INTERNATIONAL SCIENTIFIC CONFERENCE ON BEST INTEREST OF THE CHILD AND SHARED PARENTING. DECEMBER 2-3, 2019. MÁLAGA, SPAIN

ABSTRACTS WORKSHOPS

Workshop 1A Best interest of the child and shared parenting

SHARED PARENTING *VS.* CHANGE OF ADDRESS OF A PROGENITOR[1]

María Dolores Cano Hurtado

Article 19 of the Constitution recognizes that *Spanish have the right to freely choose their residence and to move through the national territory. They also have the right to freely enter and leave Spain under the terms established by law*. Therefore, in the Constitutional text this right is set to freely determine the address where the person considers for various reasons (work, family, emotional ...). However, the marital domicile will be determined by mutual agreement and in case of discrepancy, as stated in article 70 of the Civil Code, the judge will resolve taking into account the family's interest. From the combination of both articles, we can affirm that when the family remains united in an atmosphere of harmonious coexistence there will be no problem, although there are minor children, to adopt the decision that best responds to the interests of all its members, modifying the address as many times they believe convenient, inside or outside the national territory. However, the problem is generated in cases of cessation of conjugal or couple living, where it will have been fixed, either by regulatory agreement legally approved, or failing that by judicial resolution, among other aspects, the exercise of parental rights , guard and custody, and where appropriate the regime of stays and visits for the non-custodial parent. Obviously, if the shared parenting system had been accepted, given its characteristics, this change of address (sometimes caused by parental alienation) in many cases will make its continuity unfeasible. The purpose of this communication is to analyse this complex situation where the best interests of the child must necessarily prevail over all interests at stake, which is not always easy to determine because of the complexity of the relationships.

- THE MISSING KEY IN PARENTING

[1] This topic was one of the points analyzed in the publication: CANO HURTADO, M.D., "Interferencias en el ejercicio del derecho de relación paterno-filial por cambio de domicilio del progenitor custodio", en PÉREZ VALLEJO, A.M. (Editora) y ANTÓN MORENO, M.P. (Coord.), *Estudio multidisciplinar sobre interferencias parentales*, ed. Dykinson S.L., Madrid, 2019, pp. 19-46.

Mauricio Alexander Piper.

In this abstract, we are trying to bring to the front the huge problem in shared parenting, faced especially after the separation. It is about building up a wall from the side of one (or both) parents. With the raised wall, there is no chance for communication, decision-making, inclusion, mutual respect. The whole idea of gender equality is designed to fail if we show our children that - in case of separation - one gender dictates the rules. How can we tell them that there is something like gender equality if it's still possible that one parent gets lost just because the other part decides to do so. How can my son learn about equality at adults, when his childhood was full of rules made by women. Every year 200,000 children in Germany face different problems because of separation. Almost 25% of them lose their fathers with an active role in their lives. At the same time, women lose their sparring-partners in raising their kids and face problems in their work-life balance. On the other hand, many of these fathers get depressed because of the wall towards their children touches all aspects of theirs life - in a very negative way. Obviously, there's no winner in this scenario, only a Lose-Lose-Lose situation. We should stop talking about gender and roles and start putting our children in the center. Not in the middle of the conflict. Let's not forget that they are just little human beings who often, in a very young age, deep inside them, blame themselves because ´Mum and dad are fighting´. Nowadays, separation and divorce is becoming the new ´normal´ in modern everyday life. We should accept that. What we shouldn't ever accept, under any condition, is that children suffer from the process of separation, face negative emotions and get long-life concequences that can even reflect on their own relationships when they're grown up. Separated or divorced shouldn't exist in the world of Parenting. For a child there are always his Mom and Dad. So let's stick to the Mothers and Fathers because that's the only thing that children know, need and want to keep all their lives. Let's focus on communication and break up the walls that put our children in real danger. And that's the reason why we have to rethink the separation and create solutions for a better work-life balance for all parents. We have to think in Win-Win-Win scenario with children in the center unconditionally, not in the middle. Every child that looses an active parent after a separation is one too many. According to that, there is a huge demand for creating a solution, breaking up that wall and letting in the positive emotions and making their children feel loved, safe and secure. At least what they deserve is to have both parents active in their lives. If you think there is no problem, please ask a separated mother or a father. If you think there is no problem, please ask a child that has been going through the separation of its parents. --- Slides: https://we.tl/t-DYdpUHKopG Regards, Mauricio +49 178 806 77 88

CUSTODIA COMPARTIDA Y "STATU QUO"

Carmen Florit Fernández

Repeatedly, the jurisprudence, in the ruling that establishes the Medidas Definitivas about the custody of the child, bases the maintenance of the custody regime that is being exercised by the parents from the Auto de Medidas Provisionales, because the best interests of child is protected with the maintenance of the status quo because it favors the emotional stability of the child, that is, maintenance of the custody regime that was adopted initially in Medidas Provisionales or in a regulatory agreement or maintenance of the coexistence system that in fact has been existing since the

separation occurred , considering the judge that exclusive custody has been running smoothly and therefore maintaining it is the most beneficial for the child. It is true that, taking into account that one of the main issues analyzed is that of stability and therefore the minor, it is the most timely measure, but it is also that if custody is established individual way in the Auto de Medidas provisionales, given that it is an urgent process and one that does not enter into the "fondo del asunto", such decision will decisively influence what the Judge should subsequently take in the Medidas Definitivas, negatively conditioning the establishment of a future joint custody.

HIGH ROAD THE EVIDENCE BASED PROGRAM FOR SOLVING COMPLEX TRAUMA SURROUNDING DIVORCE

Dorcy Pruter

Trauma, is a wound that never heals, succeeds in transforming the subsequent world into its own image, secure in its capacity to re-create the experience for time immemorial. It succeeds in passing the experience from one generation to the next. The present is lived as if it were the past. The result is that the next generation is deprived of its sense of social location and its capacity to creatively define itself autonomously from the former... when time becomes distorted as a result of overwhelming events, the natural distance between generations, demarcated by the passing of time and changing experience, becomes obscured." Our approaches to resolving childhood trauma began with psychoanalysis, but they have expanded as greater scientific understanding is brought to bear on the experience of childhood and the role of the parent-child relationship in shaping the brain's neurological networks. With an increasing understanding of trauma and the role of parental empathy in recovery from trauma, alternative trauma-informed workshop methods have been developed to build empathy and recover healthy parent-child bonding. In this workshop, I will walk through the steps needed to create a trauma-informed recovery workshop for children and parents who have been separated byways of high conflict divorce. In this workshop I will walk you through the effective step by step strategies needed to keep families together in a healthy co-parenting relationship and restoring healthy parent/child bonds.

Workshop 1B on BIC.

BEST INTEREST OF MINORS CHILDREN IN "DAESHIS" FAMILIES: A PICTURE OF THE MOST VULNERABLE GROUPS IN A POSTCONFLICT SITUATION

Elena Avilés Hernández

Imagine the following scenario: children born in the middle of a conflict; with foreign parents who went there to fight for something they believed in. With a mother who, either by their own decision or because they were forced to, accompanied their husband. Some years later and after a succession of political and military interventions, the father is dead, under arrest or in prison, and the mother lives with her children in a refugee camp under unhealthy conditions. These children grow up without a home, without a school, without medical care; without knowing more than war, death and terror. This is just one example of the many cases of "Daeshis" families who are currently in one of the many refugee camps set up as a result of the conflict with the DAESH. So now my question is: What is the best interest of the child in this case? Some governments have denied the possibility of regaining the nationality of the adults who rejected it once they joined DAESH. They argue that the people who accepted these conditions were aware of the consequences of their actions. Others states are willing to repatriate their children, but not their parents; they believe that children, with proper treatment, could be incorporated into society and lead a "normal life". Nevertheless, these countries do not have an adequate prison system that can meet the requirement of their parents. In some cases, states simply assume that these people will never be able to rejoin society, so they consider it is better to be judged there. However, others do not even want to repatriate their children because they believe that this situation would make it easier for parents to return to the country in the future because of family ties. Meanwhile, governments of the conflict zone, as well as some NGOs working in the country and several international organizations that are monitoring the situation, consider that the only way for these children to recover is to take them away from the conflict and raise them in a society where they can reintegrate. Otherwise, and if this situation does not stop, they will become the new generation of ISIS, a group much more dangerous than the previous one. Having analysed all this information, I return to this question, leaving it open for possible reflection: in this case, what is the best interest of the child?

FACTORS OF SHARE CUSTODY WITH BREASTFED CHILDREN. THE SITUATION IN SPAIN.

Cristia Diaz-Malnero Fernandez

When the parents decide to separate, the custody of their children do always rise lots of difficulties and uncertainties. But when they have a breastfed child, the parents will need to think to settle parenting arrangements that accommodate this situation. In Spain, the Supreme Court as fixed the share custody between parents as the most suitable system to protect the interest of the child. Also, the law of some Autonomous Communities do provide that the judge will settle share custody as the referent system in case of the separation of the parents. But neither the Supreme Court nor the laws of the Autonomous Communities do provide any factors in case of breastfed children. The factors considered for share custody as distance between domicile of the parents, age of the children, work schedule of the parents, relationship between the parents in order to take day by day decision cannot be used in the first place for breastfed children. The balance between all the benefits of breastfeed and the right of the child to have a relationship with his tow parents is the key point. This is the reason why we wanted to work on this topic as the jurisprudence is the only way to analyse if a share custody is possible in these cases. The decisions taken by the courts can be divided in three categories: - Resolutions in which the court considers that share custody is not suitable

in case of breastfed children. Therefore, the custody is granted to the mother and the judge fix a regime of visit for the father usually every day two or three hours at least during the six first months of life, considering by the World Health Organization, in order to achieve a correct growth and health. - Resolutions in which the court considers that share custody is suitable and do protect the interest of the child, even using formula nutrition, considering that the child has the right to be cared by both parent, even with breastfeeding. - Resolutions in which the courts consider that share custody is possible but in a progressive way: in these decisions, the judge do fix first a custody for the mother and, once the breastfeeding is finished, he does settle the share custody. These are mixed decisions as sometimes it is very complicated to know or even to decide when the breastfeed has to stop. Therefore sometimes the mothers do decide to breastfeed till the age of 2 or 3 of the children, and the share custody is not achieved. The precise nature of shared custody arrangements will vary therefore between families and may change over time. Nevertheless, the factors as seen are not clear and there is no stability in the way they are being applied by the court, which is why this study wants to analyse them in the three different categories of judicial decisions

THE BEST INTERESTS OF THE CHILD AND RELIGIOUS FREEDOM: DISPUTES BETWEEN PROGENITORS[i]

Mª Rosa García Vilardell

This paper deals with the study of the disputes between parents over children's religious instruction. A large part of the separations and divorces in our country are contentious and a significant number are considered highly conflictive. It is increasingly common that, in the event of breakdown of the marital or de facto relationship, one of the parents shows their disagreement with the continuity of the religious formation chosen for their children initially or against the one that will be developed in a future, without prior agreement.

We are in a very sensitive area, such as paternal-affiliate relations. This requires the study of the right of parents to educate their children in conformity with their own convictions (art. 27.3 CE) and then examine their ability to exercise the indicated disputes, taking into account the religious rights of children and the protection of their best interest. In the cases of disputes between parents in the choice of the type of religious training they want for their children, it´s clear from the jurisprudence of the Constitutional Court that the best interests of the child operate as a counterweight to the rights of each parent, so that when the exercise of any of the rights inherent to the parents affects the development of their paternal-affiliate relations, and may have a negative impact on the development of the personality of the minor child, the interest of the parents must yield against the interest of this one.

Along these lines, advancing in the safeguarding of the rights of minors, the Spanish legislator showed through the reform of the Organic Law 1/1996 on the legal protection of minors (2015) which introduces the criteria established by the UN in the *interpretation* of a *child's* best *interests* and, especially, the *right* of *all children to be heard* in all matters affecting her or him.

This communication finds its origin in the paper: GARCÍA VILARDELL, M.R., "El ejercicio conjunto de la patria potestad en el caso de progenitores no convivientes: conflictos en torno a la formación moral y religiosa de los hijos", en PÉREZ VALLEJO, A.M. (Ed.), *Estudio multidisciplinar sobre interferencias parentales*, Dykinson, Madrid 2019, pp.47-73.

EL INTERÉS SUPERIOR DEL MENOR EN LA JURISPRUDENCIA DEL TRIBUNAL SUPREMO

José Manuel Martín Fuster

The Best Interest of the Child in the jurisprudence of the Spanish Supreme Court

This work will study the best interests of the child with respect to shared custody in the current jurisprudence of the Supreme Court, observing which criteria are followed for the determination of this type of custody and what issues arise in practice.

We can begin by pointing out that the introduction of the principle of the best interests of the child in our system has meant a complete transformation of family law, being today the true protagonist of the new family law. And all of this has been possible after an important legislative work, both internationally and nationally, highlighting the incorporation of the principle of the best interests of the minor in the second article of the Organic Law of Legal Protection of Minors, thus turning this principle into an imperative rule. And this concept is defined from a triple content: it is a substantive right, it is a general principle of interpretative character, and it is a rule of procedure. In these three dimensions, the best interests of the child have the same purpose: to ensure full and effective respect for all the rights of the child, as well as their integral development.

The Supreme Court, especially after the Judgment of October 8, 2009, conceives shared custody as the general rule of attribution of custody of minors, in case of crisis of marriage or coexistence of parents, provided that, of its application, there are no negative consequences for the "interest of the child". And this because, the "interest of the child" requires the maximum preservation of their relations with both parents, provided that this does not interfere with the satisfaction of their basic material, physical and educational needs, as well as emotional ones.

