

Joint custody after divorce

Banu Bilge Sarhan^{1*} 

¹ Civil Law, Necmettin Erbakan University, Konya, Türkiye.

Article Info

Keywords

Minor
Custody
Joint custody
Divorce
Best interests of the child

Article History

Received 20.02.2024
Received in revised form
27.02.2024
Accepted 11.03.2024

Article Type

Research Article

Abstract

The concept of custody is an important legal principle that expresses the rights and responsibilities exercised jointly by parents during marital union. This principle emphasizes attention to the physical, emotional, and financial well-being of minors and the principle of the best interests of the child. According to the Turkish Civil Code, as a rule, minors are considered to be under the joint custody of their parents. However, in the event of the death of a spouse or divorce, the issue of custody is resolved by a legal arrangement or a court decision. Furthermore, custody is usually awarded to the mother if the parents are unmarried, although this may be subject to certain exceptions. Courts may appoint a guardian or award custody to the father to protect and support the child's physical, mental, and moral development. This ensures that the best interests of the child are safeguarded.

Joint custody refers to the joint exercise of the child's right to custody by the parents during the marital union. This concept aims to ensure that responsibilities for the child's care, education, and supervision are shared between the spouses. However, in the event of dissolution of marriage or separation, the issue of how custody will be organized is subject to a vague regulation; the court determines it. If custody is awarded to only one spouse, that spouse can make decisions unilaterally, while the other spouse only has the right to have personal contact with the child. However, if joint custody continues, the rights and responsibilities of the child are shared in the same way despite the dissolution of the marriage.

Custody and joint custody are intended to protect the child's physical, emotional, social, legal, financial, and moral development. They also provide for the representation and protection of children in a manner appropriate to their needs. Both concepts are based on the best interests of the child and are supported by legal regulations. Therefore, custody and joint custody constitute an important legal framework for children's healthy and safe upbringing.

This study will explain the concept of custody in the Turkish legal system, the rights and responsibilities given to the parents within the marital union, and the legal regulations introduced for the right of custody after divorce. The joint exercise of the right of custody after divorce will be evaluated by considering the practices of the Court of Cassation.



1 Introduction

Custody is defined as the rights and responsibilities jointly held by the parents as long as the marital union continues and their representative rights and responsibilities over minors and rarely over incapacitated adult children, to be exercised with care and within the framework of the principle of the best interests of the child.

Cite: Sarhan B., B. (2024). The effect of creative drama courses taken by teacher candidates on critical thinking standards. *Pedagogical Perspective*, 3(1), 12-24. <https://doi.org/10.29329/pedper.2024.43>

* bbsarihan@yahoo.com

© 2024 The Author(s). Published by Pedagogical Perspective. This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License <http://creativecommons.org/licenses/by-nc-nd/4.0/>, which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way. The terms on which this article has been published allow the posting of the Accepted Manuscript in a repository by the author(s) or with their consent.



In the Turkish legal system, children under the age of eighteen are under the custody of their parents unless there is a reason for other circumstances arising from the law. In the event of the death of one of the parents, the custody belongs to the surviving spouse. In the event of the dissolution of the marriage through divorce, the custody belongs to the spouse to whom the court awards parental responsibility. If the mother and father are unmarried, parental responsibility belongs to the mother. If the mother is a minor, legally incapacitated, or deceased, or if custody has been taken away from her by a court decision, the judge may appoint a guardian or give custody to the father according to the best interests of the child, which is defined as a principle that includes supporting and thus protecting the physical, mental, social, legal, financial, and moral development of the child.

Joint custody refers to exercising the right of custody over their children by parents within a marital union. The general provisions of marriage state that the spouses shall be jointly responsible for their children's care, education, and supervision. However, the issue of whether custody should be given to a particular spouse in the event of the dissolution of common life or separation is not definitively ruled, and the Turkish Civil Code (TCC) only regulates that “custody may be given” (Art. 336 of the TCC). In the event of the dissolution of the marriage, when custody is given to one of the spouses, the authority to make decisions about the child passes to that spouse, and the other party only has the right to have personal contact with the child. On the other hand, in the case of joint custody, the rights and responsibilities of custody may continue in the same way to protect the child's best interests and well-being, and the mother or father does not have the authority to make decisions alone. In other words, if joint custody continues, the rights and responsibilities of the child will continue jointly in the same manner, even if the marriage is dissolved.

As in all modern legal systems, Turkish law prioritizes the best interests of children, who are one of the most important groups to be protected. In this study, first, after explaining the concepts of custody and joint custody, the possibility of joint custody as used within the marital union to be maintained jointly by the parents after divorce will be examined within the framework of the provisions in force and the decisions of the Court of Cassation.

