

THE SITUATION OF CHILDREN AND PARENTS IN THE DIVORCE CONTEXT IN PORTUGAL

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PARENTAL RESPONSIBILITY

The concept of “parental responsibility” covers the duties and rights to take care of the child’s person and property. It includes the responsibility to ensure that the child has shelter, food and clothes as well as a responsibility for his or hers upbringing. It also integrates the responsibility to look after the child’s property, if any, and also includes the right to represent the child legally.

Those who have the child’s parental responsibility are referred to as “holders of parental responsibility”.

Children are subject to parental responsibility until they reach majority (18 years old) or become emancipated (after 16 years old).

Our Fundamental Law (Constitution of the Portuguese Republic) establishes various principles that directly affect parent-child relationships, such as the principle of equality between parents as regards the maintenance and education of their children (Article 36.º, n.º 3), the principle of awarding parents the right and duty to educate and maintain their children (Article 36.º, n.º 5) and the principle of the child’s inseparability from their parents, except when they do not comply with their fundamental duties towards their children (only by a court decision and a due process of law) (Article 36.º, n.º 6)¹.

As long as the parents live together, they usually have jointly custody and exercise the parental responsibility over their child jointly according to the law.

However, if the parents divorce or split up, they need to decide how this responsibility will be exercised in the future.

The parents may agree that the child shall live with one parent. In this case, the other parent usually has a right to visit the child at certain times.

The parents may decide these matters by a mutual agreement or to litigation.

¹ According to Universal Declaration of Human Rights e European Chart Of Human Rights.

When a court is used, it decides which parent shall have the custody rights over the child.

The custody holder decides, among other things, where the child shall live.

When one of the parents is granted single custody, the other parent is often granted the right to see the child during certain periods (access rights or visiting rights).

Portuguese Law has different meanings for “**physical custody**” and “**exercise of parental responsibilities**”.

“Physical custody” means the right of one of the parents to decide where the child shall live and “exercise of parental responsibility” refers to issues of particular importance in the life of the child that both parents must decide together.

In case of divorce or separation, Portuguese Law establishes that one of the parents shall have single custody over the child but parental responsibilities are exercised by both parents.

Therefore, the exercise of parental responsibilities does not differ according to the relation between their parents (if they are married, unmarried or parents not living together).

The concept of “parental responsibility” has been enshrined in Portuguese Law since the Law n.º 61/2008, 31 October 2008.

Law n.º 61/2008 also adopted some of the Principles Of European Family Law Regarding Divorce and Maintenance Between Former Spouses (www.ceflonline.net).

According to Recommendation N.º R (84) 4 (Adopted by the Committee of Ministers from Council of Europe), “parental responsibility” is defined as a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular by taking care of the person of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the administration of his property.

Any decision of the court concerning the attribution of parental responsibilities or the way these responsibilities are exercised should be based primarily on the interests of the child².

² The child’s interest are a vague legal concept and is a cultural concept, profoundly dependent upon the system of values in force at any given moment and each society, concerning the person of the child, his or her material and emotional needs, and the conditions necessary for his or her healthy development. Thus, the notion can only be specified in reference to those values and by means of a systematic interdisciplinary study of the child’s real-life situation.

However, the court should also respect equality between parents and no discrimination should be made, in particular on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

In establishing the general principles of the regulation of parental responsibility, Portuguese Law imposes upon parents a “positive duty to respect their children”, which translates into the duty to take account of their opinion in important family matters, in accordance to their maturity, and the duty to gradually recognize their autonomy in leading their own lives³.

In case of divorce or separation, the court shall determine the residence of the child and the visiting rights in the accordance with his interest, taking into account all relevant circumstances, namely the eventual agreement between the parents and the availability of each one of them to promote habitual relations of the child with the other.

Therefore, the court will always decide in harmony with the interest of the child, including the one of maintaining a close relationship with both parents, encouraging and accepting agreements or making decisions that promote extensive opportunities of contact with both and sharing responsibilities between them.

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DIVORCE AND PARENTAL RESPONSIBILITY PROCEEDINGS

In the case of dissolution marriage or separation, parental responsibilities of the child are exercised jointly by both parents.

Based on the interest of the child, only the court may established that parental responsibilities are exercised by one of the parents (the resident parent or the custody holder parent)⁴.