At the time of agreeing on the shared custody regime, the TS demands, as requirements, among others, in addition to the interest of the child, at least being requested by one of the parents, that they do not live away in different localities, and that the disagreements of the parents are not greater than the normal ones derived from a marital crisis, and taking into account other circumstances such as the psychosocial report and the child's age.

According to repeated jurisprudence of the Supreme Court, shared custody, far from being an exceptional regime, must be the ordinary and desirable regime of custody of minor children. And this regime is the ideal, because it is the closest to the existing coexistence model before the marriage break. In addition, it guarantees parents the possibility of continuing to exercise the rights and duties inherent in parental rights and

to participate in equal conditions in the development and growth of their children. It also highlights the risk of petrification of the situation of the child, in case of establishing exclusive custody.

In addition, and although we can find sentences in various ways, the Supreme Court usually considers that the change of the social reality and the new case law about shared custody become an alteration of circumstances that promotes the modification of the exclusive custody previously awarded to one of the parents, in favor of shared custody.

Workshop 2A on Socioeconomic Profil.

SHARED CUSTODY AND ECONOMICS INTERESTS

Jesús Martín Fuster

It is well known that shared custody is currently considered the preferred method of custody and most suitable for the best interest of the child, and this has been assumed by the jurisprudence of the Spanish Supreme Court. However, we cannot ignore that, on many occasions, what underlies the request of the shared custody or the individual one are the economic interests of the parents, who wish, on the one hand, not to pay or reduce as much as possible the maintenance, and on the other hand, to acquire a maintenance as high as possible at the expense of the other parent, an interest that also appears on the use of the family's habitual dwelling. Thus, this paper intends to carry out a study of how these economic and private interests of the parents can influence the judge's decision when adopting the shared custody measure, and in what way this reflection of the economic interest in the parents make it more or less appropriate.

We must bear in mind that in our Civil Code there is no express pronouncement on the issue of maintenance for cases of shared custody. However, the Supreme Court, contrary to the classical and traditional conception by which in the shared custody there is no need for alimony of the parents in favor of the children —satisfying the expenses that entail the time in which they are under their care , and pay 50% of the rest of the ordinary and extraordinary expenses—, it has established jurisprudence in recent years, stating that the fact that shared custody is stipulated will not prevent the establishment of a food pension to be paid for one of the parents, especially taking into account the existence of disproportion in the income of the parents, the time of the child's stay with each parent, as well as the attribution of other expenses or circumstances that must be assessed.

With this jurisprudence, it is avoided that the mere invocation of shared custody entails the termination of the duty to provide the maintenance, taking into account the parents' wealth, and pursuing a balanced stay of the minors in any case. But, nevertheless, there is no doubt that, even so, a shared custody implies a reduction in the pension to be paid, by spending more time with the child, as well as a different treatment in the attribution of family dwelling, as we will see.

The situations and variety of assumptions that can be given are enormous, which hinders a certain and easy solution, and even not in every case the request for shared custody for economic reasons or interests can be considered reprehensible. A variety of assumptions that have also had a diversity of judicial pronouncements, which will be examined in this work.

SHARED RESIDENCE PRESUMPTION IN PORTUGUESE LEGAL SYSTEM

Sandra Inês Feitor

We cannot deny the existence of false accusations of violence and abuse, especially in cases of parental alienation aimed at contaminating factuality and proof in a wild pursuit of the exclusive relationship with children. In 2017 and 2018, the Judiciary Police warned that about 40% of allegations were false and occurred in the context of child custody disputes. Nor can such a pretext be used to refute the application of alternate residence as the preferential regime for children of separated parents, which should be analyzed case by case against the child's best interest in keeping both parents actively present and participating in their lives, and the fundamental right to family life, integral development and the free development of personality, since situations of abuse, abuse, violence and neglect, provided that they are duly substantiated, are protected by law under the Istanbul Convention. possibility of alternate residence and even joint exercise of parental responsibilities in cases of actual violence and / or abuse, without prejudice to the institute of inhibition of parental responsibility. The Council of Europe itself in Recommendation 2079 (2015) encourages Member States to adopt alternate residence as a model of their family-legal systems, naturally addressing exceptions in cases of abuse, neglect, abuse and violence, because they represent objective circumstances (provided that they are properly proven) that alternate residence does not correspond to the best interests of the child.

SHARED PARENTING IN STRAINED RELATIONS BETWEEN PARENTS? HOW CAN WE HELP TRAUMATIZED PARENTS TO TAKE THEIR RESPONSABILITY FOR THE BEST INTEREST OF THE CHILD?

Annelien Jonckheere

I work as a therapist, mediator and expert for court for 11 years now. Most people I meet in files say that they want to act for the best intrest of the child. In reality I often see that they don't handle in that best intrest. For me it was a challenge to investigate the difference between saying and acting. In Belgium, law in shared parenting is quite progressive. Law applies a 50/50 arrangement in residence and a joint parental authority. This progressive point of view can only work optimal when every involved person is working for the best interest of the child. When parents are traumatized by the divorce (and often already before divorce, even before their marriage), reality shows that they think they act for the best interest of the child but actually they don't. When we hear the word trauma we often think of mistreatment or abuse. Also psychological issues can be traumatic. When parents have a low self esteem, when their cognitions

about themselves are negative, it's a big challenge for the parents to communicate and work together for the best intrest of the child. Instead of the cooperation they blame the other parent. From my experience we can help those parents, not by blaming or accusing them, but by listening to them and motivate them to achieve their goal: the best intrest for the child. If they really want that best intrest and improve the situation, they have to start by themselves. It's important for parents to understand that. It's also important for lawyers who are quite often a confidant for their client to understand this mechanism. Of course when the other parent is acting really against law we have to react on that. But we can also adjust our reaction for the best intrest of the child and still esteem ourselves as a person. In my workshop or from my position in the panel I would like to explain the psychological mechanisms and communication mechanisms parents and lawyers should know to act for the best intrest of the child. Eventually I can present a case to make the mechanisms more clear and motivate people to 'improve the world and to start by themselves' for the best intrest of the child.

FAIR PLAY, NATURAL JUSTICE AND DUE PROCESS IN CHILD CUSTODY PROCEEDINGS

Fahad Siddiqi

It has often been witnessed that though the right to fair trial for the determination of civil rights is a fundamental right of every citizen of Pakistan, the concept of fair trial and due process has always been the golden principle of administration of justice. However, after incorporation of Article 10-A into the Constitution, it has become more important that due process should be adopted for conducting a fair trial and an order passed in violation of due process should be considered void. On the touchstone of this observation made by the honourable Supreme Court of Pakistan, it becomes abundantly clear that the Guardian Judges are under a constitutional as well as statutory obligation to assign valid reasons while curtailing fundamental rights of movement of the non-custodial parents. It imposes a restriction for an indefinite period of time that the non-custodial parent has to meet his or child/children for merely two hours twice a month and that too within court premises. It is peculiar to note here that no reason of any nature has ever been assigned to any non-custodial parent while dismissing the application filed under the provisions of S.12 of the Guardian and Wards Act 1890.

THE SOCIOECONOMIC GRADIENT OF SHARED PHYSICAL CUSTODY: CONTRASTING SWEDEN AND SPAIN

Jani Turunen

Using data from the HBSC studies in Sweden and Spain this paper analyses the socioeconomic gradient of equal shared custody and the development of the phenomenon over time in two very different country contexts. Despite the fact that SPC seems to be correlated with beneficial outcomes for children, it is not evenly distributed in Spain nor Sweden. Parents who have SPC arrangements tend to have a higher socioeconomic status than those who have sole-custody arrangements. We did however

find important country differences when it came to the diffusion of SPC: In Spain SPC diffused across social strata when it bacame more prevalent. By contrast, the Swedish data support a diverging destinies scenario where the increase was mainly happened within higher socioeconomic strata.

Workshop 3A on Parental alienation/sociology.

THE MUTUAL IMPORTANCE OF GOOD RELATIONS WITH BOTH PARENTS

Eivind Meland (presenting author), Hans Johan Breidablik

Factors associated with divorce, and especially the contact and relationship between the offspring and the nonresidential father may have a considerable effect on how the children and adolescents adapt to divorce experience (DE). We examined how the conversational confidence (CC) (the ease talking about bothersome topics) were associated with divorce experience in a cross-sectional study among adolescents in four age groups (11, 13, 15 and 17 yrs) in the county of Sogn og Fjordane in Western Norway. Further, we examined how DE and CC were associated with subjective health complaints (SHC) and life satisfaction (LS).

A total of 3807 of 4260 students answered the questions on DE and CC consistently. The prevalence of DE with preserved parental contact increased from 14.8% in the youngest age group to 21.3% in the oldest age group, while the prevalence of DE with loss of parental contact increased from 1.0% in the youngest to 3.3% among the oldest. Paternal loss of contact were three times more prevalent than maternal loss, 3.7% and 1.3% respectively. DE was consistently associated with impaired CC with fathers, less so with mothers (t-tests revealing no overlap of CIs). We performed linear regression modelling in order to examine how DE and CC with fathers and mothers impacted on SHC and LS in models where we controlled for age and sex and the associations between the predictors. DE impacted SHC modestly but significantly in the full model, but to a far lesser degree than CC with mothers and fathers. CC with fathers and mothers equally impacted SHC (regression coefficients with vastly overlapping CIs). Similarly, we conducted linear regressions examining the associations with LS. DE impacted LS still modestly. CC with fathers had a stronger association with LS, and even more so for CC with mothers, but the regression coefficients still had overlapping CIs. All associations were statistically significant with p-values < 0.01. The explained variances were modest for the full model with SHC (0.11), but stronger with the full model for LS (0.23).

DE may impair subjective health and life satisfaction among adolescents, but the associated decline in confidence talking with parents may represent a more urgent challenge. Family laws and public health efforts should aim at preserving good relations with both parents, also after divorce.

THE COOPERATIVE PARENTING TRIANGLE AS A TOOL

Päivi Hietanen

It takes a lot of effort, many discussions and flexibility for the parents to make post-

divorce joint custody and parental cooperation work. Cooperative parenting is not easy if there are a big tension between the parents and if parents have big difficulties to discuss about matters the consider the child. If parents find it difficult to cooperate and they fight for the child, it is very stressful for the child and cause serious problems. Therefore, it is vital that both parents seek help as early as possible for the cooperation problems they cannot resolve together. The parents should be willing to learn to cooperate with each other. The end of the intimate relationship does not end the parental relationship. Cooperative relationship between the parents makes the child feel safe. The child will not have to choose one parent over the other or take responsibility for the adults' issues or feelings. For the child, what is crucial about the divorce is not the divorce itself; what matters instead is the way the parents handle the divorce, as well as what the child´s life will be like and what kind of relationship the parents manage to build with another after the divorce. The child forms a separate relationship with each parent. These relationships have a crucial impact on the child's whole life, because it is the ground the child will build their self-image and self-esteem on. Maintaining both parent-child relationships and having the parents supporting each other's parenthood is important for the growth and development of the child. The parents have a shared responsibility for making sure the child receives proper care, nurture and parenting. The Cooperative Parenting Triangle is meant to be used as a tool while working with the parents. The triangle can be used as a conversation starter and for sharing information in individual, couple and group meetings. The triangle may be balanced differently for each family, highlight various needs, and point out individual aspects of parenthood and parental roles.Triangle helps parents to focus on the child´s point of view and helps parents to understand the difference of ending the intimate relationship from continuing parenthood. Co-parenting protects the child from the losses and negative effects of a divorce. Parents who engage in co-parenting build a cooperative relationship that is good for their child and works well in their situation.They understand the significance and value to the child of the other parent and try to support and protect this relationship within their resources.

PROFESSIONAL CO-OPERATION AND SUCCESSFUL FAMILY COURT INTERVENTIONS IN CASES WITH ACCESS REFUSAL AND ACCESS BOYCOTT IN GERMANY

Silvia Danowski-Reetz

Professional co-operation and successful family court interventions in cases with access refusal and access boycott in Germany The international recognition of access boycott and parental alienation as a serious form of psychological abuse threatening the best interests of the child has remarkably proceeded during the past years. Phenomenology, diagnostics, intervention and long term consequences of the parental alienation syndrome have been described, and scientific research on the topic has been undertaken, especially in the Anglo-American research community. Consequently, Parental Alienation has been included in the ICD-11 as an index term for the specific diagnosis of a caregiver-child relationship problem (QE52.0). Because of the long-term psychological consequences for the affected children Parental Alienation has widely been recognized as a form of psychological and mental abuse in the international research community. However, in Germany the scientific recognition of Parental Alienation is just beginning to take place among professionals involved in family court cases. Most of the family judges and other professionals are indecisive on or ignorant about the phenomenon. In most judicial cases over lost access between a child and a

parent the historical time-out argument of Anna Freud (1940s) is still the base for court decisions. The rejected parent is ordered to step back from the access request, „give it time" and to meanwhile write letters to the child. In most every case this course of action, that is non-intervention, finally cements the complete loss of access to a former primary bonding person for the child. The psychological long term consequences of the child are not taken into account. It is finally being realized among judges and professionals that „waiting in" is in fact not resulting in any access and contact later on. Instead children, later teenagers and young adults of parental alienation tend to have psychological or behavioral problems or even get in conflict with the law. Consequently a small number of dedicated family judges and professionals have started to question the routines and initiated a professional discussion about parental alienation. Resulting from the emerging recognition of PA as a form of psychological abuse the first successful court interventions are taking place in Germany. But still, local court decisions of such a kind are likely not to be supported by the State family court. In this workshop or presentation the focus will be on successful cases of German family court interventions and professional co-operation. The Psychological Expert Witness Silvia Danowski-Reetz will explicate the diagnostics of parental alienation and distinguish this phenomenon from other causes of lost access. Real judicial cases, the court intervention and the aligning work of professionals involved will be described. Successful interventions to resume access to the rejected parent will be pointed out. The following State Court decisions and the final outcome will be displayed. Mrs. Danowski-Reetz will finally discuss the following observation: Once one successful court intervention on parental alienation has taken place in a specific court, the number of new filings of high conflict custody and access cases with parental alienation in the same court considerably declines.