2 Right of custody

2.1 The concept of custody in principle

Custody is defined as all of the responsibilities and rights exercised jointly by the parents (TCC, Art. 336/I. See also: “The history of custody shows that for a long time, only the custody of the father was accepted.” Birsen, 1963) as long as the marriage continues, which are generally exercised by taking care of the persons and property of minors and rarely of incapacitated adult children, and by observing the principle of the best interests of the child (“It is the principle imposed by the law on parents to represent children, which means that the best interests of the child should be taken as the basis in every situation and decision concerning the child.” (Binatlı, 1965; Dural et al., 2016, 2016; Şirin, 2019).

According to the relevant articles of the TCC, minor children are under the custody of their parents unless there is a legal reason for other circumstances; however, in the event of the death of one of the parents, the custody belongs to the surviving spouse, and if the marital union is dissolved by divorce, the custody belongs to the spouse to whom the court awards parental responsibility. It should be noted that if the mother and father are unmarried, the custody belongs to the mother. However, if the mother is incapable of having custody (minor, incapacitated, or deceased) or if

custody has been taken away from her, the judge may appoint a guardian or give custody to the father according to the best interests of the child. Furthermore, spouses must also provide care and attention to their minor stepchildren. The other spouse must appropriately assist the spouse in exercising parental authority over the child within the scope of the duty of care and attention and represent the child for the child's needs to the extent that the situation and circumstances require it.

2.2 Legal nature of custody rights

Even though Articles 335-351 of the TCC are related to custody law, Turkish law did not need to provide a complete definition (Köseoğlu & Kocaağa, 2009). The doctrine, taking the law into account, defines custody as rights and responsibilities, which include rights and obligations on both sides (For an opposing view, see Köseoğlu & Kocaağa, 2009), as well as exceptional provisions for minor children (Akıntürk & Ateş Karaman, 2012; Ardiç, 2008; Akkurt et al., 2021; Çatalbaş, 2021; Dural et al., 2016; Erdem & Makaraci Başak, 2022; Koçoğlu, 2018; Tekinay, 1978; Tokuş, 2021; Yılmaz & Yıldırım, 2021). Even though the right of parental authority is an absolute (Çatalbaş, 2021; Dural et al., 2016; Erdem & Makaraci Başak, 2022; Köseoğlu & Kocaağa, 2009;) right that is inalienable, non-waivable (Erdem & Makaraci Başak, 2022), and strictly attached to the person (Köseoğlu & Kocaağa, 2009; Serdar, 2008), it has a quality that imposes obligations on the person and allows intervening in the best interests of the child (Erdem & Makaraci Başak, 2022). Within the scope of the decisions of the Court of Cassation (“The female plaintiff requested custody of the child B., born in 2006, to be given to the defendant father, stating that she did not have the economic means to take care of the child, and this request was repeated at the hearing. It was understood that the child stayed with the defendant's father and was cared for by the paternal grandmother. While this is the case, the fact that the custody of the child was given to the plaintiff's mother against her will by stating that the child was old enough to need maternal care without applying for an expert examination by considering Article 5 of Law No. 4787 on the Establishment of Family Courts, Duties, and Proceedings is contrary to the procedure and the law and requires reversal.” Yargıtay 2. HD., 16.11.2011, 18862/18702 (Lexpera, D. 22/10/2022). “From the trial and the evidence gathered, it was decided by the court that the custody rights of both parties were abolished by stating that there was no reason to give custody to the parties, since the plaintiff's husband was under custody in accordance with Article 419/2 of the TCC and the defendant mother did not request the custody of the minors during the trial, and it became evident that this situation did not constitute an obstacle to establishing a personal relationship with the mother and father. In that case, it was erroneous not to make a decision to establish a personal relationship between the defendant's mother and the children, which necessitated a reversal.” Yargıtay 2. HD., 08.03.2017, 24292/2468 (Lexpera, D. 22/10/2022), it is concluded that custody is both a right and a responsibility (Bükel Koç, 2020) because if it were a situation involving only rights, these decisions should not be ruled, but the fact that it contains an obligation has necessitated the issuance of these decisions.

In order to provide more information on the legal nature of custody rights, it is necessary to examine the governing principles of custody.

2.2.1 Governing principles of custody

2.2.1.1 Principle of time limitation. Custody is a legal concept introduced for the protection (“Since the child is not mature enough both in terms of age and maturity to express his/her will and to protect himself/herself...” (Tokuş, 2021) of minor children and automatically loses its effect

upon the attainment of maturity. According to the TCC, the right of custody ends in all cases of maturity (Bükel Koç, 2020; Tokuş, 2021). The scope of custody is narrowed with the effect of adult children being able to stand on their own feet and with advancing age (Coşkun, 2023). The point to be noted here is that the provisions of parental authority, not guardianship, should be used for a child who is restricted or incapacitated and becomes an adult (Art. 419/III of the TCC).