The decision may result from an approval judgment, confirming an agreement between the parents on the exercise of parental responsibility, or a judgment of merits containing a compulsory decision on the exercise of this responsibility.

The agreement must be approved by the judge of the competent court or by the civil registrar (only in divorce proceedings by mutual consent) and must be attached to the application for divorce.

³ Portuguese Law also establishes that parents should take their child’s wishes into consideration on matters regarding their academic and professional training.

⁴ Alternating custody is rarely applied by courts because it is only possible by an agreement between parents establishing a system of alternating custody.

This agreement may also be concluded during the attempt at reconciliation presided by the judge.

This attempt to reconciliation is compulsory in contested proceedings for divorce and in proceedings to decide on the exercise of parental responsibility.

It is always necessary to obtain court approval for any agreement entered into by the parents (whether it is a spontaneous or results from mediation process), except with regard to the aforementioned participation of the registry office.

With regard to proceeding before the registrar, the Public Prosecutor at the Family Court must give an opinion on the agreement before the approval by the civil registrar.

Approval must be refused whenever the agreement is not in the interest of the child, including that of maintaining a close relationship with the non-resident parent.

At any stage of the proceedings and whenever this seems appropriate, the judge may, on his own initiative and with the consent or of those involved, order participation by public or private mediation services.

The judge will approve the agreement secured through mediation if it protects the interests of the child.

When parental responsibility is exercised jointly by both parents, they decide on matters affecting the life of the child under identical conditions to those which were applied during the marriage, except for the major difference that the child can live with only one of them.

In this context, the position of the parents with regard to the child does not change in legal terms upon divorce or separation.

With regard to acts or issues of particular importance or for which the law expressly requires the consent of both parents, the non-resident parent must be consulted and give his consent to the act.

Furthermore, the parent who does not exercise parental responsibility has the power to oversee the education and living conditions of the child.

In the absence of agreement between the parents on **issues of particular importance**, the court must decide on these, after an attempt of

reconciliation and after hearing the views of the child, unless it is inadvisable to hear this child's view⁵.

In all proceedings concerning to parental responsibilities, it is not compulsory to instruct a lawyer except at the appeal stage⁶.

The only essential documents at this initial stage are the birth certificate of the child and, if the parents are married, their marriage certificate.

Voluntary jurisdiction rules apply to these proceeding concerning to child's interest, which the court may freely investigate the facts, collect evidence, order enquiries and gather the information regarded as appropriate. Only evidence which the judge considers necessary is admitted.

At any stage of the proceeding, the judge can appoint or request technical advisers to assist to enquiries, provide elucidations, make examinations or prepare advices.

In these proceedings, the court is not subject to criteria of strict legality but in each case must adopt the solution which seems most appropriate.

Therefore, when called to intervene in determination of parental responsibility, is must be guided by full and exclusive consideration of the child's interests.

However, the voluntary nature of the jurisdiction does not release the court from the requirement to base its decisions on fact and law.

In proceedings of this kind, decisions may be changed, without prejudice to the effects already produced, on the basis of supervening circumstances which justify the change.

Supervening circumstances are those occurring after the decision and those occurring before the decision which has not been raised owing to lack of knowledge or other substantial grounds.

Those parents are entitled to hear the information, reports, examinations and opinions disclosed in the proceedings and may request clarifications, submit further evidence or request the gathering of any information which they consider necessary.

⁵ Usually, the child does not take part in processes of regulation of parental responsibility and is therefore not represented by either his or her parents. The child's interests are considered to be protected by the Public Prosecutor's Office, which intervenes in all proceedings concerning to children.

⁶ Legal aid (i.e. free charges and non-payment of lawyer costs) applies in all courts and registry offices, whatever the form of proceedings.

The judge will reject, in a ruling against which there is no appeal, those requests which are pointless, impossible to carry out or manifestly intended to delay matters.

The hearing of both sides with regard to the evidence obtained by the means described is guaranteed.

At any stage of the proceedings and whenever it is considered appropriate, the court may provisionally decide on those matters which must ultimately be resolved and also order any urgent steps which are essential to ensure the effective enforcement of the decision.

Within the general terms of the civil procedure, parents or the Public Prosecutor may submit an appeal.

However, decisions delivered according to the criteria of appropriateness and expediency are not open to appeal to the Supreme Court of Justice.