THE WORLD'S FIRST GENDER EQUALITY CATALOG FOR CHILDREN AND FATHERS

By Jesper Lohse, MBA, World Parents Organization, www.worldparents.org

The World's first gender equality catalog for Children and Fathers has been created in Denmark. It documents that the family law is not in the best interest of the child in modern society and law reforms is required by Government. We are living in a shared parenting world with single parenting law.

In today's society, global change and social media affects our work-life balance. We no longer can state who is the best student, employee, manager, leader, prime minister or parent, just by looking at gender.

Gender equality in work, education and family life is a new reality, but we have to understand it and learn how to live with it in our society. In education, most developed countries have progressed positively offering equal opportunities for boys and girls. In the workplace, we are seeing more and more female leaders in business and politics. That is positive.

However, in family life we are today living in a shared parenting world with single parenting law for historical and cultural reason. This is no longer in the best interest of the child, families, organizations or society. In the Nordic countries shared parenting and equal parenting time is the norm today in the population.

The family law however, is - beyond any doubt - violating the UN Children Convention article 2, 3 and 7 [1] as well as the European Human Rights convention articles 6, 8, 14 and 17 [2].

The formula is simple

+ New shared parenting research

+ Human Rights Conventions

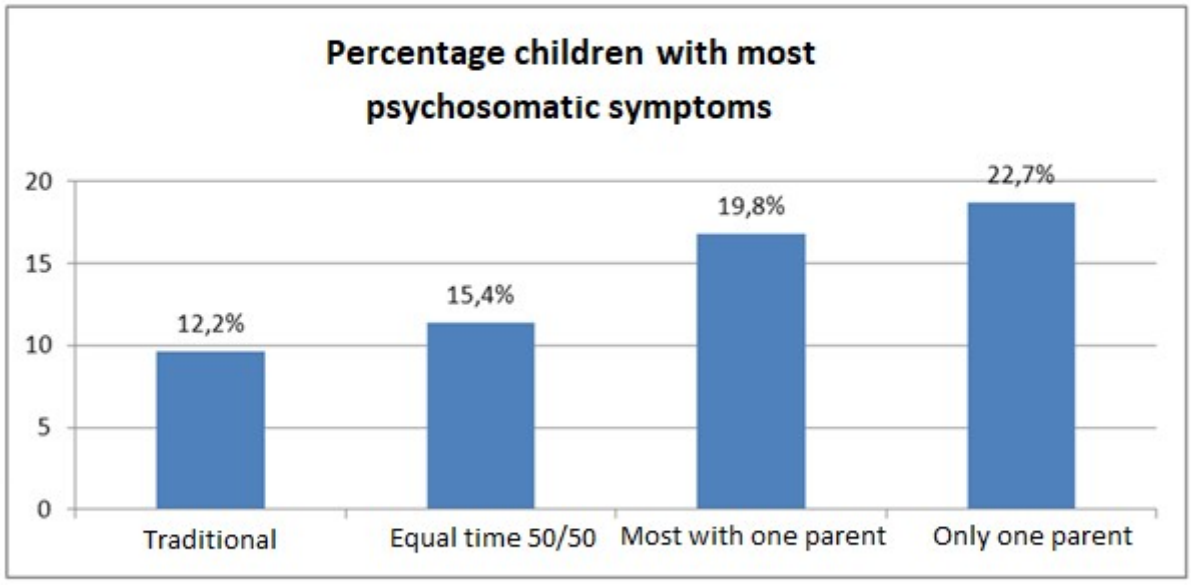
+ The World's first Gender Equality catalog for Children and Fathers

= Governmental responsibility for shared parenting law reforms

The research on children's health and real-life in the Nordic countries today documents that shared parenting is in the best interest of the child. This is due to increased social relations with more love and care from two parents, more quality time with both parents, a better contact to all the grandparents and a larger social family. In addition, reasons can be more holidays, better children financing and a clearer identity of man and woman – and most importantly all together less stress in traditional families and families using shared parenting with equal time at both parents.

An example of this research is from Sweden [3], where children health data from all 200.000 children in the age of 12-15 has been, analyzed related to psychological symptoms and family forms. The reality and research illustrate that the social relations are of major importance for children, not just the positive collaboration between parents or the financial situation. Children is simply, less stressed in society.

All 200.000 children in Sweden age 12-15



Source: Chess, Centre for Health Equity Studies

A review of the international shared parenting research [4] also concludes that shared parenting and equal time with parents is in the best interest of the child, as the general rule, even in both conflict and non-conflict families. First, children that spends equal parenting time fare as well as or better than, those in maternal residence - especially in terms of the quality and endurance of their relationships with their fathers.

Secondly, the research documents that "parents do not have to be exceptionally cooperative, without conflict, wealthy, and well educated, or mutually enthusiastic about sharing the residential parenting for the children to benefit. Third, young adults who have lived in these families say this arrangement was in their best interest—in contrast to those who lived with their mothers after their parents' divorce.

Fourth, most industrialized countries, is undergoing a shift in custody laws, public opinion, and parents' decisions - a shift toward more shared residential parenting. With the research serving to inform us, we can work together more effectively and more knowledgeably to enhance the well-being of children whose parents are no longer living together."

Human Rights Conventions

The aim of the human rights conventions is to protect all children and parents against discrimination by gender and other factors such as the family forms. The conventions also state that all children have the rights to know and be cared for by its parents and that all citizens have the right to respect of family life.

All citizens have, the right to be able to try their citizens' rights in due time and no country that apply by the UN convention of the child and the Human Rights Conventions can make law and practices that are violating the conventions. The human right conventions combined with the shared parenting research is simply in direct conflict with the current family law and practices in most developed countries today.

The World's first gender equality catalog has been presented in Denmark to document the many areas in the law and practices are not in the best interest of children in society. We are living in a shared parenting world with single parenting law.

The gender equality catalog 2018 includes 348 examples divided into 12 themes based on several years of analysis of family law and practices in Denmark. However, it seems from many discussions with shared parenting organizations in more than 25 countries that it applies for many or all developed countries today.

Hopefully the catalog can be an inspiration for the United Nations and international governments, researchers, educators, experts and politicians for a better understanding of the gender equality challenge in gender equality towards work-life balance, Gender equality and the UN global goals in society.

Kentucky and Arizona are leaders

A great example of the international family law that we all will see in the future is the recent Kentucky law [6] on shared parenting. The law create a presumption that joint custody and equally shared parenting time is in the best interest of the child. Also, the law enables the courts to consider the motivation of the adults involved when determining the best interest of the child.

After the introduction of the new law both the number of court cases and the number of cases about domestic violence has gone down, although the population has increased. More than 20 states are looking into the new law called the most popular law of the year and Arizona already before Kentucky had an equal law with shared custody and equal parenting time being the presumption of the best interest of the child.

Yours Sincerely,

Jesper Lohse, MBA, World Parents Organization

- Chairman of the Danish Fathers Association founded in 1977
- Chairman of the Nordic Equality Council
- Appointed by Minister for the Ministers Counselling Committee 2019-2023 on Danish Family Courts Houses
- Board Member, International Council for Shared Parenting, ICSP

[1] UN Convention of the Child: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

[2] European Convention on Human Rights: https://www.echr.coe.int/Documents/Convention_ENG.pdf

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[4] Linda Nielsen, Wake Forrest University, 2011

USA,
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PARENTAL ALIENATION AND SHARED CUSTODY: CHALLENGE OR IDEAL SITUATION?

Celia Lillo

In conflictual separation cases where parental alienation and loss of parent-child bond is present, we advocate the implementation of a structured family intervention process (processus d'intervention familiale encadreé, or P.I.F.E.), under judicial warrant. This intervention process aims to rebalance and re-establish the parent-child ties that have been degraded or broken by parental conflict, and to encourage the re-building and repairing of the parent-child bond. From the very beginning of this process, both parents and child are encouraged to be actively involved, as are the parents' lawyers, and in cases where it occurs, the child's lawyer as well. Developed in Montreal over a 5-year period in an interdisciplinary context, this psycho-judicial intervention consists of a collaboration and professional articulation (psychologist, lawyers, judge) of the most consistent and comprehensive level possible, bringing into play the competencies of all professionals involved. The inclusion of these collaborative principles is

fundamental/crucial for the P.I.F.E process to stimulate the personal responsibility of each parent in achieving this objective of repairing the parent-child bond. The PIFE process is based on a systemic-strategic perspective of aid but also of constraint. It is for this reason that consent for the PIFE intervention protocol (an 11-page document) needs to be to be signed by the parents and their lawyers, and then endorsed by a judge who will remain implicated in the file until the goal of the intervention P.I.F.E. is reached. The rebuilding process requires confirmation of the parents' understanding and adherence to the main objective advocated in the framework of the P.I.F.E. Once this step is completed, we accompany the family towards rapid implementation, starting with minimum objectives that provide concrete and evaluable steps. We ensure that the alliance with both parents, especially with the closer relative (sometimes referred to as the "alienating" parent), is possible. Once this preliminary phase is complete, we begin preparations for the gathering and combining of the parents' objectives. We will then come together to define with the parents a minimum objective to begin the reestablishment of the parent-child link. During this phase, the child may be seen one or more times. Within the exercise of gathering and combining the parents' objectives, the development of a realistic scenario for the child's first re-contact with the "alienated" parent is considered. The appropriate timing will be determined by considering the depth of resistance of each family member, and of the interactional configuration. (Lillo, C.; Van Dieren, B., 2016) * In the event of the child's resistance or refusal to any contact with the "alienated" parent, we will carry out an analysis of the probable causes that may have contributed to this obstacle, while providing new intervention strategies tailored to family reality. In addition, a continuous and concrete assessment of the progress of the intervention is carried out. This evolutionary assessment, written in the form of brief reports, provides an update on the willingness and ability of each parent to do everything in her or his power to contribute to the re-building objectives. The P.I.F.E. focuses on family skills and progress rather than on disabilities and failures, without minimizing the difficulties and challenges presented by the family dynamic within the objective of parent-child re-bonding. The evolution reports also serve to provide insight into the child's experiences and needs, allowing us to perceive them in the child's relational context. Once written, they will first be presented and discussed with each parent before being handed over to the lawyers and the judge. In the event of a wilful and unjustified obstruction of the child's relationship with his or her alienated parent, the use of the judge's interventions may be considered. Parental alienation and shared custody Through the presentation of a specific case of parental alienation, we will illustrate the conditions that led to an agreement to establish shared custody after one year of structured family intervention (P.I.F.E), the basis of which allowed for a judge's decision to entrust custody of a daughter to her parents, alternating every other week. At the time the PIFE intervention mandate was entrusted to us, the parents had been separated for one year after 20 years of marriage. Their 12-year-old daughter had refused any contact with her father since the marital breakdown a year earlier. Mediation sessions had been undertaken without success and an interim judgment granting access rights to the father had not been respected. Following this, a psycho-legal assessment stipulated that primary custody should be granted to the mother, but that their daughter should be seen by a specialist in parent-child relational difficulties in order to move towards a more appropriate relationship with each parent. During the course of the P.I.F.E. intervention in this particular case, we were asked to deploy various strategies to overcome obstacles and break family deadlocks. In this presentation, we will put forward the intervention strategies recommended in this case, notably the use of an advanced level of articulation between professionals

(psychologist-lawyers), followed by the intervention of a judge (3 hearings), who remained in the case for the last 6 months of our P.I.F.E. intervention. The judge's role was key in the successful resumption of the parent-child bond and the implementation of shared custody. * Lillo, C. ; Van Dieren, B. (2016) « Expertise collaborative et Processus d'intervention familiale encadrée (PIFE) ». Dans O. Odinetz et R. Rocca (dir), Séparations conflictuelles et aliénation parentale- Enfants en danger (p. 288-303). Éd. Chronique Sociale, Lyon, France

EL PLAN CONTRADICTORIO EN LA SOLICITUD DE CUSTORIA COMPARTIDA

D. Nicomedes Rodríguez Gutiérrez

RESUMEN: Tras la sentencia del Tribunal Constitucional 185/2012, de 17 de octubre, la adopción del régimen de guarda y custodia compartida ya no depende del informe favorable del Fiscal sino, únicamente, de la valoración que merezca al Juez la adecuación de dicha medida al interés del menor, siendo punto de partida que la guarda y custodia compartida no es lo excepcional sino que debe ser la regla general siempre que no resulte perjudicial para el menor, pues "el mantenimiento de la potestad conjunta resulta sin duda la mejor solución para el menor en cuanto le permite seguir relacionándose establemente con ambos padres". En este sentido, se estudian los elementos a tener en cuenta, así como la necesidad de presentar un plan contradictorio, de conformidad con la STS de 15 de octubre de 2014, la cual establece la importancia del mismo para determinar el régimen de cumplimiento de la custodia compartida.