2.2.1.2 Principle of the best interests of the child. Although the concept of the best interests of the child is not defined in the TCC or the United Nations Convention on the Rights of the Child (UNCRC) (Karaaslan, 2000), “It is a fact that every child has different needs and expectations...” (Coşkun, 2023; Çatalbaş, 2021), this concept is mentioned in many articles. Within the scope of the decisions of the Court of Cassation (Yargıtay 2. HD. E. 2006/15824, K. 2006/18407, D. 26.12.2006), there is no clear definition; only the procedures that will benefit the child are specified (Özgenç, 2018). Within the scope of the UNCRC, the principle of the best interests of the child is emphasized by stating that “Humanity owes the child the best it has to give” (Coşkun, 2023; Tokuş, 2021). Similarly, in the relevant articles of the TCC, many aspects that are in the best interests of the child are addressed, but no clear definition is made.

Based on these documents, the concept of the best interests of the child can be defined as the protection of the child’s social, legal, financial, moral, and communal development, particularly the child’s physical and mental characteristics (Akyüz, 2020; Coşkun, 2023; İnan, 1968). According to the Swiss Civil Code, on which the TCC is based, the child should be educated according to the day’s conditions. Within this education, his/her physical, mental, and moral development should be monitored and encouraged (Art. 302/I of the Swiss Civil Code). Based on the aforementioned points, this principle can be summarized as ensuring, protecting, and improving the child’s well-being (Karaaslan, 2000; Tokuş, 2021; Yücel, 2013).

2.2.1.3 Principle of indivisibility. The right of custody should be considered as an indivisible whole. According to the TCC, the mother and father exercise custody within the marital union. There is no valid situation leaving some rights and responsibilities to the mother and other rights and responsibilities to the father. This is supported by a decision of the Court of Cassation (Yargıtay 2. HD. 17.12.2007, E. 2007/16702, K. 2007/17750), which ruled that the division of rights and responsibilities is incorrect. It should be noted that if the mother and father have to divide their labors, it will not violate the principle of indivisibility (Coşkun, 2023).

2.2.1.4 Principle of strict attachment to the person. The right of custody is included in the personal rights of the parents. Since it is within the right of personality, this right cannot be transferred or waived. This can be seen as a reference to the principle of the best interests of the child (Tokuş, 2021; Yücel, 2013). However, due to the best interests of the child, in some cases, parents may authorize third parties (Coşkun, 2023). This authorization may be used when necessary to ensure the child’s well-being.

2.2.1.5 Being related to public order. Custody is a matter of public order, and since it is related to public order, it involves all the rules of public order (Özgenç, 2018); See also: “Custody is a matter of public order and the defendant’s acceptance of the lawsuit does not have legal consequences on its own.” Yargıtay 2. HD. E. 2015/25040, K. 2016/1042, D. 20.01.2016; Yargıtay HGK. 18.04.2019, 2-2643/484.). The principle of the child’s best interests rather than the parents’ agreement must be acted upon because custody is a matter of public order (Tokuş, 2021).

3 Scope of custody

3.1 Authority over children

The right of custody refers to parental authority over children, and this right is directly recognized by law. Article 335 of the TCC states that a minor child is under the custody of his/her parents and that this custody cannot be taken from the parents unless there is a legal reason. Similarly, Article 339 of the TCC states that the child cannot leave home without the parents' consent and cannot be taken away from the parents unless there is a legal reason.

After divorce, the spouse with the right of custody will have wider sovereignty over the child. Therefore, without a legal reason, the child cannot be taken from the spouse with the right of custody (Koçoğlu, 2018).

3.2 Child's name and surname

People need publicity to customize and differentiate themselves in their relations with others and society (Akipek et al., 2016). Names fulfill this need. This is because names and surnames are used to identify oneself, belong to, and be known in society (Koçoğlu, 2018). A person's name and surname are among the strictly attached rights of a person. The person cannot transfer, renounce, or waive this right (Akipek et al., 2016). Furthermore, a person's right to a name is one of the absolute rights and can be asserted against anyone.

Names are among the most important aspects of personality; they constitute the person's spiritual integrity and reflect the personality to the external world (Akipek et al., 2016). Therefore, a person's name must be protected. For this reason, the legislation stipulates that a child's name cannot be changed unless there is a justified reason, even if divorce occurs. In addition, Article 7 of the UNCRC regulates the issue of a name as a right of the child under the title of "right to name and nationality" (Koçoğlu, 2018); For a contrary view, see the following: "Let us begin with the name of the child. According to Article 339/5 of the Civil Code, the parents shall determine the child's name. If the parents cannot agree on the child's name, the family court judge shall give the child a name. The matter can also be explained as follows. The father wants the child's name to be ..., the name of his mother, while the mother insists on ..., her mother's name. They go to the judge, and the judge wants the child's name to be ..., the name of his own mother. As a result, the child's name will be [the name decided by the judge]. As can be seen, the mother and father determine the child's name within the scope of parental authority. In case of disagreement, it has not been seen in practice that the judge is the giver of the name..." Yargıtay 18. HD., 29.9.2016, 9861/10849 D. 30.03.2023, Yargıtay Karar Arama Motoru [Court of Cassation Decisions Search Engine]).

