

When disputes arise between divorced parents living in different member states over the rights to the custody of the child

In a number of cases the relocation of one of the parents owing to separation or divorce results in a dispute between the parents regarding the right of custody over the child. Dr. Andrea Bayer legal expert of Kovács Réti Szegheő Attorneys at Law highlighted the fact that the fundamental provision regulating matters of parental responsibility is Council Regulation 2201/2003, the 12th preamble paragraph of which lays down that the grounds of jurisdiction in matters of parental responsibility must be established with view to the best interest of the child, in particular to the criterion of proximity.

Art. 8 of Council Regulation (EC) No. 2201/2003 stipulates that matters of parental responsibility come under the jurisdiction of the courts of the EU country of habitual residence of the child – pointed out the expert of Kovács Réti Szegheő Attorneys at Law.

However, Art. 20(1) of EC No. 2201/2003 under certain circumstances provides the courts of the other member state the possibility to issue interim or protective measures even in cases where the said provision establishes the jurisdiction of another member state regarding the substance of the matter.

Dispute over the right of custody

In a number of cases due to separation or divorce one of the parents relocates to a different member state, resulting in a dispute between the parents regarding the guardianship right over the child. – outlined the fundamental issue dr. Andrea Bayer.

By general rule in compliance with Art. 8 of Council Regulation EC No. 2201/2003 matters of parental responsibility come under the jurisdiction of the courts of the country of habitual residence of the child.

But what happens if the parent relocating to another member state takes the child with him or her after the separation or divorce, while the court procedure establishing the right of custody over the child is still ongoing in the country of habitual residence, or the court has taken a decision granting the interim custody rights to the other parent?

The European Court was questioned regarding the interpretation of Art. 20 of EC regulation 2201/2003, as to whether this provision enables the court of a given member state to take interim measures aimed at providing custody right to one of the parents of the child residing in that given member state.

The best interest of the child prevails

According to the expert of Kovács Réti Szegheő Attorneys at Law, based on the judicial practice of the European Court we must remember that one of the fundamental rights of the child – as laid down in Art. 24(3) of the Charter of Fundamental Rights of the European Union – is to maintain personal and direct contact on a regular basis with both parents, and the respect



of this right is inseparable from Art. 24(2) setting out that the priority of the best interest of the child must prevail above all.

Consequently, any departure from this provision is only permitted in cases where this right is contrary to any other fundamental interest of the child. In other words any measure preventing the child to maintain regular, personal and direct contact with both parents is only justified by the child's other interests of greater importance than that providing the ground for the said fundamental right – emphasised dr. Andrea Bayer. It follows that Art. 20 of EC No. 2201/2003 may not interpreted without considering the above fundamental right.

Furthermore, the European Court has also established that Art. 20 of 2201/2003(EC) may not be interpreted in a way which in case of wrongful removal of the child would provide grounds for the parent exercising such illegal conduct to prolong the situation caused by his or her wrongful conduct. Consequently, whenever the relocating parent brings the case to the court of a member state other than the court of the state assuming jurisdiction as to the substance of the matter, such courts must consider whether to take any measures preventing the child from maintaining regular, personal and direct contact with both parents, since such rulings can only be issued if substantiated with another interest of the child bearing higher priority than the interest giving ground for the said right.

It follows from the aforementioned, that in matters of parental responsibility it is advisable to take the case to the end before the court of the country of habitual residence of the child, since in the EU there are very few cases where the court of a given member state intervenes with cases brought to court in another member state – concluded the expert of Kovács Réti Szegheő Attorneys at Law.