Workshop 3B on Parental alienation/sociology.

EL SÍNDROME DE ALIENACIÓN PARENTAL Y EL "FRIENDLY PARENT" COMO EJEMPLOS DE PERVERSIÓN DEL SISTEMA

Carmen Rosa Iglesias Martín

Si bien no podemos hacer depender la concesión de un régimen de guarda y custodia compartida de que haya una total armonía entre los progenitores, la cooperación, la coordinación y la implicación de ambos progenitores son el mejor precedente para minimizar riesgos en la toma de decisiones. Sin embargo, el hecho de que existan tensiones entre los progenitores no puede llevar a denegar a priori este sistema de

guarda dado que, por otro lado, las tensiones no se solventarían concediendo un sistema de guarda monoparental. Medir el grado de conflicto determinará el sistema de guarda por el que se opta. Tuvieron especial predicamento, durante un tiempo, dos teorías: el Síndrome de Alienación Parental y el "Friendly Parent". En la primera se venía a decir que, existían determinadas conductas de los progenitores, más o menos sutiles, que decantaban la voluntad del menor hacia el progenitor alienador que, prácticamente en todos los casos, era la madre. La segunda suponía la valoración positiva, en las resoluciones, del progenitor más amable, del que tiene una actitud más amistosa o colaborativa. Con ella, se acaba concediendo la custodia o las visitas según el comportamiento de los progenitores, lo cual acaba degenerando en otorgar la custodia al progenitor amable, más para castigar al otro progenitor (menos colaborativo) que para atender las necesidades del menor. Como vienen repitiendo nuestros Tribunales, las decisiones sobre los menores no tienen que ser un premio o un castigo al progenitor que mejor se comporte durante la crisis matrimonial, sino que, son decisiones ciertamente complejas en las que se tienen que tener en cuenta unos criterios abiertos, que delimiten lo verdaderamente importante a la hora de establecer el interés superior del menor. El riesgo al que se expone el menor con todos estos argumentos sesgados, no hace nada más que esconder una situación de dominio que impide que se investiguen los hechos y que pueda llegar a ocasionar un daño irreparable en los menores en el momento de decidir el régimen de guarda y custodia. No por obvio está de más el proclamar que se requiere un estudio pormenorizado de cada caso, tener en cuenta todas las circunstancias que lo particularizan y, actuar en consecuencia y proporcionalmente. Although we cannot depend on the granting of a system of shared custody and custody of a complete harmony between the parents, the cooperation, coordination and involvement of both parents are the best precedent for minimizing risks in decision-making. However, the fact that there are tensions between the parents cannot lead to a priori denial of this guard system since, on the other hand, the tensions would not be solved by granting a single parent guard system. Measuring the degree of conflict will determine the guard system that is chosen. Two theories had a special predicament for a while: the Parental Alienation Syndrome and the Friendly Parent. In the first one, it was said that, there were certain behaviors of the parents, more or less subtle, who decanted the will of the child towards the alienating parent who, in almost all cases, was the mother. The second was the positive assessment, in resolutions, of the friendliest parent, who has a more friendly or collaborative attitude. With it, custody or visits are granted according to the behavior of the parents, which ends up degenerating into granting custody to the kind parent, more to punish the other parent (less collaborative) than to meet the needs of the child. As our Courts have been repeating, decisions about minors do not have to be a prize or a punishment to the parent who best behaves during the marriage crisis but, they are certainly complex decisions in which open criteria have to be taken into account, that define what is really important when establishing the best interests of the child. The risk to which the child is exposed with all these biased arguments, does nothing more than hide a situation of dominance that prevents the facts from being investigated and that can cause irreparable harm to minors when deciding the regime of custody and custody. It is not obvious that the proclamation that a detailed study of each case is required, taking into account all the circumstances that particularize it, and acting accordingly and proportionally.

SHARED PARENTING AND POLITICS: THE BACKGROUND OF EQUAL OPPORTUNITIES IN THE GERMAN SHARED PARENTING CONTEXT

Jorge Guerra

Shared Parenting (SP) or Joint Physical Custody (JPC) is a modern approach of organizing responsibilities upon children beyond the end of the relationship between their parents.

The core of JPC is an approximatively equal sharing of their rights and duties concerning their children. Both parents assume after divorce or separation similar responsibilities on their children so that they can have similar opportunities to develop for example equally their professional career, if they want it so.

Intuitively this approach would match goals of movements pursuing an equal position of men and women in society, pursuing their equal opportunities a priori.

However reality shows that this is not exactly like this.

A more accurate look shows that this conclusion is not always adequate

This presentation will analyse the background of equal opportunities in the German context concerning Shared Parenting in order to understand it better.

Understanding is a precondition of helping to impulse the implementation of Shared Parenting as a rule in the German Law System – and probably in other Law Systems as well

LA CUSTODIA COMPARTIDA DE HIJOS CON DISCAPACIDAD EN ESPAÑA. ANÁLISIS JURISPRUDENCIAL - *THE JOINT CUSTODY OF CHILDREN WITH DISABILITIES IN SPAIN. JURISPRUDENTIAL*

SONIA MARÍA JORDÁN ALMEIDA

RESUMEN: La regulación de la custodia compartida se introdujo en el Código Civil con la Ley 15/2005, de 8 de julio. El cambio generacional experimentado en nuestra sociedad ha traído consigo que ambos progenitores asuman la custodia compartida de sus hijos como algo natural. Todo son ventajas. El problema se plantea cuando estamos ante un hijo con discapacidad, que suele poner límites a este régimen y exige extremar los deberes de ambos. Analizaremos jurisprudencialmente cómo no es una solución que valga para todos, así como hasta qué punto caben las imposiciones de determinadas medidas en relación con menores con discapacidad. Traeremos a colación la SAP de Córdoba de 23 de enero de 2018, pionera en obligar a un padre a ejercer una custodia compartida, pese a su oposición.

PALABRAS CLAVE: Patria potestad, custodia compartida, hijos con discapacidad, interés del menor.

ABSTRACT:. The regulation of shared custody was introduced in the Civil Code with Law 15/2005, of July 8. The generational change experienced in our society has brought

both parents to assume shared custody of their children as natural. All are advantages. The problem arises when we are faced with a child with a disability, who usually puts limits on this regime and demands extreme duties of both. We will analyze jurisprudentially how it is not a solution that is valid for everyone, as well as to what extent the impositions of certain measures fit in relation to children with disabilities. We will bring up the SAP of Córdoba on January 23, pioneer in forcing a father to exercise joint custody, despite his opposition.

KEY WORDS: *Parental authority, Joint custody, Children with disabilities, Child's interest.*

Workshop 4A on Comparative Study.

SHARED PARENTING IN IRELAND

Karen Kiernan

Shared parenting is a new and poorly understood concept in Ireland and is not yet measured in our national Census. One Family is a national NGO working with one-parent families who undertook a survey of people sharing parenting in Ireland in 2017. This survey highlighted many of the issues, challenges and possible solutions that currently exist in Ireland. We also now suggest some of the arising opportunities that can support sharing parenting into the future given Ireland is decades behind our European neighbours in supporting families who are sharing parenting or using private family law courts.

SHARED PARENTING - CHALLENGES IN EAST-CENTRAL EUROPE AND HUNGARY

Csaba KISS, Dr. jur.

Although there have been radical changes during the past 50 years in the structure of social life, advancements and improvements in psychological methodologies and approach, significant sociological changes in Hungarian society in terms defining the "modern" family, the associated legislation and legal practice failed to realize, accommodate and adapt to these changes, sticking to out-dated mentality that cannot cope with needs of our modern society. Our Association consists of professionals who have researched and realised the need for change, not just in legislation but more importantly in associated juridical practice therefore we have analysed numerous options and proposed amendments to Hungarian Civil Code and to Family law during the past decades (e.g. implementation of the UN Convention on the Rights of the Child, New York), which would allow the Hungarian legal practice to transition into the 21st century. Above all, considering gender equality, we focused on emphasizing the changed roles of parents, the equal right of both parents and the right of the child to access both parents, the changed circumstances of joint parental custody after the termination of a joint family life. Joint parental custody that includes joint physical care

as well as shared parenting as a fundamental element of the legislation. There are progressive positive examples that reflect this type of thinking; we shall not go too far, neighbouring countries of Hungary, like Austria and Slovakia introduced shared parenting rules very efficiently and successfully, that are based on the principle of joint parental custody. This principle enables an effective recognition and respect of the child's human rights, i.e. that the child has fundamental right to access both parents physically and emotionally, in which there shall be no further limitations. The current Hungarian legislation and juridical practice, even though it was updated in 2014, using an excuse of being built on old fundaments, ignores and breaches this human right of the child, and with this ignores the general European Recommendation (Parliamentary Assembly the Council of Europe's Committee on Equality and Non-Discrimination, 2015) on shared parenting. The Hungarian legislation still allows one parent to expropriate the child or children after the termination of joint family life, with an active support of the Hungarian juridical practice, that result in cs. 300.000 children being orphaned "by divorce", supports the misuse of custodial role, granting the effective custodial rights typically to one parent only, exposing the child, the other parent, family members and friends to further unresolvable emotional damage instead of trying to act as protective in each direction, towards each involved party. In the legislation of the region the cooperation of parents after divorce or separation has replaced the over-dated and forced custodial/non-custodial roles, which decreased the number of divorces and contributes to much satisfied children and modern families. We are proposing a recommendation at the Málaga Conference to the Council of Europe to ensure joint custody and shared parenting as default in the member states' family law proceedings. INTRODUCTION The Association of Divorced Fathers (ADIF)and the Father-heart Association have formed a Hungarian Association Alliance, which has goals of strengthening public awareness of a harmonious family life in Hungary; assisting fathers, grandparents, and children who are separated from each other; protection of the rights and the best interests of children and their parents in a separated family; support for parental rights; increase of the social acceptance of the need for a more balanced family law and jurisprudence; ensuring equal parental authority for both parents; achieving equal parental physical care for all children and parents, taking into account the best interests of the child The ADIF was established amongst the first associations after the system change in 1989 and since then has been fighting persistently for its goals through cooperation with affiliated organizations and international commitments. The Associations are not against women and their role in the family; the associations are supported by 30% of women.

LEGISLATIVE REGULATIONS IN ROMANIAN LEGISLATION IN THE CONTEXT OF THE NEED TO REDUCE AND / OR STOP THE PHENOMENON OF PARENTAL ALIENATION

Simona Vladica

In Romania, the cases in which one of the parents claims parental alienation have multiplied in recent years, both in the criminal sphere and in the civil field. This phenomenon has already become a concern, with short, medium and long term effects.

However, there are situations in which, although one parent accuses the other parent of parental alienation, this aspect is not real. For this reason it is necessary to know the limits to which one can discuss about parental alienation versus false parental alienation.

The father and the mother represent important attachment figures that play a decisive role in the emotional and social development of the child. In the case of families who break up through a divorce or the parents who choose to separate, observing the principle of the "best interests of the child" established by the law, can be vitiated by the impossibility of the child to have unlimited access to both parents.

Separate or divorced parents end up emotionally abusing their children, even when there is a court decision establishing a program of personal ties of the minor with the non-resident parent. in this way the parents neglect or seriously violate both the rights of the child and those of one of the parents.

The judicial procedures for stopping and punishing these abuses are often cumbersome and are not carried out quickly. One of the reasons is also because the emotional abuse of the child is more difficult to prove than a physical abuse.

In Romania, in this delicate cases, an interprofessional and institutional collaboration is desired between: judge - mediator – psychologist.

In this regard, on June 27-28, 2019, at the Bucharest Tribunal - the court that judges this cases – it was organised an international conference addressed exclusively to judges and prosecutors specialised in the settlement of minor and family disputes within the courts / prosecutor's offices from Bucharest and from the country. Also attended the conference: psychologists from the General Directorates of social assistance and child protection, psychologists, psychiatric doctors, justice auditors (future judges and prosecutors) and law and psychology students.

All the guests of this conference were and are concerned with the training of the skills and abilities to manage and solve these files with minors, through theoretical and practical training, necessary to identify situations of real parental alienation, adopting the appropriate measures for their removal, as well as outlining some legislative changes with remedial, preventive / sanctioning character.

Secondly, the organizers of this event intend to improve the Romanian legislation, modify the Romanian law and / or add / modify some articles of the law.

It is also necessary to choose the mediation as a method to resolve the conflict between the parties before it begins to increase in intensity.

In Romania, efforts are being made at the legislative level because both parents must be sent to mediation at the beginning of the trial, and when it is necessary to attend at least 5 psychological counseling sessions at the beginning or during a court trial.

Currently, a working group of judges, prosecutors, psychologists and mediators from Romania identifies and proposes legislative solutions to prevent and stop the spread of this phenomenon of parental alignment. The most important of these solutions will be found in my present work.