A surname is a word that follows a person's personal name ("In speech, correspondence, and signatures, the first name is used first and the surname is used last." Article 2 of Surname Law No. 2525) and identifies the person's family. According to Article 321 of the TCC, the child takes the family's surname if the parents are married. It should be noted that in the event of the dissolution of the marriage, if the child is born within three hundred days or even if the child is born after three hundred days and if the mother proves that the child was born to her former husband, the child takes the surname of the family, or, in other words, the surname of the husband (Koçoğlu, 2018). This is because the surname is regulated under the title of "provisions on paternity" in the TCC, and even in the case of the divorce of the parents, the surname acquired by the child through paternity will not need any change as the paternity does not change (Başoğlu, 2017).

3.3 Living with the child

Within the scope of the principle of the best interests of the child in the marital union, the parents should live together in order to supervise and protect the child. According to Article 21 of the TCC: “The place of residence of the child under custody is the place of residence of his/her parents, or if the parents do not have a common place of residence, it is the place of residence of the mother or father to whom the child is entrusted. In other cases, the child's place of residence shall be deemed his/her place of residence. The place of residence of persons under guardianship is where the guardianship authority to which they are subject is located.” It should be noted here that the legislation has regulated the legal residence of the child as a detailed provision rather than a framework provision, taking into account different possibilities and the best interests of the child (Koçoğlu, 2018).

3.4 The child’s responsibility to listen and the right to be heard

For the child's healthy development, parents may sometimes have to establish authority in matters that the child does not like but are necessary for the child’s upbringing. It should be noted that the concept of listening should not be restricted to marital unions because, in the event of divorce, the child is required to listen to both the custodial and the non-custodial parent (Birinci Uzun, 2016). This concept of listening should not be considered a definitive concept, as the child is not required to listen to his/her parents in situations that may harm him/her and his/her rights.

In the event of the dissolution of the marital union, a problem arises for the child as to which one of the parents should be listened to, given the diverging views of the child’s parents that may arise in practice. According to Article 346 of the TCC, the best interests of the child can be resolved by a judge.

4 Joint custody

4.1 Definition

Joint custody is defined as the joint exercise of the right of custody over the children by the parents within the marital union (Art. 336/1 of the TCC). It is also regulated in the general provisions of marriage that the children's care, education, and supervision shall be jointly undertaken (Art. 185/2 of the TCC). In the case of dissolution of partnership or separation, custody may be granted to one of the spouses (Art. 386/2 of the TCC). It should be noted that it is controversial whether custody is obligatory for only one of the spouses. The TCC regulates it as “may be given” and does not make a definitive provision. Regarding whether joint custody is possible or not, previous judicial decisions should be reviewed:

According to the decision of the İzmir 4th Family Court dated 27.05.2009 and numbered 448/470:

“What is ideal for the child is that both parents are actively involved in decisions about the child and that the child can see both parents as much as he/she wants without restrictions. The most common negative experience after divorce is that ex-spouses clash over childcare and contact. They may continue their conflicts over the child, punishing each other and using the child to express anger. Regardless of the arrangement for child custody, the needs of the child should always come first. During an interview with the couple, it was observed that both parties had the will and understanding to take into consideration the best interests of the child, to come together and make decisions about the child even after the divorce, and to cooperate in the decisions to be made about the child. As a result of the evaluations, it was concluded that the parties had the

desire, consciousness, and necessary motivation for the joint custody application, that they had a supportive attitude towards the communication and sharing of the minor with the other parent, taking into account the psychosocial development of the minor. The parties could use that joint custody if the living order to which the joint child is accustomed is ensured (Çatalbaş, 2021).” In making this decision, the best interests of the child were taken into consideration.

According to the decision of the 2nd Civil Chamber of the Court of Cassation dated 20.02.2017 and numbered 2016/15771 E. 2017/1737: (For more information, see Yargıtay 2. HD., 20.02.2017, 15771/1737 D. 11/11/2022, Yargıtay Karar Arama Motoru [Court of Cassation Decisions Search Engine]).