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ENFORCING DECISIONS

If, in the case one of the parents does not comply with what has been agreed or decided, the other parent may ask the court to take the necessary steps to enforce compliance and to sentence parent guilty of this non-compliance to pay a fine and compensation in favour of the child and the applicant, or both.

Once an application has been made or joined to the proceedings, the judge will invite the parents to a meeting or will order the respondent to be notified so that he or she may make whatever representations he or she considers appropriate.

At the meeting, the parents may agree to alteration of the arrangements for the exercise of parental responsibility, bearing in mind the interests of the child.

If a meeting has not been held or when the parents cannot agree during the meeting, the judge will order a brief investigation to be carried out, together with any other steps which he considers necessary, and will ultimately take a decision.

This proceeding is incidental to the main proceeding and may result from a application by a parent or the public prosecution service.

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MAINTENANCE OBLIGATION

Portuguese Law requires member of the same family to provide assistance in the basis of parental responsibility.

Therefore, parents must feed, educate and maintain their children.

This obligation is generally discharged by a monthly payment known as maintenance.

The court fixes the amount of the payment and the conditions for its variation but it may exempt a parent from that obligation if he or she undertakes to house, feed and maintain a child.

If maintenance payments are in arrears, it's possible to take court action to enforce payment, requesting an attachment order for the amount of maintenance against sums payable to the debtor by other people (an employer).

Primarily, enforcement will take an assignment of earnings (part of debtor's wages or salary can be seized and the maintenance payments will be paid from it)⁷ but it is also possible an attachment of goods, bank assets or an execution against real property.

There are certain categories of assets and claims that can't be attached (clothing, food, certain items of furniture, part of the salary) so that debtors and their family can still enjoy a reasonable standard of living.

The amounts deducted will also include the maintenance which may be about to fall due and will be paid directly to the maintenance creditor (resident or custody parent).

If civil enforcement proceedings do not produce the desired result, in some circumstances, this obligation may result in criminal responsibility.

Since January 2000, Portugal has also a Public Fund available if a maintenance creditor fails to pay and it is not possible to take an assignment of earnings or goods.

In this case, the Public Fund supports the maintenance payment and, as soon as possible, it will try to recover that money from the debtor parent.

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PARENTAL ALIENATION

⁷ If this involves a public official, the respective amounts will be deducted from their salary on a request from the court send to the official service; if this involves an employee or salaried worker, the amounts will be deducted from their wage or salary (the employer will be notified and will be designated as the approved depositary; if this involves a person in receipt of profits, pensions, subsidies, commission payments, percentages, fees, gratuities, shared earnings or similar income, the deduction will be made from the amounts when they are paid or credited, with the necessary requests or notifications being made for this purpose and with the notified bodies being designated as the approved depositaries.

A child and his or her parent shall have the right to obtain and maintain regular contact with each other and such contact should only be restricted or excluded only where necessary in the best interest of the child.

Today, the right of contact in the context of a divorce or separation is understood very broadly. It consists of the right of the non-custodial parent to relate to and spend time with the child, not only through occasional contacts but also by providing accommodation for the child for short periods of time (such as weekends, holidays) and by corresponding with the child (by letter, e-mail, telephone, electronic communication, or through an intermediary).

Portugal has been sanctioned several times by Human Rights European Court concerning to mal-function of legal instruments to prevent violations on contact concerning children (*Reigado Ramos vs Portugal e Maire vs Portugal*).

Therefore, the court must take the necessary steps to enforce compliance, including civil or criminal responsibility.

Recent decisions from Portuguese Superior Courts notice violations of the agreement or decision concerning to contacts between the non-resident parent and the child, involving acts of “parental alienation” (Richard Gardner, 1985).

Parental alienation dynamics typically emerge during divorce and involve the active, although often cover, alienation of the child from one parent by the other parent.

When a child expresses unjustified hatress or unreasonably strong dislike of one parent, making acess by the reject parent difficult or impossible, these feelings may be influenced by negative comments by the other parent.

To prevent the devastating effects of Parental Alienation, Portuguese judges begin by recognizing the symptoms.

We have noticed that many of the symptoms or behaviors focus on the parent but, in some cases, the child may also exhibits hatred and vilifies the targeted parent.