PUTTING SHARED PARENTING INTO SCOTTISH FAMILY LAW

Ian Maxwell

Scotland's politicians will consider and pass a new family law in early 2020. The Children (Scotland) Bill amends various aspects of our law regarding arrangements for children in separated families. As published, it lacks the elements we feel would support shared parenting. Although still part of the United Kingdom, Scotland has its own laws and court system. The current family law dates back to 1995. It still refers to residence and contact orders which makes obtaining court orders for any form of more equal sharing of parental responsibilities more difficult . This presentation tells the continuing story of how Shared Parenting Scotland (the new name for Families Need Fathers Scotland) is lobbying for this law to include a rebuttable presumption of shared care when family disputes come to court. We are also seeking to change the naming of court orders regarding arrangements for children, removing the use of "residence" and "contact" orders so that parents are placed on more equal footing. Previous Beating the Drum for Shared Parenting papers in Boston (2017) and Strasbourg (2018) described how this small charity has worked to raise awareness in Scotland of the benefits of shared parenting for children in anticipation of this lobbying work during the passage of the Scottish legislation. Conducting opinion polls, publishing research results, setting up a cross party group in the Scottish Parliament on shared parenting and building a coalition of supportive children's and family organisations has brought us to the edge of a shared parenting law. We have even changed the name of our charity to emphasise that shared parenting is about gender equality, not father's rights as it will offer a more balanced pattern for mothers and fathers to bring up children together while also maintaining their careers. Work/life balance is difficult for separated parents, but it is far better for children to experience life with two working and caring parents, rather than the old stereotype of mother as carer and father as breadwinner. Although the campaigning this paper describes is taking place in Scotland, the messages are relevant to any country in which family law could be altered to make shared parenting the default position for court decision about arrangements for children. The paper will provide general lessons for other countries on how to campaign effectively on this topic and build a wide support base to change the law. It will also give a contemporary account of how we are trying to move amendments to the Children (Scotland) Bill as it passes through the Scottish Parliament.

Workshop 4B on Comparative Study.

THE PARTICIPATION OF CHILDREN AND OTHER GOOD PRACTICES FOR AN INCLUSIVE JUDICIAL SYSTEM : A DISCUSSION PAPER EXPLORING ISSUES OF CHILD PROTECTION / CHILD SAFEGUARDING IN SHARED PARENTING

Naina Athalye

When considering the best interest of the child, several issues of child protection come to the forefront vis a vis shared parenting . Children continue to remain vulnerable to abuse even when judgements by the family courts appear fair. Most countries of the global south do not have a system to watch over families in the context of shared parenting leaving children in danger of physical or psychological abuse. The Indian culture poses several challenges against the backdrop of a still active patriarchal system which has significant repercussions on the family. These cultural nuances do not encourage the participation of children , especially of girl children or children with disabilities . The onus is then on the judicial system, to remain sensitive to the needs and opinions of children when settling cases of separation or divorce. The discussion paper examines child protection issues and good practices such as a pre-litigation centre where shared parenting concerns are resolved with the assistance of psychotherapists and counsellors. Couple and family therapy have led to better decision making by parents The paper discusses recommendations made to support the judicial system, especially for judges, through follow up programs that involve civil society volunteers and interns. Additional support to children within the Judicial system is the people's court (Lokadalat) where orders for the protection of children can be more powerfully mandated and passed.

RÉGIMEN DE VISITAS O COMUNICACIÓN EN SUPUESTOS DE INHABILITACIÓN ESPECIAL PARA EL EJERCICIO DE LA PATRIA POTESTAD VS INTERÉS SUPERIOR DEL MENOR

Cristina Callejón Hernández

El artículo 46 del Código Penal prevé una pena privativa de un derecho muy concreto: la inhabilitación especial para el ejercicio de la patria potestad, tutela, curatela, guarda o acogimiento, así como la privación de la primera. Centrándonos en el supuesto de inhabilitación especial para el ejercicio de la patria potestad, esta conlleva para el penado la pérdida de todos los derechos inherentes a ella, si bien subsisten todas las obligaciones. El régimen de visitas es una institución que ha evolucionado con el tiempo (actualmente se prefiere la expresión derecho de comunicación) y ha acabado convertida en un derecho para el menor y un derecho-deber para los padres. Siendo esto así, si un sujeto queda inhabilitado para el ejercicio de la patria potestad y, por tanto, privado de sus derechos pero forzado a continuar en el cumplimiento de sus obligaciones, ¿podría ser compatible un régimen de comunicación entre el menor y el padre o madre inhabilitado? En este trabajo se pretende otorgar una respuesta a este interrogante en la creencia de que no existen soluciones genéricas cuando entra en juego el interés superior del menor, sino que habrá que valorar cada supuesto sin tomar como punto de partida el hecho de que, siempre y en todo caso, una inhabilitación en tal sentido cierra cualquier tipo de posibilidad a la existencia de relación entre padres e hijos, máxime si se tiene en cuenta que la inhabilitación, a diferencia de la privación, presenta un carácter temporal.

TRANSNATIONAL SHARED PARENTING AFTER DIVORCE

Paloma Fernández-Rasines

This contribution arises from the results of a research done in Navarra, Northern Spain, where shared parenting after divorce has been increasing steadily since regional regulation was introduced in 2011 (Fernández-Rasines & Bogino-Larrambebere 2019; Fernandez-Rasines 2016, 2017). Recent literature devoted to how co-parenting after divorce is affecting children rights in Spain and Ecuador, as countries linked by significant migration flows during the past two decades in Spain, and Navarra particularly (Castillo 2016; Baca 2015). Navarra appears as a comparative scenario where judicial resolutions investigated unveil a higher vulnerability on contested cases within Ecuadorian ex-partners. In addition to that, this proposal seeks comparing transnational processes on how normative regulation is being recently introduced in Ecuador. According to Solsona et al. (2019), social debate on cooperative parenting after separation and divorce has been introduced with claimed gender neutrality. Related enactments seem to have taken for granted that men and women take part equally on parental duties, shared residence, and physical daily care. Although, along with an aim for promoting equal rights and responsibilities toward parenting, mainstream cultural practices in Spain and Latin American countries seem to display a different picture where gender roles prevail throughout marriage and after breakup (Lupica, 2016). Discussion here is addressed to see how new regulations on shared residence and joint physical custody are fostering children's wellbeing by challenging gender roles imbalance, principally regarding transnational families.

Workshop 5A on ADR and Shared Parenting.

PARENTALITY COORDINATION AS A SOLUTION TO THE HIGH FAMILY CONFLICTIVITY AND THE PROTECTION OF THE MINOR

Dra. Esther Alba Ferre

All minors, also those negatively involved after the family breakdown, must be developed their right to private and family life (art. 8 of the European Convention on Human Rights) even if there is a high level of conflict between their parents, who, who positive parentality should be exercised even in these situations.

Parentality functions are essential for the proper physical and mental development of children. The coordination of parents in the care of their children should be carried out, both when the parents are living together, and once separated even if there is incommunicado or ineffective communication between them. How to reconcile positive parenthood in high-conflict situations?

Parentality coordination may be presented as a judicially adopted solution to the problem raised and always in order to ensure the supreme well-being of minors (the primary object of coordination) and to accompany parents in the reunion in the exercise of parentality.

The parental coordinator can approach the last opportunity to place himself in the adult place to gather in the parental capacities of both and maintain the impartiality that will be broken in favor of the children in that family system, ensuring their well-being in the face of existing emotional and family disorder.

Given the need for this figure, it is time to call on our legal system to regulate a judicial reality, where the effectiveness of the parental coordinator figure is increasingly being

recognized through pilot plans in various Autonomous Communities. It would not be sufficient to make a generic recognition of the coordination of parenthood and a more specific and comprehensive legal regulation of this institution is demanded that defines the professional profile of the parental coordinator, determining and concretizing its functions and the procedure related to his appointment.

RESUMEN:

Todos los menores, también los implicados negativamente tras la ruptura familiar, deben ver desarrollado su derecho a la vida privada y familiar (art. 8 del Convenio Europea de Derechos Humanos) aunque exista un nivel alto de conflictividad entre sus padres, quienes deberían ejercer la parentalidad positiva incluso en estas situaciones. La Recomendación Rec (2006) 19 del Comité de Ministros a los Estados Miembros sobre políticas de apoyo al ejercicio positivo de la parentalidad define el ejercicio de la parentalidad como "todas las funciones propias de los padres/madres relacionadas con el cuidado y educación de los hijos" y entiende que la parentalidad positiva se refiere al "comportamiento de los padres fundamentado en el interés superior de los niños, que cuida, desarrolla sus capacidades …".

Las funciones de parentalidad son imprescindibles para el adecuado desarrollo físico y psíquico de los hijos. La coordinación de los progenitores en el cuidado de sus hijos debería llevarse a cabo, tanto cuando los padres se encuentren conviviendo en pareja, como una vez separados aunque exista incomunicación o comunicación ineficaz entre ellos. ¿Cómo hacer conciliar la parentalidad positiva en situaciones de alta conflictividad?

Es necesario plantearse la necesidad de mejorar la gestión de este tipo de conflictos. La mediación puede ser una propuesta de solución siempre partiendo de la voluntariedad de las partes, pero cuando ésta no existe (lo que suele suceder ante situaciones conflictivas) es necesario repensar otra posible solución.

En este sentido, la STSJ de Cataluña 1/2017, de 12 de enero reconoce que "las diversas leyes, tanto sustantivas civiles … como procesales … van otorgando a los jueces un amplio margen de actuación de oficio cuando se trata de tomar medidas para evitar perjuicios a los menores, o bien para conocer la real situación familliar, que le permitan tomar decisiones más adecuadas, sobre la base del interés del menor que es el que siempre debe prevalecer".

La coordinación de parentalidad se podrá presentar como una solución adoptada judicialmente al problema planteado y siempre con el fin de garantizar el bienestar supremo de los menores (objeto primordial de la coordinación) y de acompañar a los progenitores en el reencuentro en el ejercicio de la parentalidad. La AFCC (Association of Families and Conciliation Court) ya en 2005 definía la coordinación de parentalidad como "un proceso alternativo de resolución de disputas centrado en el niño, en el que un profesional de la salud mental o ámbito judicial, con formación y experiencia en mediación asiste a padres con alto grado de conflictividad con tal de implementar el plan de parentalidad".

La figura del coordinador parental surge en este contexto ante la necesidad de aportar a las familias intervenciones profesionales alternativas y especializadas y apoyadas por el sistema judicial, que contribuyan a reducir el conflicto entre los progenitores, priorizando el interés de los hijos y reestableciendo una colaboración parental efectiva.

El coordinador parental puede aproximarse a la última oportunidad de situarse en el lugar de adulto para recabar en las capacidades parentales de ambos y mantener la imparcialidad que se romperá a favor de los menores habidos en ese sistema familiar, garantizando su bienestar ante el desorden emocional y familiar existente.

Visto la necesidad de esta figura, es el momento de reclamar a nuestro ordenamiento que regule una realidad judicial, donde cada vez más se está reconociendo la eficacia de la figura del coordinador parental a través de planes pilotos en diversas Comunidades Autónomas. No sería suficiente hacer un reconocimiento genérico que establezca que la autoridad judicial puede disponer la designación de un profesional que intervenga ante estas situaciones, como hace el Código Civil Catalán en su art. 233.12, lo que ya tendría cabida en nuestro art. 158 CC.

Se demanda una regulación legal más específica y amplia de esta institución que defina el perfil profesional del coordinador parental, determinando y concretando sus funciones y el procedimiento relacionado con su nombramiento.

Será necesario que en esta futura regulación se den respuesta a los siguientes interrogantes ¿Esta función corresponde a los propios equipos psicosociales adscritos al juzgado? ¿Sus funciones exceden de las propias de un perito? ¿Es un auxiliar del Juez? Al no tener claro estas cuestiones, se desconocen el tiempo de duración de esta intervención así como si sus decisiones pueden ser o no recurridas, qué sucede en caso de incumplimiento de las decisiones acordadas o quién asume los costes. Para poder dar respuestas, lo más ajustadas a Derecho, tras conocer el origen de esta figura, se analizarán los distintos planes pilotos y las principales sentencias existentes en esta materia, partiendo de la STSJ 11/2015 de Cataluña de 26 de febrero que fue la que primero reconoció esta figura y sus funciones. Será de inestimable ayuda la opinión del magistrado Pascual Ortuño, experto en la materia.

Debemos concluir resaltando que aunque se ha alabado esta institución por los beneficios que la misma reportará al menor, eso no puede convertir al coordinador parental en un recurso ordinario ante los conflictos familiares y sustitutivo de la responsabilidad parental de los progenitores. Sólo se deberá recurrir a esta figura en situaciones de alta conflictividad familliar y donde se deban proteger los intereses de los menores.