“It is impossible to state that the ‘joint custody’ arrangement is ‘explicitly’ contrary to the Turkish public order or violates Turkish society's basic structure and fundamental interests. In that case, the court, in accordance with Article 17/1 of the International Private and Procedural Law, both taking into account the regulations regarding the custody in the joint national law of the parties, who are British citizens, by going into the merits of the case and evaluating all the evidence together, and by stating that the request is contrary to the Turkish public order, to make a decision on the case regarding the ‘joint custody’ request and to establish a written judgment by stating that the request is contrary to the Turkish public order, has required a reversal.” While making the decision, the concepts of domestic law and public order were examined in detail, and it was determined that they would not be detrimental to these concepts. It should be noted here that the reason why the concept of joint custody is in accordance with public order and domestic law is that Protocol No. 11 to the European Convention on Human Rights (ECHR) (For more information, see <https://www.tbmm.gov.tr/sirasayi/donem26/yil01/ss123.pdf>), to which the Turkish Republic is a party, has the status of an international convention and international conventions have the force of law upon their acceptance by the Turkish Republic. Their publication in the Official Gazette (The last paragraph of Article 90 of the Constitution, entitled “Ratification of international treaties,” states that “international treaties duly put into force shall have the force of law. They cannot be applied to the Constitutional Court with the claim of unconstitutionality.”). According to Gençcan (2017), who was the President of the 2nd Civil Chamber of the Court of Cassation at the time of the decision and is currently the President of the Chamber, considering the existence of Protocol No. 11, Article 5 of Additional Protocol No. 7, and the international conventions recognizing the “best interests of the child” in Article 3 and Article 12 of the UNCRC, it is necessary to accept the Turkish courts’ broad interpretation of the custody provisions in the TCC as joint custody. After this historic decision of the Court of Cassation, it was decided that the concept of joint custody would not be contrary to the law and public order.

According to the decision of Ankara Regional Court of Appeals 2HD dated 05.12.2017 and numbered 2017/1132E, 2017/1471:

In a concrete case, it was observed that the mother did not consent to joint custody and wanted the custody to be given to her unilaterally. It was decided that the joint custody arrangement was applicable for the best interests of the child; even if the parents have terminated the marriage for the best interests of the child, they should volunteer to maintain a relationship with the child together, and thus the conditions for unilateral custody are not met (Apaydın, 2018).

4.2 Legal nature

The right of joint custody is the right of the parents to have a say in all matters that come to mind

under equal conditions as if they were in a marital union (Coşkun, 2023) and to exercise this right together (Çatalbaş, 2021). In this way, the parents act together to protect the child's well-being and act according to the principle of the child's best interests (Tokuş, 2021). It should be noted that while joint custody is mandatory within the marital union, it is offered as an option in the case of dissolution of the marriage or separation.

4.3 Purpose

It is possible that parents who make decisions about the upbringing of their child together within a marital union may make separate decisions due to the dissolution of that marital union. However, if the custody continues as it was within the marital union, the mother or father will be prevented from making decisions alone. The best interests and well-being of the child will be protected (Bükel Koç, 2020). Suppose custody is granted to only one of the spouses. In that case, the rights and responsibilities of custody will be exercised unilaterally, and the other party will only be able to request personal contact with the child. However, in the case of joint custody, even if the marital union has ended, the rights and responsibilities over the child will continue jointly as they should (İnce, 2018).

4.4 Field of application

4.4.1 Joint custody during marriage

The TCC defines joint custody as “the joint exercise by the parents of the right of custody over the children within the marital union.”

The expression “joint custody” means that parents should jointly manage the care and upbringing of their children, jointly administer their property, act together in important decisions, and work together to ensure the healthy growth and development of their children and that the parents are equally responsible (Akyüz, 2020). Parents may not partially or completely relinquish their parental authority or responsibility and may not request that it be taken away since parental authority cannot be transferred to a non-parent (Akyüz, 2020).

In some cases, one of the parents cannot exercise parental authority for various reasons. In such cases, the mother or father who has the child with her/him exercises sole parental authority. However, depending on the form and duration of the actual impossibility, the party exercising parental authority must act by principles previously determined by the other party (Bölükbaşı, 2021).

Since the recognition of joint custody only for married couples may cause injustice, the UNCRC states that joint custody should not be limited to the duration of marriage and should be applied in all cases where it is in the best interests of the child. States that have ratified that convention are required to recognize the right to joint custody for the healthy development of children when it is in the best interests of the child (Çatalbaş, 2021).

4.4.2 Joint custody in case of separation and divorce

According to Article 169 of the TCC: “When a divorce or separation lawsuit is filed, the judge takes temporary measures for the care and protection of children during the continuation of the lawsuit.” Article 336 of the TCC further stipulates: “If the joint life has been dissolved or separation has occurred, the judge may grant custody to one of the spouses.”

The doctrine is divided into two views here. According to the first view, it is considered that the

TCC prefers the expression “may give” instead of “will give,” and that separation is not the same as divorce and that actual separation does not affect the right of custody. Therefore, the issue of joint custody is not completely eliminated by leaving it to the discretion of the judge (Çatalbaş, 2021). According to the other view, joint parental custody is only possible within the marital union because the joint exercise of parental custody during separation may increase the tension between the parents and cause them to violate the principle of the best interests of the child. It may lead to actions that would harm the child's material and non-material integrity (Akyüz, 2020).

