for the child, whether each parent has an appropriate dwelling, whether the parents can show mutual respect for and effectively communicate with each other regarding the child's needs. Despite the lack of legal definition of shared custody, such a list of factors can be a useful tool for courts that face the complexities of this care arrangement after divorce or separation.

Apart from the concept and definition of shared custody, it is also worthwhile to discuss a presumption in favour of shared custody. In simple terms, this is the starting point from which the court proceeds when deciding custody cases. Under American family law, Kentucky was the first state to enact into law a rebuttable presumption of joint legal custody, as well as shared custody [Section 403.270(2) of the Kentucky Revised Statutes]. A presumption can be rebutted (invalidated; negated) by incidents of domestic violence, which is stipulated in Section 403.315 of the Kentucky Revised Statutes. Similarly, in Alaska, it is presumed that the parent who has a history of perpetrating domestic violence against the other parent, the child, or a domestic living partner may not be awarded shared custody [Section 25.24.150 (g) of the Alaska Statutes].

Also in West Virginia, there is a legal presumption that joint and equal (50-50) physical custody is in the best interests of the child. If the presumption is rebutted, the court, in the case of absence of a parenting plan, constructs a parenting time schedule which maximises the time each of the parents has with the child and is consistent with ensuring their best interests (Section 48-9-102a of the West Virginia Code). Recently, shared custody presumption has been introduced in Nevada. Pursuant to Sections 125C.0025(1) and 125C.003(1) of the Nevada Revised Statutes, there is a presumption that shared custody is in the best interests of the child if the parents have agreed to an award of shared custody or so agree in open court at a hearing for the purpose of determining the physical custody of the child; or a parent has demonstrated, or has attempted to demonstrate but has had their efforts frustrated by the other parent, an intent to establish a meaningful relationship with the child. Kentucky, Nevada, and West Virginia are the only states which, thus far, have statutory presumptions of shared custody. Most states in the US take the view that shared custody is not a "one size fits all" solution. It is rather a unique solution and should be assessed with great care.

## 6. Discussion

The social changes that have occurred in most countries in Europe and the US over several decades are influencing a re-evaluation of traditionally understood parental

roles. Shared custody, where children spend equal or almost equal time with each parent, has become a popular way to arrange child custody after divorce or separation. This type of custody has its supporters and opponents, but empirical research unequivocally shows that the advantages outweigh the disadvantages<sup>41</sup>. To respond to the need to modernise family law regulations and adapt them to the changing social reality in Poland, it is worth to finally regulate issues related to shared custody in the FGC.

Under the current law in Poland, shared custody can be ordered at the request of the parents, who should submit to the court a parenting plan indicating how they will cooperate to raise and care for their children. The court may order shared custody even without parental request, but this rarely occurs in practice. However, the lack of regulations referring explicitly to this parental care arrangement generates some problems with its application. This is why there is a need to introduce substantive regulation – to at least introduce the term and the definition of shared custody – into the FGC. Below are some conclusions from a review of state statutes that can be of use to the Polish lawmaker.

First of all, it does not appear to be necessary to now adopt a broad definition of shared custody, such as in Utah, but it would be optimal to modify the current provisions so that § 1a[1] can be added to Article 58 of the FGC. Taking as an example the concise and substantial definition of shared custody in Michigan, the new provision could stipulate that the court may retain full parental authority of both parents and specify that both have equal or nearly equal periods of physical custody (shared custody). Due to the fact that Article 58 of the FGC applies to the divorcing parents, a similar provision should be added to Article 107 of the FGC which refers to parents living separately. In this context, it is important to change the perception of shared custody in Poland. The state statutes analysed above clearly show that this type of child custody aims to assure the child frequent, continuing and substantial contact with both parents after their breakup, and this does not necessarily mean custody of equal durations of time. Shared custody does not have to be symmetrical (50-50).

In order to facilitate courts in assessing whether shared custody serves the best interests of the child in a specific case, the catalogue of grounds that justify the granting of shared custody can be also considered. For example, a new Article 58 § 1a[2] of the FGC may be: When deciding on shared custody, the court shall be guided by the welfare of the child and shall take into account, in particular:

- 1) the opinion of the child,
- 2) the age and health of the child,
- 3) the ability of the parents to communicate and cooperate in matters concerning the child and their personal situation,
- 4) the distance between the parents' places of residence,
- 5) the previous division of parental responsibilities.

<sup>41</sup> E. Fransson, S.B. Låftman, V. Östberg, A. Hjern, M. Bergström, *The living conditions of children with shared residence – the Swedish example*, "Child Indicators Research" 2018, Vol. 11, No. 3, p. 877, available at: <https://doi.org/10.1007/s12187-017-9443-1> [accessed on: 4 April 2025].



Thirdly, the introduction of regulations on shared custody does not constitute an acceptance of a legal presumption that child custody of that type is in principle better than sole custody in every case. Apparently, only three American states require judges to proceed from the presumption that shared custody is – *ipso facto* – better for children. As far as it can be accepted that joint legal custody should be a starting point for courts, it is difficult to admit that living alternately in the two households is in the child's best interests in every single case, as was mentioned in the opinion of the current Commission for the Codification of Family and Guardianship Law<sup>42</sup>. Shared custody may be in fact the best or worst solution for children in their specific circumstances, especially in the context of the child's age and their relationships with each of the parents. Also relevant are the economics of each parent, their work schedules, distance between their homes, and cooperation. Therefore, in Europe and the US, shared custody is regarded as one of the possible options for deciding on parental authority after divorce or separation. As when making parental care arrangement orders, the welfare of the child must be the first and paramount consideration.

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