LA EDAD Y MADUREZ COMO CONCEPTOS CLAVE EN EL ESTATUTO JURÍDICO DEL MENOR

Beatriz Verdera Izquierdo

La Ley Orgánica 26/2015, de 28 de julio de protección a la infancia y adolescencia modifica el término "suficiente juicio" por "madurez" es decir la posibilidad del menor de edad de entender, comprender el significado del hecho que realiza, que toma parte o

que le afecta o puede afectar y tener conciencia de las consecuencias de su decisión o actuar. Como manifiesta el Preámbulo de la Ley Orgánica: "por ser un término más ajustado al lenguaje jurídico y forense." La regulación actual supone un cambio importante de concepción de la capacidad del menor, teniendo en cuenta una serie de factores como es el nivel de desarrollo, la capacidad y autonomía. Así, en cierta forma, se vuelve a los sistemas jurídicos romanos donde se determinaba la madurez real a través de la inspectio corporis, dicho sistema fue superado por razones de objetividad y tracto jurídico, estableciendo sistemas más generales y objetivos. Por ello el Ordenamiento ha ligado, a lo largo del tiempo, la capacidad de obrar a una determinada edad. Se retoma el sistema de comprobación de capacidad de forma individual y particular que se había denostado y dejado al margen el cual, aunque no proporciona la adecuada seguridad jurídica y puede llegar a ralentizar considerablemente el tráfico jurídico económico, comporta una mayor seguridad. A partir de las reformas operadas en 2015, la funcionalidad del concepto "edad legal" pasa a un segundo plano, debiendo poner el acento en cuestiones de raciocinio, mentales, y de desarrollo intelectual del menor. Se debe partir de la capacidad natural, de entender y querer, como límite mínimo a partir del cual el menor podrá llevar a cabo determinadas actuaciones, se trata de un sistema de acuerdo con el cual la edad se gradúa en función de diversas capacidades a las que se les asocia progresivamente un ámbito de actuación que concluye con la plena capacidad al adquirir: la "edad legal" determinada. Todo esto nos lleva a un "personalismo, personificación o personalización" de las cuestiones jurídicas a través de la individualización de la capacidad. Esta situación de comprobación de la capacidad de forma particular hace que el estatuto jurídico del menor acoja una serie de garantías "extra" a los efectos de salvaguardar la desigualdad e inseguridad que tal regulación puede producir. Todo el sistema gira entorno de la "madurez" del menor que se entiende adquirida –en todo caso- a partir de los 12 años, por tanto, se traduce en la concreta madurez del menor en el particular asunto que le incumbe, siendo un medio para favorecer a los menores en determinadas fases de su desarrollo. Así, debe valorarse la madurez respecto a la particular decisión que le puede concernir o afectar, directa o indirectamente, o sea, esté en condiciones de formarse un juicio propio debido a que tiene raciocinio para comprender, evaluar y sopesar determinadas situaciones que le afecten. De esta forma el menor puede comprender el alcance del acto y la importancia y trascendencia de sus deseos y expresiones. Este sistema es un atavismo y, en cierto sentido, va en contra de la seguridad jurídica al recoger en su texto un concepto jurídico indeterminado. En cualquier caso, se concreta una edad a partir de la cual todos disponen de la capacidad legal adecuada para intervenir en el tráfico jurídico-económico. Siendo fundamental en cualquier sistema tener fijada la denominada "edad legal" computada de forma cronológica y natural que otorga seguridad jurídica a los operados. Al respecto, disponemos del art. 12 CE como norma constitucional civil, que aborda una materia propiamente referida a Derecho de la Persona como es la capacidad, pero, con naturaleza jurídica plural. Cabe poner de relieve que las capacidades de los niños dependerán de múltiples factores como las circunstancias propias de cada niño y fundamentalmente su entorno que le fomentará una u otra inquietud. El art. 9.2 LOPJM al abordar el derecho a ser oído y escuchado vuelve a tratar el tema de la madurez. La madurez siempre será apreciada por un tercero o sujeto ajeno al propio menor (un médico, un psicólogo, personas allegadas...), por ello dicha apreciación siempre contará con alguna nota de subjetividad que podrá conllevar que pueda ser impugnada con posterioridad. En consecuencia, se podría cuestionar si dichos sujetos deben asumir responsabilidad por tal apreciación. Así, se trata de un criterio de difícil apreciación que dependerá de diversos factores a tener en cuenta y deberá ser valorado por personal

cualificado y especializado y no, exclusivamente por el juez. Y, tal como establece el art. 2.2 b) y el referido art. 9 LOPJM se valorará "en función de su edad y madurez". A su vez, el legislador en el art. 2 LOPJM recoge una serie de elementos de ponderación de los criterios anteriormente expuestos en el precepto entre los que vuelve a situar: la edad y madurez. Cuestiones tratadas en la presente comunicación desde la vertiente de la atribución de la custodia compartida.

THE AUGSBURG BUSINESS MODELL IN SEPARATION AND DIVORCE

Bernd Dr. Evers

Relevance of the Topic – Current Situation – Challenge – Purpose of the Study: As consequence of separation and divorce, the annual rate of affected children in Germany is calculated as to be as high as 160.000-200.000. Various German and international studies revealed a percentage of up to 70%, in which children lost one parent either substantially or totally, associated with a significant psychosomatic morbidity rate comparable with the one after death of a parent. The increasing occupancy rate in women and increasing gender equality on one hand and the growing willingness and preparedness of men to more and more participate in their children`s care process on the other hand is driving a gradually developing change of the parent`s role from a traditional maternal-dominated caring situation to a more balanced or equal-parental situation. As of now, all over Germany a very heterogeneous procedure after separation and divorce concerning all involved actors led to very heterogeneous outcomes especially with focus on the children´s way ahead. Purpose of the presented case study has been to prospectively observe and analyze a couple`s separation and divorce particularly focusing on the well-being of the two involved elementary school-aged children. The case developed from a ready-to-go equiparental model situation into a move-away of the non-cooperating parent (nc-p) and subsequent disruption of both children out of their well-established center of life to an austere farm more than 250km part from one of the other days. Objective of the study was 1) to analyze the root causes of such a children`s disruptiion course focusing on the role and behavior of a) both parents as well as b) all involved professional key actors and develop necessary ways-out and 2) to apply and test an innovative semiqualitative scoring system for supporting the assessment of the actors and their interdependencies to ease the understanding of the situation and support the decision making process. MATERIAL/METHODS: The case study has been started in 2016 and has now been conducted for 3 years. Throughout this period the following aspects were monitored and analyzed: Role and behavior of parents in terms of willingness and capability to co-operate to find children-needs-based solutions as well as key aspects such as ability to foster the children`s development, children-parents relation, continuity and binding tolerance Role, behavior and focus of interest of key professional actors (both parties` lawyers, judges including district court und higher regional court, family consulting institutions as well as youth welfare office representatives, guardian ad litem, teachers etc.) in terms of competence (profession-focused knowledge, experience), engagement, availability, children focus, personal biographic background, conflict of interest (monetary or role-specific), communication style and willingness to come up with agreements and children-focused solutions. Furthermore, a rough multilateral cost calculation has been undertaken to illustrate the financial flow between the main actors. RESULTS: The root cause of the escalating development from a ready-to-go for equiparental children`s care case to a move-away of the n-cp associated with the immediate disruption of the children out of their center of

daily life with subsequent complete alienation of one and partial alienation of the other child can be clearly seen as a result of a complex-orchestrated combined behavior of all key actors. Key action patterns were constant fueling of the conflict by at least one lawyer, lacking competence, capability and willingness of the consulting actors as well as the youth welfare office representatives, significant conflict of interests and bias of the guardian ad litem, a decision of the local and the higher court neither applying the current national and international laws nor the well-established current scientific knowledge on children`s well-being. Significant interdependencies as well as total lacking transparency and control from outside significantly contributed to this unique escalating development. Some actors such as the n-cp and the guardian ad litem significantly benefitted from this development financially. The most striking take-away however was, that children`s support and protection was not available at any phase of the process at all. CONCLUSIONS: The presented case of a particular striking escalation clearly indicates the need for a full-spectrum plan covering short-, mid- and long-term actions consisting of the following key lines: - Ban immediately conflict-fueling actors (e.g. lawyers) - Teach all professions key topics as updated research and its impacts on children`s well-being - Ensure full transparency of the achievements and interdependencies of all actors - Ensure certification and interdependence and quality standards of guardian ad litem - Implement an eye-level non-profit protector and spokesperson for the involved children - Establish a german-wide-transparency of the actor-network and their performance - Establish interdisciplinarization and multisectoralisation of the steering groups - Ensure process-optimization to exclusively focus on the children`s well-being - Accelerating the initiation of the process and primarily strive for extra-court solutions - Establish independent data surveillance and research with international linkage - Ensure transparent financial flows. - Apply and perform reality check of the new score in larger groups

CHILDREN'S STATEMENTS ABOUT CHANGES IN LIVING ARRANGEMENTS FOLLOWING SEPARATION AND DIVORCE – *THE CONTEXT OF MANDATORY FAMILY MEDIATION IN NORWAY*

Lovise Grape, Prof. Renee Thørnblad,

All parents of children under 16 years who separate in Norway are obliged to meet for a mandatory family mediation session, which is carried out for free by the local family counselling offices. Parents will make an agreement that concern, among other things, where the child should reside and how to organize contact with each parent. This is the first formal context where families can consider shared parenting. It is a political goal in Norway to provide children with the opportunity to participate in this process (Bufdir, 2019). The Hearing Children in Mediation project examines children's participation in mediations that apply a child-inclusive model in Norway. Although the mediator rarely ask the children whether they have an opinion about residence and contact arrangements, many children do express their views on this topic (Thørnblad & Strandbu, 2018). Thus, the project has given more emphasis into children's living arrangement preferences.

One article, currently in the final phase before being submitted to a journal, concerns the extent of and content in children's living arrangement preferences. The findings cannot be disclosed at this time point without the permission from the journal.

However, there are additional findings and alternative ways of looking at our data. We would like to present the pattern of the correspondence between children's preferences and the agreement written by parents when the mediation session has ended. The patterns illustrate a variation in that children and parents can both agree and disagree on the living arrangement that parents have agreed on. This is an opportunity to discuss and reflect on what child participation can be in this context, and how this relates to decision-making regarding living arrangements following parental divorce and separation.

The project has been developed in collaboration with mediators in some family counselling offices in Norway, and is thus considered clinically relevant for practitioners in similar contexts, and researchers interested in the field of divorce, custody and children's rights. The data collection was carried out between 2013-2015 at four family counselling offices in two regions in Norway. A total of 213 families and 346 children participated with the average age = 10.8 (SD = 0.7). Mediators wrote children's messages during a conversation between the mediator and the children in a form, and filled out information about the family and the agreement made by parents after the mediation session. In 20 % of the mediation cases, the mediator had ticked one or several "worrisome conditions" in the family, such as mental illness, substance abuse, contact with child protection services, and violence (Thørnblad & Strandbu, 2018).

When parents make agreements regarding residence and contact following separation and divorce, the aim is to consider "the best interest of the child". One way to succeed in this is to include the children's own views on the topic. As stated by Article 12 in the UN Convention on the Rights of the Child (UNCRC), children have the right to express their views freely in all matters affecting them (UN General Assembly, 1989). Inviting children into mandatory family mediation in Norway aims to follow the UNCRC.

As a summary, this abstract relates to several topics that is in focus during the International Scientific Conference on Best Interest of the Child and Shared Parenting. The first thing is the development of children (object of analysis); this abstract thematise what the capacity of children to share their views on custody and access. The second thing relates to the fifth panel regarding alternative dispute resolution on shared parenting and joint parenting plans.

THE REASONING OF JUDGMENTS ABOUT JOINT CUSTODY

Elena Goñi Huarte

In accordance with the 1989 United Nations Convention on the Rights of the Child (art. 3) the best interests of the child have gone from being an undetermined legal principle to be configured as a right. The current wording of Article 2 of the Organic Law 1/1996 of 15th January, on the Legal Protection of Minors (following the modification introduced by LO 8/2015, of 22th July) states that "all minors are afforded the right to have their best interest assessed and taken into account as a primary consideration in all

actions and decisions concerning them, both in the public and private spheres" (art.2.1). This article also outlines the content of the best interest of the child by regulating a series of general criteria to be used in the interpretation and application thereof (art. 2.3: basic needs, opinion of the minor, family environment, identity of the minor, non-discrimination and personality development)and also includes a list of general elements or guiding principles for the weighting of the previous criteria (art. 2.4: age and maturity, equality, the passing of time, stability, preparation for adult life, etc.). But we must not forget that this article also provides that "any measure taken in the best interests of the child must be adopted in observance of the guarantees for due process and, in particular: the reasoning for the decision adopted should refer to the criteria taken into consideration, the elements applied when weighting the criteria against each other and against other current and future interests, and the procedural guarantees observed "(art. 2.5 d) . This establishes an obligation to justify the decisions made according to the best interests of the child and the duty to base such justification on the regulated interpretation criteria and weighting elements. This paper analyzes the most recent jurisprudence on joint custody cases (STS 500/2019 of 27th September, STS 215/2019 of 5th April, STS 124/2019 of 26th February, etc.) to assess whether they adequately protect the best interest of the child. The reasoning provided in court rulings will also be analyzed to examine whether they are based on the interpretation criteria and weighting elements regulated in the Organic Law 1/1996 of 15th January, on the Legal Protection of Minors.

Workshop 5B on ADR and Shared Parenting.

EDUCAR EN EL RESPETO MUTUO A PARTIR DE LA CUSTODIA COMPARTIDA

María del Mar Villanueva Martín

Resumen del trabajo: La propuesta aborda una temática candente en la que la discusión actual promete perjudicar más al menor que a configurar su personalidad íntegra. La investigación pretende desvelar esa situación caótica, incidiendo en aspectos claves del ámbito de la educación social y otras disciplinas afines, aportando conceptos y estrategias para el avance en eficacia de la custodia compartida.

Las rupturas matrimoniales con separación de cónyuges plantean el problema del cuidado de los hijos menores del matrimonio. Tal cuidado, al ser integral, ocupa un puesto importante la educación, encaminada a la formación completa de los hijos menores como personas que son. La educación será compartida entre la madre y el padre, y ha de tener un efecto unívoco, es decir, conjunto o complementario, de modo que no vaya cada uno por su lado e, incluso, se contradigan, tanto en lo personal como en lo aprendido en los centros de enseñanza a los que acudan los hijos, según la decisión de cada uno de los mentores.

Esta educación consensuada y concordante es un elemento básico en la formación de la personalidad del menor, de acuerdo con los fundamentos actuales de la psicología y la pedagogía evolutivas y del desarrollo. Si la realidad vital del menor se configura a partir de experiencias contradictorias entre él y sus padres, se potenciará la aparición de un pensamiento ilógico o disociado que, en consecuencia, afectará ostensiblemente la formación del menor. En este debate, el discurso de la pedagogía social ofrece valiosas estrategias de comunicación y pensamiento crítico: piezas claves en la construcción de una personalidad sólida, responsable y autónoma.