1. Giving children choices when they have no choice about visits. Allowing the child to decide for themselves to visit when the court order says there is no choice sets up the child for conflict. The child will usually blame the non-residential parent for not being able to decide to choose whether or not to visit. The parent is now victimized regardless of what

happens; not being able to see his children or if he sees them, the children are angry.

2. Telling the child "everything" about the marital relationship or reasons for the divorce is alienating. The parent usually argues that they are "just wanting to be honest" with their children. This practice is destructive and painful for the child. The alienating parent's motive is for the child to think less of the other parent.

3. Refusing to acknowledge that children have property and may want to transport their possessions between residences.

4. Resisting or refusing to cooperate by not allowing the other parent access to school or medical records and schedules of extracurricular activities.

5. A parent blaming the other parent for financial problems, breaking up the family, changing is lifestyle, or having a girlfriend/boyfriend.

6. Refusing to be flexible with the visitation schedule in order to respond to the child's needs. The alienating parent may also schedule the children in so many activities that the other parent is never given the time to visit. Of course, when the targeted parent protests, they are described as not caring and selfish.

7. Assuming that if a parent had been physically abusive with the other parent, it follows that the parent will assault the child. This assumption is not always true.

8. Asking the child to choose one parent over another parent causes the child considerable distress. Typically, they do not want to reject a parent, but instead want to avoid the issue. The child, not the parent, should initiate any suggestion for change of residence.

9. Children will become angry with a parent. This is normal, particularly if the parent disciplines or has to say "no". If for any reason the anger is not allowed to heal, you can suspect parental alienation. Trust your own experience as a parent. Children will forgive and want to be forgiven if given a chance. Be very suspicious when the child calmly says they cannot remember any happy times with you or say anything they like about you.

10. When children cannot give reasons for being angry towards a parent or their reasons are very vague without any details.

11. A parent having secrets, special signals, a private rendezvous, or words with special meanings are very destructive and reinforce an on-going alienation.

12. When a parent uses a child to spy or covertly gather information for the parent's own use, the child receives a damaging message that demeans the victimized parent.

13. Parents setting up temptations that interfere with the child's visitation.

14. A parent suggesting or reacting with hurt or sadness to their child having a good time with the other parent will cause the child to withdraw and not communicate. They will frequently feel guilty or conflicted not knowing that it's "okay" to have fun with their other parent.

15. The parent asking the child about his/her other parent's personal life causes the child considerable tension and conflict. Children who are not alienated want to be loyal to both parents.

16. When parents physically or psychologically rescue the children when there is no threat to their safety. This practice reinforces in the child's mind the illusion of threat or danger, thereby reinforcing alienation.

17. Making demands on the other parent that is contrary to court orders.

18. Listening in on the children's phone conversation they are having with the other parent.

19. One way to cause your own alienation is making a habit of breaking promises to your children. In time, your ex-spouse will get tired of having to make excuses for you.

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COURT ACTIONS BEFORE PARENTAL ALIENATION

Prevention of Parental Alienation is the most important step for both parents and professionals.

Court must confront alienation where it is found and ensure treatment begins, initiate preventive measures, and educate parents about the symptoms and causes of alienation.

As a central area involved in settling matters of custody, support and shared parenting (visitation matters), the Courts are in a position to do all of these things, through these steps: -

⇒ Recognize early the symptoms of alienation, and help educate parents and attorneys of these symptoms;

⇒ Identify high-risk cases.

⇒ Intervene quickly.

⇒ Don't let attorneys use delay tactics like continuances, especially in cases with a high-risk for alienation;

⇒ Order parents into therapy (family systems and cognitive behavioral therapy), hopefully before they come to an agreement on a Shared Parenting Plan;

⇒ Order a "Guardian Ad Litem" to monitor compliance and report to the court;

⇒ Don't withhold visits unless there is a question about the child's safety. There is always the risk that withholding visits will reinforce alienation and increase the risk that the child will believe there is something wrong with the targeted parent;

⇒ Give the parents an opportunity to speak before the court;

⇒ Order therapy for the child if their general level of functioning (school grades, socialization, interests, etc) deteriorates;

⇒ If the child is already "alienated", order therapy for the parents with a therapist who understands parental alienation and works with high conflict families.

After all, when parents divorce or split up, their child continues to need a father and a mother as well and their relationships must be separated from parent's conflict.

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