MEDIATION IN THE NEW BRAZILIAN CIVIL PROCEDURE CODE - NCPCB: AN ALTERNATIVE FOR CONFLICTS IN THE CONTEXT OF PARENTAL ALIENATION

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Abstract: This is a bibliographical research that tries to demonstrate, from the new Civil Procedure Code, that the mediation consists of an alternative for the solution of conflicts in the context of the parental alienation, more and more common in situations of conjugal rupture. Mediation is a self-constitutional process whereby the disputing parties are aided by a third party, neutral to conflict. It is important that the mediator encourages the parties to seek solutions on their own, with which they can identify themselves and, consequently, commit themselves.

Keywords: Mediation. Parental alienation. Conflict resolution.

The changes in society have called for an increasingly intense action by the Judiciary and other legal professionals. In this context, globalization undoubtedly plays an important role, since it has provided easier and faster access to information, which, as a consequence, has also made it possible for society in general to increase awareness of its rights and duties and a greater demand for conflict of interest solutions. On the other hand, it is imperative to apply peaceful
solutions in a way that reaches a composition and, at the same time, attends the interests of those involved, avoiding more wear, both emotional and financial. In this way, alternative solutions to mediate situations involving conflicts of interests, among them, mediation, applied in various forms of conflicts.

It is quite true that one of the main characteristics inherent to the human being is the diversity of interests which, as a consequence, can lead to conflicts, as a rule, more intense in marital conflicts. In this context, conflicts involving parental alienation have been observed more and more frequently in Family Law. Unfortunately, in a mourning that is poorly drawn by the end of the marriage relationship, it is possible for one or both spouses to adopt a pattern of behavior that culminates in the weakening of the parental relationship between the child and the ex-consort. On the other hand, it is also in the Family Law that mediation is gaining space, above all, after the new Civil Procedure Code sets out its application. Thus, we believe it is necessary to raise the awareness of the application of mediation, especially in the context of parental alienation, given its seriousness and effects on those involved, making family well-being possible. Therefore, the present paper aims to demonstrate the importance of applying mediation to causes involving parental alienation as an alternative to conflict resolution.

1. Mediation

First, we emphasize that at an early stage the conflicts were resolved through self-defense, that is, the solution was achieved through force and later, those were delegated to the State through the Judiciary. To this, therefore, it is responsible for securing the principle of access to justice inscribed in art. 5.º, XXXV of the Federal Constitution of Brazil, from which it emanates one of its principal functions consubstantiated in the search for a solution to the conflict of interest that is submitted to it, whose decision, of course, will displease one of the parties. In this sense, the new Brazilian Civil Procedure Code (CPCB), in predicting mediation, brings the expectation that the number of processes that are dragging on for years will be reduced.

Mediation can be defined as a negotiation facilitated or catalyzed by a third party. Some authors prefer more complete definitions suggesting that mediation is an self-resolution process whereby the disputing parties are aided by a third party neutral to the conflict or by a panel of people of no interest in the cause, to arrive at a composition. It is a method of dispute resolution in which a process is developed consisting of several procedural acts by which the impartial third party facilitates the negotiation between the persons in conflict, enabling them the better to
understand their positions and to find solutions that are compatible with their interests and needs. (AZEVEDO, 2013)

Alongside mediation as an self-resolution method, we find conciliation, commonly confused with it, so they are delimited in the new CPC. Reconciliation consists of the self-composed technique mediated by an impartial third party in order to guide and suggest agreements, adopting an interventionist stance without investigating the causes that culminated in the conflict. This peculiarity gives him some criticism, since often the agreement is accepted, but with a feeling of loss, instead suggested by the conciliator according to his point of view. Cezar-Ferreira (2007) points out that conciliation is indicated for conflicts that do not involve relationship issues that are needed or are intended to continue, such as those of business or family members.