En la custodia compartida el hijo o la hija han de sentirse atendidos y queridos por igual, por la madre y por el padre. Los padres, adultos, han de decidir por sí mismos su actuación, en caso contrario, ha de recurrirse a la mediación familiar. Asimismo, han de tener en cuenta las aportaciones educativas de la pedagogía social, pues una formación fracturada puede producir en las personas dificultades conductuales importantes, para la toma de decisiones y comportamentales. Siempre el interés del menor ha de primar en su educación y, con ello, evitar lesiones irreversibles en su personalidad presente y futura

THE CONCEPT OF PIETAS, FROM ROMAN LAW, AS AN ELEMENT OF PARENTAL CUSTODY IN CASE LAW

Beatriz García Fueyo

Custody of the children after separation or divorce along with the role of their guardians have kept doctrine and jurisprudence divided on an international level. According to Ulpiano's fragment (D. 27, 10, 4) from the Corpus Iuris Civilis, the legal position of both parents had been different (patria potestas competed exclusively to the paterfamilias) but if the mother was found to be in a vulnerable position, they were on an equal footing. Ulpiano refers to the legal attributions of the mother in the domestic sphere as well, recognizing her auctoritas on the offspring, which implies a moral power rather than a legal one, embodied in the ability to advise them and the children's duty of obedience as a counterpart. This pre-eminent and socially accepted role of the mother based on their mutual affection or pietas had economic implications, as she could be sui iuris and have certain degree of wealth. From this perspective, several court judgements have been analysed.

YATROGENIA IN FAMILY PROCESSES, ACCORDING TO THE CUSTODY MODEL

José Luis Sariego Morillo

¿Evita la custodia compartida los efectos iatrogénicos? este trabajo demuestra que la custodia compartida evita: incumplimientos de de las medidas judiciales tales como: visitas. pagos de pensiones pagos de gastos extras decisiones de patria potestad Realizo comparativas según modelo de custodia. Añado un pequeño avance de cómo la custodia compartida paritaria y preferente propicia que bajen de forma muy significativa, la aparición de violencia en el hogar.

I use the word yatrogenia or iatrogenia to explain those negative side effects that are never taken into account, when a custody court process is resolved.

Spain is a country where there are about 75,000 legal proceedings a year on average in the last 10 years, in which custody of children is discussed.

We have no reliable data on children who each year have their lives cut short by a judicial process of separation or divorce.

By making a calculation of the rate of children per woman in Spain, it gives us an approximate result that there are some 85,000 children whose lives are affected by a judicial custody process.

That's why we set out on the data we have in our work, and we've studied families with shared custody and those who don't.

In this little analysis we do today, reviewing a precedent study, we have broken away from 100 families with children who have gone through our office for the past 10 years, 50 families with shared custody and 50 other families with sole custody.

To do this, we have started by analyzing the families that went to a change in measures after the separation and/or divorce judgment, and we have raised different variables.

According to the custody model, in the 3 years following the sentence, we have looked for how many went to one trial or more, later, and they give us this result: TABLE

That is, the 50 families who had the sole custody went to court 138% of the families, within the next 3 years. This indicates that many families had more than 2 or 3 subsequent trials.

Those with shared custody went to court in 39.50% of the families.

The total is 177.50% of the families went back to trial, in order to modify measures or to request changes to the effects of divorce .

Let's have a look to the percentage of families who went back to trial, but taking into account another variable, according to the way of the initial process, by mutual agreement or adversarial. And here's the result: TABLE

The cases in which families reached an agreement, the 73.50% of them went back to trial, because those initial agreements, did not regulate properly the measures of separation, and 104% of the families whose decision was made by the judge in a trial went back to trial (one or more) over the next three years.

But we wanted to go further this data, and have distinguished shared custody cases from sole custody cases, as mutual agreement or adversarial.

Let's first take a look to the global data, during next three years, to families with shared custody:

We see clearly that the families who agreed out of courts a shared custody, only one of them went back to trial within the next 3 years. And those families whose shared custody was "imposed" by the courts, in 39% of the cases went to court again within the next 3 years.

Now let's see what happens to this same variable in families that had sole custody:

The high percentage of families who went to a trial after a sole custody agreement are very striking. This table shows the high percentage of families with sole custody who went back to trial, or more than one, within the next 3 years.

Now let's look at this table made year by year, and according to the different variables: TABLE

Just one shared custody case submitted a modification of measures within next 3 years, and it was in the case of a change of residence to another city of one of the parents. In the rest of the cases, none went back to trial.

26% of families with shared custody following an adversarial process, filed a lawsuit to modify measures in the year after the final court ruling. All of them were presented by the mothers who opposed shared custody in the initial process.

In the case of adversarial shared custody, the trend is that it falls within the next 3 years, although the percentage of modification of measures remains very high as a whole, over the next three years: 39% of cases.

We have looked for possible causes of these modifications, and in front of half of the parents requesting sole custody, the other half is usually for other reasons: city change, money, parental cooperation problems, etc.

We move on to exclusive maternal custody by "mutual agreement." In this case, the fathers mostly request the modification of measures. Nearly half of the cases we have handled, the cause was that parents said they feel cheated by their lawyers or the common attorney when they signed the "mutual agreement." Many of them were unaware of their rights and those of their children in shared custody or told that in "that court or city" it was impossible to obtain it in trial.

Others however (42%), had signed a mutual agreement under pressure for a veiled threat (or not), of being reported for abuse or because they had been prohibited from seeing children under threat of calling the police, or felt compelled to reach an agreement.

INFLUENCIA DE LA MEDIACIÓN EN LOS REGÍMENES DE VISITA

David Romero Benguigui

Español: El divorcio o cualquier tipo de separación en siempre un hecho estresante y fuente de conflictos. Es por ello que la mediación podría ser una herramienta eficaz para ayudar a normalizar esta situación. A través de este trabajo vamos a ahondar en las opiniones de distintos profesionales y familias sobre el tema y como la mediación podría ser de utilidad como mecanismo normalizador de la situación, todo ello respaldado por un diseño piloto de trabajo de campo. English: Divorce and separation is always a stressful event and source of conflict. Therefore, an effective tool to deal with this type of situations. In this work we collect the opinions of different experts and professionals and could be the family mediation useful as a normalizing mechanism of the situation, all backed by a pilot fieldwork design.

Workshop 6A on Spanish Law.

FINANCIAL ABUSE: ALIMONY IN SHARED PARENTING PLANS AS A PREVENTIVE MEASURE THEREFOR

Ana María Prieto del Pino

Expert review of studies on shared parenting supports the advantages thereof over other alternative custody plans. Research carried out by prominent scholars such as Nielsen has found that, independent of parental conflict and family income, children in shared physical custody families—with the exception of situations where children need protection from an abusive or negligent parent—have better outcomes across a variety of measures of well-being (academic achievement, emotional health, behavioral problems, physical health and stress-related illnesses, and relationships with parents, stepparents, and grandparents) than do children in sole physical custody. However, the advantages of shared parenting and its compliance with best interest of the minors could be jeopardised by the threat of economic abuse, whose manifestations, despite their severity and harmfulness, are not usually perceived and labeled as violence. Domestic and gender violence, either direct or vicarious (that is to say, extended on the victim's children or other relatives), include economic abuse, which can be defined as behaviour that is coercive, deceptive or unreasonably controls another without their consent and in a way that prevents them from being financially autonomous. Situations involving withholding or threatening to withhold financial support necessary to meet reasonable living expenses are also included, some examples being those of coercing someone to give up control of their assets, disposing of property against their wishes without lawful excuse, preventing them from acessing to joint funds or from seeking (or keeping) employment or withdrawing financ ial support for them. Although little research has been conducted on how economic abuse can be conceptualise in relation to other forms of abuse, some evidence has been provided for construing it as a unique form of abuse moderately correlated with psychological, physical, and sexual forms of abuse (Mathisen Stylianou et all.: 2013). As a consequence of its frequent underestimation, pre-existing economic-abusive situations could be disregarded and maintained under the cover of shared parenting agreements. Likewise, cases where one party is subject to financial or economic abuse by their former partner after separation are frequent. The traditional legal and judicial approach takes for granted that alimony creditors are living with one of the parents, therefore a gap exists regarding the cases of shared custody that could be used for economic-abusive purposes by the wealthier ex spouse. In view of the above, the Supreme Court decision dated February 11th 2016, should not be considered only an expression of the High Court's commitment to preserve and strengthen joint custody plans. The Spanish Supreme Court has stated that although "the appellant considers that there is no need of alimony payments in the framework of a shared parenting plan, since each parent will pay for the children maintenance during their custodial period, (...) shared parenting does not exclude alimony payment when there is disproportion between the spouses' incomes, or as in this case, when the mother does not receive her wages or is not entitled to any payment at all (article 146 CC), since the amount of maintenance shall be proportional to the needs of the creditor, but also to the debtor's income". Furthermore, this decision should be assessed as a very valuable instrument to avoid economic abuse, since charging ex spouses with alimony in cases of remarkable disproportion in te rms of financial resources can prevent them from causing harm to their former partners and their children, paradoxically, under the cover of the best interest of the minor.

¿EN QUÉ MEDIDA AFECTA LA CUSTODIA COMPARTIDA A LAS DESGRAVACIONES POR HIJOS EN EL IMPUESTO SOBRE LA RENTA DE LAS PERSONAS FÍSICAS?

Juan de Dios Reyes Rascón

¿En qué medida afecta la custodia compartida a las desgravaciones por hijos en el Impuesto sobre la Renta de las Personas Físicas? Antonio Manuel Cubero Truyo. Catedrático de Derecho Financiero y Tributario. Universidad de Sevilla. Juan de Dios Reyes Rascón. Contratado predoctoral FPU, Departamento de Derecho Financiero y Tributario. Universidad de Sevilla. RESUMEN. En los últimos años y fundamentalmente tras la jurisprudencia del Tribunal Supremo que establecía la custodia compartida de hijos menores como criterio "normal y deseable", salvo que los intereses del menor lo desaconsejen, los casos de aplicación de este modelo de guarda y custodia han aumentado de forma exponencial en nuestro país. Esta nueva realidad no se encuentra al margen del estudio en el ámbito fiscal, pues el régimen de custodia determina judicialmente cuál es la persona progenitora que se encuentra a cargo de los hijos, componente éste último que determina la aplicación o no, de determinados elementos tributarios propios de las unidades familiares. Recordemos que la Ley 35/2006, de 28 de noviembre, del Impuesto sobre la Renta de las Personas Físicas y de modificación parcial de las leyes de los Impuestos sobre Sociedades, sobre la Renta de no Residentes y sobre el Patrimonio, establece dos tipos de unidad familiar a los que se les permite una serie de desgravaciones cuando tienen a su cargo hijos y reúnan los demás requisitos establecidos legalmente en función del elemento fiscal a aplicar. Nos referimos a la opción de tributación conjunta que conlleva la aplicación de la reducción de la Base Imponible por dicha causa, a la reducción por el pago de anualidades por alimentos y al mínimo por descendientes. donde no se somete a tributación la parte de la renta que va destinada a satisfacer las necesidades básicas de los hijos menores del contribuyente por dicho motivo. Lo que se pretende con este estudio es aunar en un documento y de forma sistemática en qué medida pudieran verse afectadas dichas desgravaciones en el Impuesto de la Renta de las Personas Físicas en los casos donde un matrimonio se ha separado legalmente o sin vínculo matrimonial con hijos a su cargo y bajo el modelo de custodia compartida. Hemos de tener presente, que en el caso de unidades familiares formadas por matrimonios no separados legalmente y con hijos menores que no se encuentren viviendo de forma independiente con el consentimiento de sus padres o mayores incapacitados judicialmente, es relativamente visible que tienen derecho a optar por la tributación conjunta o por la individual, e incluso también en los casos de unidades familiares cuyos cónyuges se han separado legalmente y la custodia la tenga en exclusiva uno de ellos, pudiendo éste sujeto optar por la tributación conjunta, no obstante, no está tan claro en el caso de que la custodia no fuera ya en exclusiva, sino compartida, donde los hijos podríamos indicar que conviven con los dos progenitores, lo que suscita más dificultad a la hora de determinar si tienen derecho a optar por la tributación conjunta y en su caso, quién sería el sujeto en poder aplicarla, teniendo en cuenta que ningún hijo puede permanecer en dos unidades familiares al mismo tiempo. Si comprobamos la evolución de la fiscalidad directa de las familias, podemos observar que efectivamente ha sido un elemento que ha ofrecido numerosos debates y controversias desde la entrada en vigor de la Ley 44/1978, de 8 de septiembre, del Impuesto sobre la Renta de las Personas Físicas en nuestro país, afrontando hasta la actualidad numerosas reformas para adaptar la normativa reguladora a las nuevas realidades familiares que se han ido consolidando en cada momento. Palabras clave:

Custodia compartida, IRPF, declaración conjunta, mínimo por descendientes, anualidad por alimentos.