In the case of divorce, according to Kurt (2018), although it is thought that the state of separation is not the same as the state of divorce and that the law has provided a mutual opportunity for joint custody through the expression “may give,” this is a misconception. In accordance with Article 182 of the Civil Code: “In regulating the personal relationship of the spouse who is not granted custody with the child, the interests of the child, especially in terms of health, education, and morals, shall be taken as a basis. This spouse is obliged to participate in the child’s care and education expenses to the extent of his/her ability...” Based on this provision and noting that the provision is divided into spouses who are granted custody and spouses who are not granted custody and that joint custody is not mentioned, it is seen that it will not be possible for parents to use joint custody after divorce, and even that joint custody cannot be used in the case of divorce. When the doctrine is examined for the contrary viewpoint, according to Erdem & Makaracı-Başak (2022), there was a discussion regarding Art. 336/II of the TCC. According to this article, in the case of divorce, custody shall belong to the party to whom the child is entrusted, but it is pointed out that the contrary is not prohibited. In other words, it is emphasized that the judge has discretionary power and the child's best interests should be considered. Furthermore, Protocol No. 7 to the ECHR also emphasizes equality. The relevant protocol states that the issues that will affect the child's future are related to custody and that it is not always in the child's best interests if only the party to whom custody of the child is entrusted makes the decision. According to another opinion, it is claimed that joint custody by the parents after divorce is the most ideal solution in terms of the principle of the best interests of the child and that joint custody can be ruled by taking into account that the request submitted by the parents in this direction is in the best interests of the child (Çatalbaş, 2021). According to Arkan Serim (2016), the articles of the TCC on custody do not contain any statement that custody must be given to either the mother or the father after divorce or that joint custody is not possible; in the case of divorce, although it is possible at the discretion of the judge for custody to be given to one of the spouses, the interests of the child should be prioritized. It is also stated that the party who is not given custody may become alienated from the child and that joint custody may be more appropriate in some cases, taking into account the interests of the child. According to Öztan and Öztan (2020), Article 5 of Additional Protocol No. 7 means that the principle of joint custody adopted during the continuation of the marriage shall also apply in the event of the dissolution of the marriage. Therefore, Article 5 of this protocol should be applied in the same manner during the continuation of the marriage and after its dissolution. The principle that applies to the relationship between parents and their children during marriage should also apply after divorce. Moreover, the expression “parents’ relations with their children” in Article 5 of the protocol also covers the custody relationship. Therefore, the rule that the parents will have joint parental rights in the regulation of the parents’ relations with their children during the marital union is valid even after divorce. Finally, according to Erlüle (2020), the fact that the TCC does not allow a parent who wishes to exercise the right of custody together with the other parent to do so constitutes a

violation of Article 8/1 of the ECHR and the right to respect for family life under Article 20 of the Constitution. It is also argued that the right of custody may be restricted in order to protect the best interests of the child. However, it would be more appropriate to regulate the right of custody in accordance with the line of descent, independent of the marital status of the parents, and that this approach is in line with the developments in the European legal environment and the international conventions ratified by Turkey.

Since Article 5 of Additional Protocol No. 7 (Approval of Additional Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11, which was signed on behalf of the Turkish Republic on 14 March 1985 and approved for ratification by Law No. 6684 dated 10/3/2016, was resolved by the Council of Ministers on 28/3/2016 in accordance with Article 3 of Law No. 244 dated 31/5/1963, upon the letter of the Ministry of Foreign Affairs dated 28/3/2016 and numbered 10719437 D. 01.04.2023, https://insanhaklarimerkezi.bilgi.edu.tr/media/uploads/2016/08/26/AIHS_7.proto.kol.pdf) provides for absolute equality between spouses, it may be contrary to the rule of absolute equality to award custody of children to one of them, whether the parents are married, divorced, or in an extramarital relationship, unless doing otherwise would be contrary to the best interests of their children. It should be noted that, due to the additional protocol, it may be accepted that the domestic legal system recognizes the authority to decide on joint custody (Öztañ, 2018).

4.4.3 Joint custody in cases of non-marriage

Article 337 of the TCC provides for the right of custody in cases where the parents are not married. According to this article, in cases where the parents are not married, the right of custody belongs to the mother. Unless the parties are married, joint custody is not recognized. However, the exception of the right of custody of the biological father is regulated under Article 337/II of the TCC. Accordingly, in cases where the child's mother is deceased, legally incapacitated, or a minor, the right of custody may be granted to the biological father. It should be noted that if the parties are not married, it is understood that the mother and father do not have equal rights. Although Article 337/I of the TCC grants the mother the right of direct custody since the mother establishes the paternity bond with the child, Article 337/II of the TCC states that even if the father establishes a paternity bond with the child, he does not have the right of direct custody. It is also stated that for the father to gain the right of custody, the mother must be in one of the conditions mentioned above, and the court must decide to grant the right of custody to the father (Çatalbaş, 2021). International conventions stipulate that regulations should be made in the domestic legal system of state parties in order to prevent discrimination against children. According to Article 2 of the UNCRC, state parties emphasize that it is discrimination if children cannot benefit from the rights granted to other children since their parents are unmarried. It is necessary to prevent discrimination in the courts in terms of the rights of children born in marriage and children born in non-marriage and to keep children equal in terms of custody rights by making new regulations.