In Brazil, before the new Code of Civil Procedure, and in view of the Judiciary’s greater objective of promoting access to justice and social pacification, the National Justice Council - CNJ instituted the National Judicial Policy for the Treatment of Conflicts of Interest set forth in Resolution 125/2010. It is a normative act whose purpose is to stimulate, improve and disseminate the mechanisms for the composition of conflicts, avoiding the legal structure of the judiciary due to the high number of cases, many of which are due to excessive judicially of conflicts of interest. Reconciliation and mediation are recognized as effective instruments of social pacification, permanent and complementary to the Judiciary, which, although close, cannot be used as synonyms.

Due to the nature of the family conflict, difficulties can increase in size, since the time of the process does not always coincide with the time of the parties, that is, the sentence can put an end to the judicial process, but the internal conflicts of each party have not yet solved, can trigger new problems. For that reason, after the sentence, can prolong with the lodging of innumerable resources or, even if it is tried final, new conflicts can gain body through new actions, perpetuating an internal conflict not solved.

Thus, in cases involving affectivity, mediation, which Groeninga (2004) defines as "a method whereby a third person, impartially, specially formed, helps the parties to broaden communication through a greater understanding of the roots of the conflicts that present themselves. "Mediation is therefore a process that offers those who are experiencing a conflict the possibility and the adequate environment to seek, through a facilitator, a solution. Although performed by a neutral third party, unlike conciliation, the mediator will not make any suggestions for the resolution of the conflict, restricting itself to facilitate the rapprochement
and communication between the mediated, helping them identify their real conflicts and interests in order to that cooperatively find their own solutions.

Among some reasons for the premise that the mediator does not offer solutions to the parties, is the fact that the parties are able to understand the context of the conflict better than a third party. Thus, a solution that may appear to be the best from the perspective of the mediator may not be understood as reasonable by the parties. Another issue concerns the fact that, when making proposals, the mediator may cause the parties not to participate in the construction of possibilities of agreement, harming one of the main objectives of mediation, that is, the incentive to create options for settlement. In addition, if the parties misinterpret some mediator attitudes that demonstrate authority, the idea of impartiality of the facts is likely to be impaired.

It is imperative that each proposition of the parties be analyzed with caution, stimulating the extraction of the positive and negative points of each one in order to make possible a satisfactory agreement to those involved.

The purpose of mediation is to establish or restore quality in communication between those involved avoiding new disputes, and the agreement is only one of its possible consequences. One of the advantages of mediation is its informality, which can be adopted before or even in the course of a judicial process and, if it is not fruitful, the status quo prior to its adoption can be resumed at any time, according to the will of the mediated.

2. Mediation in the New Code of Brazilian Civil Procedure and parental alienation

The new CPC requires the application of mandatory conciliation or mediation as the initial stage of the procedure to be followed by the parties to the conflict, except in cases where the subject matter of the dispute does not allow self-determination or when both parties inform the judge of their lack of interest in the attempt composition. That is, if one of the parties expresses its disinterest in the audience, it will not occur. Article 334.º of the NCPC provides that:

If the initial petition meets the essential requirements and it is not the case that the request is dismissed, the judge shall appoint a conciliation or mediation hearing at least thirty (30) days in advance, and the defendant shall be summoned with at least twenty (20) days in advance.
It should be noted that "there may be more than one session for conciliation and mediation, not to exceed two (2) months from the date of the first session, as long as it is necessary for the composition of the parties" (§ 2, article 334.º CPC).

And one of the most problematic areas that instigate mediation is family law, involving parental alienation. Such a context enables mediators to encourage the parties to adopt a non-adversarial stance in the aftermath of the post-nuptial conflict. Krüger (2009) emphasizes that divorce mediation is shorter and with lower emotional costs for those involved.

As we have said, mediation in the context of parental alienation is fundamental given the gravity. Some authors such as Oltramari (2009) prefer to call it family mediation, having several applications and one of the main themes that guide it is the end of marital relations. This is because, the marital breakdown necessarily implies adaptation to the new reality to all its members. Such adjustments will depend on many factors such as the circumstances in which the rupture occurred, the time of union, the age, and the existence or not of children, the financial question, the psychological balance and many others.