SHARED CUSTODY AND CHILD ALTERNATION. (CUSTODIA COMPARTIDA Y ALTERNANCIA DEL MENOR)

Jésica Delgado Sáez

Shared custody has always been allowed in the framework of Spanish law, but it was not until Law 15/2005, of 8 July, modifying the Civil Code and the Law of Civil Procedure in matters of separation and divorce, that it obtained express recognition. In spite of this, during the first years of Law 15/2005, the Spanish Courts were reluctant to adopt shared custody because they considered it to be detrimental to the best interests of the child, because it caused relocation of the child, or because conflicts between parents were too serious to adopt shared custody... Today, the Supreme Court has established that shared custody should be considered the normal model and even desirable as a means of exercising parental authority. Joint custody allows both parents to continue to develop their parental responsibilities after separation or divorce and allows both parents to support their children. It therefore promotes the principles of equality, parental co-responsibility and co-parentality. Shared custody can be established in many ways. It can be established for fixed hours of the day, for example, one parent will always pick up the child at lunchtime or on leaving school and the other will be responsible for dinner and putting the child to bed; an alternance of certain days of the week so that the child associates certain days and activities to a specific parent; weekly, as most case law studied established; fortnightly, monthly or even annually. The custody model established will depend on the conditions of each family, although the models of short alternation are usually associated with young children since the young age of the children is not a factor that excludes shared custody. In the case of breastfed babies, it may be established that the child is under exclusive custody until a certain age and from that moment onwards a shared custody regime is provided for short periods of alternation. For this reason, we can conclude that the age of the child does not make shared custody difficult. This data should be taken into consideration as another element in order to determine how shared custody should be implemented, and with what periodicity. The choice of alternation in shared custody will have to be made taking into consideration the best interests of the child in the specific case since it is one of the guiding principles of our legal order in all cases involving children, and even the child's hearing can be used to find out more precisely what is in the best interests of the child as long as the child has a sufficient judgment or is over twelve years of age.

JOINT PHYSICAL CUSTODY BEYOND COURT ORDERS: THE CASE OF SPAIN

Montserrat Solsona Pairó

Joint physical custody beyond court orders: the case of Spain Authors: Amalia Gómez-Casillas (Universitat Pompeu Fabra), Marc Ajenjo (Centre d'Estudis Demogràfics, Universitat Autònoma de Barcelona), Montserrat Solsona (Centre d'Estudis Demogràfics, Universitat Autònoma de Barcelona). Background: In Spain, the joint physical custody has increased considerably since 2009, comparing to other forms of custody, although exclusive custody of the mother is still predominant (Solsona &

Spijker, 2016). Therefore, this change in the type of custody has emerged as a new paradigm of childcare arrangements. To analyse this social phenomenon, previous research conducted in Spain has mainly used judicial data (Solsona et al., 2019; Solsona & Ajenjo, 2017; Solsona, Spijker & Ajenjo, 2017; Rodríguez, 2015; Catalán et al., 2008). Using this type of sources entails excluding the cases where the agreement is reached without undergoing judicial proceedings. Thus, this limitation cast considerable doubt on the results of a study conducted in the Courts of Barcelona showing that the proportion of joint physical custody among married couples (30.1%) is higher than cohabiting couples (16.9%) (Solsona et al., 2019; Solsona & Ajenjo, 2017). The question risen is whether the most collaborative cohabiting couples are out of the sample because they are avoiding the judicial system. In order to draw conclusions on this matter, we conducted a survey intending to answer the following questions: (i) Which is the proportion of couples with children that have dealt with their union dissolution outside the judicial system?; (ii) Are married couples more prone to deal with their union dissolution through the judicial system than the cohabiting ones? Does the married couple undergo more conflictive proceedings than cohabiting ones?; (iii) Is joint physical custody higher among cohabiting couples comparing to the married ones? Methods: This paper is based on the results of the survey designed by our research team in January 2019: the survey on joint physical custody in six Spanish Autonomous Communities 2019 (Encuesta sobre Custodia Compartida en seis comunidades autónomas españolas – CUCO 2019). The survey explores the union dissolution process and the decisions on childcare time distribution in the six Spanish Autonomous Communities with the highest proportion of joint custody: Balearic Islands, Catalonia, Valencia, Aragon, Navarre and the Basque Country. The final sample is composed of 750 respondents, 375 women and 375 men aged from 35 to 55 years old who: have at least a child aged under 16 when the union dissolution occurred; this child was born in the framework of a heterosexual relationship; the union dissolution occurred in the period 2010-2017. Results: In the six Autonomous Communities considered, 19.6% of the respondents have not undergone a judicial proceeding after the union dissolution. The respondents that used to be in cohabitation are more prone to get to a verbal agreement than the married ones: 31.3% versus 7.8% respectively. The proportion of joint custody as a parental practice is higher for married couples (41.2%) than for cohabiting couples (37.8%). However, for the couples that have got to verbal arrangements, the proportion is slightly higher for cohabitants (43.5%) than married couples (41.2%). Conclusions: This study provides results indicating that around a fifth of the couples with children is avoiding the judicial system to deal with their union dissolution. It also shows that cohabiting couples are more prone to get to a verbal agreement when dealing with their union dissolution than the married ones. However, the proportion of contentious cases is the same both for married and cohabiting couples when the couples getting to a verbal agreement are considered in the analysis. Thus, cohabiting couples are not more litigious than married ones, meaning that the same proportion undergoes a contentious proceeding. Although this study reveals that joint physical custody as a parental practice is slightly higher for married couples than the cohabiting ones, these differences are not significant. References: Catalán, María José; García, Begoña; Alemán, Carmen; Andréu, Pilar; Esquiva, Antonio; García, María Dolores; Marín, Catalina; Matás, Ana María; Soler, Concepción (2008) "Custodia compartida: solicitudes de esta modalidad de custodia en procedimientos amistosos y contenciosos, desde la entrada en vigor de la nueva ley del divorcio (15/2005)", Psicología jurídica, familia y Victimología: 123-129. Rodríguez-Domínguez, Carles (2015) Funciones del psicólogo jurídico y de los peritajes psicológicos en el contexto de

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Workshop 6B on Spanish Law.

CUSTODIA COMPARTIDA EN LA SOCIEDAD ESPAÑOLA DEL SIGLO XXI: CONDICIONANTES CIENTÍFICOS, SOCIALES Y POLÍTICOS

Antonio Videra García

El divorcio es siempre un acontecimiento doloroso o traumático en la vida de las personas implicadas, en especial los niños. En los procesos contenciosos es dónde existen más problemas entre los padres ya que en muchas ocasiones éstos se odian y se intentan hacer daño el uno al otro. Los niños tienen el ideal de una vida común junto con sus dos padres. En muchas ocasiones los niños sueñan con una reconciliación entre los dos progenitores, pero con el paso del tiempo, ven que esto es realmente un ideal imposible. Lo que es disfuncional para los niños es sobre todo ver cómo los padres siguen una escalada de conflicto continuo, peleas, denuncias, etc. Suelen tener también un sentimiento de deslealtad hacia uno de los progenitores menoscabando la relación con el otro, es lo que se conoce como conflicto de lealtades. Podemos hablar en términos generales de dos tipos de divorcio. El primero es de mutuo acuerdo: referido al divorcio que se ha solicitado y aceptado por ambos cónyuges o bien, por uno de ellos, pero con el consentimiento del otro. Se deberá solicitar una propuesta del convenio regulador por ambas partes donde se especificará las consecuencias del divorcio de mutuo acuerdo: uso de la vivienda, forma en la que se repartirán los bienes y cuáles son esos bienes, relaciones con los hijos, pensión que uno de los cónyuges debe pagar al otro y otra información de interés. El segundo tipo es el contencioso: este tipo divorcio se solicita por una de las partes de forma unilateral sin que haya consentimiento por el otro cónyuge. Este tipo de divorcio no se acompañan de ningún convenio regulador no siendo necesario alegar ninguna causa, aunque es obligatorio que por lo menos haya transcurrido los tres meses para poder solicitar la petición. En este caso será el Juez quien mediante la sentencia de divorcio, determinará la situación para cada uno respecto a los bienes, las obligaciones para con los hijos, etc. En este trabajo de revisión analizamos los distintos tipos de custodia en función de la existencia de conflictividad o contenciosidad entre los progenitores y en especial revisamos la posibilidad de custodia compartida cuando exista una denuncia por violencia de género o cuando exista violencia de pareja previa o postdivorcio. También realizamos un análisis de los condicionantes sociales y políticos que existen en contra de la implantación del modelo de custodia compartida dónde no es infrecuente ver cómo se atacan a los defensores de

dicho tipo de custodia calificándoles de contaminadores de propuestas del heteropatriarcado.

LA ATRIBUCIÓN DEL USO DE LA VIVIENDA FAMILIAR EN LOS SUPUESTOS DE CUSTODIA COMPARTIDA

Mª Amalia Blandino Garrido

La concesión de la guarda y custodia de los hijos de forma compartida a ambos progenitores suscita la cuestión de qué criterios aplicar en orden a la atribución del uso de la vivienda familiar. La Ley 5/2005, de 8 de julio, que introdujo en el art. 92 del CC la posibilidad de establecer la denominada "guarda y custodia compartida", nada dispuso sobre la atribución del uso de la vivienda familiar. Estamos ante un tema central y de enorme relevancia práctica, por lo que resulta llamativo el silencio del legislador. El art. 96 del CC, que regula la atribución del derecho de uso sobre la vivienda que constituía el domicilio familiar, está pensado para los casos en que la custodia de los hijos se atribuye de forma exclusiva o individual a uno de los progenitores (párrafo primero) o cuando, existiendo varios hijos, la custodia de algunos se atribuye a un progenitor y la de los restantes al otro (párrafo segundo). En el primer caso, en principio, en defecto de acuerdo de los cónyuges aprobado por el Juez, el uso de la vivienda familiar corresponderá a los hijos y al cónyuge en cuya compañía queden. En el segundo, "el Juez resolverá lo procedente", decisión que -aunque nada se diga en la norma- deberá fundamentarse en el interés superior del menor. El vacío legal en materia de atribución de la vivienda familiar cuando se acuerda la custodia compartida se solventa aplicando analógicamente las previsiones del mencionado párrafo segundo del art. 96 del CC. El interés superior del menor, conforme a la nueva redacción otorgada al art. 2 de la Ley Orgánica de Protección Jurídica del Menor por la Ley 8/2015, de 22 de julio y a la interpretación jurisprudencial, no puede desvincularse absolutamente del de sus progenitores, cuando es posible conciliarlos. Así, cuando el régimen de guarda y custodia se establece de forma compartida, cabe adoptar distintas medidas en orden a la atribución del uso de la vivienda familiar, atendiendo a la salvaguarda del interés del menor pero también a otras circunstancias, como son la titularidad de la vivienda familiar y las necesidades de los progenitores. Cabe atribuir el uso de la vivienda de forma alterna a los progenitores y a los hijos durante el período en que les corresponda ejercer la custodia y, por tanto, tener a los menores en su compañía. Esta medida permite que los hijos permanezcan en la vivienda familiar, contribuyendo a su estabilidad. Es posible también, como ha determinado el Tribunal Supremo, adscribir la vivienda familiar a los menores y a aquél de los progenitores que por razones objetivas tenga más dificultades de acceso a una vivienda (no ser titular o disponer del uso de ninguna otra, menores ingresos, etc.). No procederá, en estos casos, una adjudicación indefinida, sino temporal, similar a la que se establece en el párrafo tercero del art. 96 del CC para los matrimonios sin hijos, dirigida a facilitar la transición a la nueva situación de custodia compartida. Otra opción es no atribuir el uso de la vivienda familiar a ninguno de los progenitores. Hay que tener en cuenta que, conforme a la doctrina jurisprudencial, la regla del art. 96, párrafo primero, del CC, que establece que "el uso de la vivienda familiar (...) corresponde a los hijos y al cónyuge en cuya compañía queden", no es una medida automática derivada de la concesión a un progenitor de la guarda y custodia sobre el hijo menor. La finalidad del art. 96 del CC es que los menores tengan asegurada una vivienda digna en la que habitar con el progenitor custodio, sin que ello implique necesariamente tener que atribuir el uso de la

vivienda familiar al hijo menor, al ser perfectamente posible atender a tal derecho elemental proporcionándole otra vivienda. Aplicado al caso de custodia compartida, consideramos que cabe no atribuir el uso de la vivienda familiar cuando el hijo no precise de la vivienda por encontrarse satisfechas las necesidades de habitación a través de otros medios; solución que requiere que la vivienda o viviendas alternativas sean idóneas para satisfacer el interés prevalente del menor. En todo caso, cuando existan hijos menores de edad, dado el carácter de ius cogens de las medidas tuitivas relativas a los mismos, la decisión sobre la atribución del uso de la vivienda familiar deberá ser decidida por el Juez, aun cuando las partes no se lo hubieran solicitado. Asimismo, la decisión del juzgador puede apartarse de lo solicitado por las partes. Es necesario, pues, que haya un pronunciamiento expreso sobre el uso de la vivienda familiar cuando se adopta una medida de custodia compartida, por tratarse de una materia de orden público. El tema objeto de estudio ha sido contemplado en la legislación autonómica (CCCat, Código del Derecho Foral de Aragón, Ley Foral navarra sobre custodia de los hijos en los casos de ruptura de la convivencia de los padres y Ley vasca de relaciones familiares en supuestos de separación o ruptura de los progenitores), así como en el Anteproyecto de Ley sobre el ejercicio de la corresponsabilidad parental y otras medidas a adoptar tras la ruptura de la convivencia de 10 de abril de 2014, que establece que si la guarda y custodia fuera compartida podrá otorgarse el uso de la vivienda por "periodos alternos" a ambos progenitores y, en otro caso, deberá asignarse a aquel que "tuviera objetivamente mayores dificultades de acceso a otra vivienda".