5 Conclusion

In this study, we evaluated the legal nature, purpose, and application area of the concepts of custody and joint custody, among the most important aspects of marital union. When the provisions of the TCC on custody were examined, it was observed that custody is a concept that includes the responsibilities and rights of the parents to take care of the child's personality and property and to observe the principle of the best interests of the child, which are exercised jointly by the parents as long as the marriage continues. However, the legislation has not fully defined

parental authority, and the doctrine defines parental authority as a set of rights and responsibilities for minor children, which includes two-sided rights and responsibilities. It is emphasized that although the right of custody is an absolute right that is inalienable, non-waivable, and strictly attached to the person, it has a quality that includes the possibility of intervention within the framework of the best interests of the child. In this context, the legal nature of the right of custody can be understood both as a parental right, which includes both rights and responsibilities in line with the principle of the child's well-being and best interests and as a responsibility, which includes obligations to address the needs of the child. These basic principles suggest custody is a shared responsibility between the parents as long as the marriage continues. However, in the event of the dissolution of the marriage, it is intended to protect the best interests of the child.

Joint custody is based on the principle that the parents have the right to have a say under equal conditions within the marital union and exercise that right together. This regulation exists to protect the child's well-being and act in accordance with the principle of best interests. Joint custody within the marital union lets the parents decide the child's upbringing together. However, joint custody is offered as an option in the case of dissolution of the marriage or separation. At this point, it is important to continue joint custody by considering the best interests and well-being of the child. According to the principles governing parental custody, the principle of time limitation indicates that parental custody is intended to protect minors and ends with attaining maturity. The principle of the best interests of the child is a principle that forms the basis of the right of custody and is frequently emphasized in legal regulations. Although this principle is not explicitly defined in domestic or international instruments such as the TCC and the UNCRC, it emphasizes that the best interests of the child should be observed. Although the decisions of the Court of Cassation do not provide a clear definition of the best interests of the child, they highlight that various procedures and legal arrangements should serve the best interests of the child. This principle aims to protect and improve the child's physical, mental, social, legal, financial, moral, and social development. It can be stated that the TCC, in parallel with the Swiss Civil Code, requires the child to be educated in accordance with the conditions of the day. Such education should monitor and encourage the child's physical, mental, and moral development. The principle of the best interests of the child requires that the right of custody be considered as an indivisible whole. This principle is based on the idea that parents bear joint responsibility for the child's well-being and that their rights and responsibilities are indivisible. Furthermore, it cannot be ignored that the right of custody is a personal right and cannot be waived. However, in some cases, in the best interests of the child, parents, and third parties are also authorized. The principle of indivisibility emphasizes the joint exercise of custody by the parents within the marital union. The principle of strict attachment to the person states that the right of custody is inalienable and cannot be waived; however, in some cases, third parties may be authorized in the best interests of the child.

Joint custody should be evaluated separately during marriage and in cases of separation or divorce. Since granting joint custody only to married couples may cause injustice, the UNCRC recommends that joint custody should not be limited to the duration of a marriage and should be applied in cases where it is in the best interests of the child. In this respect, it was emphasized that the principle of the best interests of the child and the discretionary power of the judge, taking into account the interests of the child, are important. In case of divorce, temporary measures are to be taken for the care and development of the child, and decisions on who will exercise custody should be established by taking into account the best interests of the child. In cases with no marital union,

the mother has the right of custody, but the biological father may have the right of custody in certain circumstances. However, this does not ensure equality of rights between unmarried parents. In this regard, it is important that regulations are made in the domestic legal system regarding children's rights and that children benefit equally from custody rights without discrimination.

In this respect, to protect the best interests of children and to ensure that parents stand at an equal distance from their children and make joint decisions regarding their physical, psychological, and moral development, joint custody is a choice that should be taken into consideration even after divorce. The most important duty in this regard falls to the judges. The judge should examine many factors, such as the children, parents, and social, financial, and cultural conditions in the concrete case separately, including the parents' requests, and decide on each case individually. Considering the practices of the Court of Cassation, to ensure fairness and consistency in this matter, legislators should introduce new regulations and create a basis for the decisions to be made by judges in line with the best interests of the child.

5 Statement of researchers

In this section, you are expected to declare the information regarding the titles given below.

5.1 Researchers contribution rate statement

The authors contributed to the study.

5.2 Conflict statement

The authors declare no potential conflicts of interest.

References

- Akıntürk, T., & Karaman Ateş, D. (2012). *Civil Law*. Beta.
- Akipek, J. G., & Akıntürk, T., & Ateş, D. (2016). *Law of persons*. Beta.
- Akyüz, E. (2020). *Child law*. Pegem.
- Apaydın, E. (2018). The necessity of a legislative regulation on the joint custody after the dissolution of marital union. *Inonu University Law Review*, 9(1), 445-476. <https://doi.org/10.21492/inuhfd.425434>
- Ardıç, O. (2008). *Civil law*. Seçkin.
- Arkan Serim, A. (2016). Joint custody in case of divorce. *Legal Journal of Law*, 14(167), 6075-6088.
- Başoğlu, B. (2017). The effect of kinship on child's surname. *Inonu University Law Review*, 8(1), 351-378. <https://doi.org/10.21492/inuhfd.319827>
- Binatlı, Y. Z. (1965). *Turkish civil law*. Tam-iş printing house.
- Birinci Uzun, T. (2016). The Exercise of Parental custody under Turkish civil code and Joint custody after Divorce and for Unmarried Parents in accordance with the Principle of the Best Interests of the child. *Hacettepe Law Review*, 6(1), 135-166. <https://dergipark.org.tr/en/pub/hacettepehdf/issue/46361/582712>
- Birsen, K. (1963). *Civil law lessons*. Ahmed Said printing house.
- Bölükbaşı, Ö. (2021). *Joint custody and enforcement of joint custody decisions*. Yetkin.
- Bükel Koç, M. (2020). *Joint custody* [Master thesis, Ankara University- Institute of Social Sciences]. National Thesis Centre Archive https://tez.yok.gov.tr/UlusalTezMerkezi/tezDetay.jsp?id=Xpj_zkIV3Z9Wx9DiuYh-Wg&no=y7P4T3uO5RKavwDRO1s4-g
- Çatalbaş, İ. (2021). *Custody and joint custody*. Seçkin.
- Çoşkun, N. H. (2023). *Adaptation of the Principles Governing Custody to Joint Custody*. Aristo.
- Dural, M., & Öğüz, T., & Gümüş, M.A. (2016). *Turkish Private Law Volume III Family Law*. Filiz.
- Erdem, M., & Makaracı Başak, A. (2022). *Family law*. Seçkin.
- Akkurt, S. S., & Erdoğan, K., & Tokat, H. (2021) Erdoğan. *Civil law*. Seçkin.
- Erlüle, F. (2020). Current developments regarding joint custody after divorce. *Bursa Bar Journal*, 45(114), 59-68. <https://www.jurix.com.tr/article/21772>
- Gençcan, Ö. U. (2018). Joint custody. *Izmir Bar Bulletin*, 27(8 March 2017 Special Issue), 24-30.

- İnan, A.N. (1968). The effect of the principles of the declaration of the rights of the child on Turkish law. *Ankara University Journal of Faculty of Educational Sciences (JFES)*, 1(1), 201-219. https://doi.org/10.1501/Egifak_0000000220
- İnce, N. (2018). Gemeinsames Sorgerecht nach der Scheidung. Eine vergleichende Untersuchung der Rechtslage in der Türkei und in europäischen Ländern. *Türkiye Adalet Akademisi Dergisi*, (34), 189-230. <https://dergipark.org.tr/en/pub/taad/issue/52648/693661>
- Karaaslan, E. (2020). A look for the child: The best interests of the child. *İstanbul Bar Journal*, 94(4), 79-112. <https://www.jurix.com.tr/article/21311>
- Koçoğlu, S. (2018). *Consequences of divorce for the child*. Beta.
- Köseoğlu, B., & Kocaağa, K. (2009). *Family law and practice*. Publications of the Union of Turkish Bar Associations.
- Kurt, L. M. (2018). Joint custody in the case of divorce. *Inonu University Law Review*, 9(2), 157-186. <https://doi.org/10.21492/inuhfd.456782>
- Özgenç, Z. (2019). An analysis of public policy intervention in determining the applicable law to child custody. *Ankara Hacı Bayram Veli University Faculty of Law Review*, 22(1), 3-47. <https://dergipark.org.tr/tr/pub/ahbvuhfd/issue/43951/540032>
- Öztan, B. (27-28 April 2018). *Joint custody in divorce* [Paper presentation]. Izmir Civil Law Days-II-Family Law Symposium.
- Öztan, B., & Öztan, F. (2020). Joint parental custody in divorce and the models for its implementation. *Çankaya University Journal of Law*, 5(1), 2569-2608. <https://jurix.com.tr/article/20850>
- Serdar, İ. (2008). Joint custody. *Dokuz Eylül University Law Review*, 10(1), 155-197. <https://dergipark.org.tr/en/pub/deuhfd/issue/46844/587417>
- Şirin, M. C. (2019). Çocuğun yararı gözüyle çocuğun yüksek yararı ilkesine bakış. *Çocuk Ve Medeniyet*, 4(8), 219-240. <https://dergipark.org.tr/tr/pub/cm/issue/57214/807917>
- Tekinay, S. S. (1978). *Turkish family law*. Sulhi Garan Printing House.
- Tokuş, A. (2021). *Joint custody*. Seçkin.
- Yılmaz, S., & Yıldırım, A. (2021). *Civil law-I*. Seçkin.
- Yücel, Ö. (2013). The child's will in the context of the best interest of the child. *Ufuk Üniversitesi Hukuk Fakültesi Dergisi*, 1(2), 117-137. <https://jurix.com.tr/article/4273>