Regardless of whether or not the end of the union is right, children almost always do not see it immediately. And, similarly, your reactions will depend on a number of factors such as the development phase, the degree of affection towards the parents, support systems, etc. Be that as it may, each member of the family, nuclear or extended - grandparents, uncles, cousins - will be affected in some way and everyone will influence each other. (DIAS, 2013)

Family mediation, taking into account the peculiarities of each case, can achieve creative solutions built by the parties involved, so that, while celebrating their agreement, they also develop skills that allow for greater and better maturity for all. An arduous task that requires much preparation, since they are questions of the order of affection.

Wallerstein & Kelly (1980) argue that it is not divorce itself that leads to possible mismatches, but rather the specific circumstances of separation, such as conflict between parents, absence of one, use of the child as a weapon "Of revenge, etc. Thus, the family can no longer be the absolute locus of protection for its members, especially children and adolescents, since the issue of violence in the family is not only a result of physical aggression but also of psychological aggression. The worst are the reflexes on the children still in full development, and can lead to irreparable damages.

The truth is that the separation of parents imposes on the child a reality almost always difficult to be accepted, regardless of age. Wallerstein and Kelly (2002) explain that divorce can also be very difficult for preschoolers, since they are in a phase of adaptation to removal from home towards school and friends. At this stage, they have a timid sense of morality, which,
coupled with the difficulty of distinguishing between their thoughts and reality, makes them especially vulnerable to guilt and confusion. The authors add that children may present learning deficits and, depending on their age, regression in development, presenting anxiety, enuresis, sleep disorders, etc., situations that may require professional intervention. Between six and eight years of age, children seem to have a rather peculiar difficulty in their age, because they perceive what is happening, but without the maturity necessary to deal with separation. Therefore, they may experience feelings of intense sadness and longing, fantasize a reconciliation or even show conflicts of loyalty.

Taking into consideration the litigation between couples, very rarely the moment of separation occurs in a calm and unhurried way, especially if the rupture occurs due to the change of object of desire of one of the pairs. Commonly, betrayal is one of the factors that can drastically transform family life after separation. In any case, regardless of the existence or not of treason, there is a high probability that differences will occur. And it is under this vertex that the unresolved internal conflicts of one (or both) can erupt. The big problem is if the ex-couple has a common child, which can serve as a powerful weapon of attack and revenge against the former partner. It is possible, therefore, that one of the parents (or both) adopt a pattern of negative behaviors aimed at weakening or disrupting parental bonds, characterizing parental alienation. (DIAS, 2013)

We emphasize that there is no single way of practicing parental alienation, since there are a multitude of behavioral combinations that characterize it. However, it is common ground that the conduct of the alienating parent usually breaks out at the time of the separation from the couple, nevertheless having its origin in conflicts before the end of the relationship - the alienator, for example, can carry his conflicts from the separation of their own parents. But, it is good to point out that the AP can occur even during the constancy of the relationship (DAYS, 2013).

Molinari & Trindade (2014) emphasize that the child feels a constant pressure not to disappoint the parent with whom he lives. In such situations where the child is led to hate and to reject a parent who loves it, the contradiction of feelings produces a destruction of the bonds, which, if it persists for a long time, will establish a process of crystalizing that will no longer allow its restoration, making the symbolic death of separation a real death of the subject.

After conceptualizing parental alienation, it is important to note that it is not confused with the parental alienation syndrome - PAS, although it is a rather common misconception. It was from the 1980s, because of the large number of child custody cases, that the professor of
clinical psychiatry at the Department of Child Psychiatry at Columbia University, Richard A. Gardner, devoted himself to the study of the alienation syndrome parental - SAP.

Gardner (2002a) noted not only a considerable increase in situations where one parent programmed the child to move him away from the other, hoping that this would favor him in the court case, but also the child’s own contributions in support of the child’s denigrating campaign. Parent alienator against the alienated parent, resulting from the programming. He also observed a set of symptoms that appeared together and, in his view, would guarantee the designation of syndrome, so he introduced the term parental alienation syndrome - SAP. That is, for Gardner (1985) two are the essential factors for the characterization of SAP. The first of them refers to the influence of the alienating on the child to the point of this introjecting the reality that is transmitted to him as true, contributing to the denigrating behavior against the alienated parent. The second, related to the presence of a set of interlaced symptoms presented by the child. Gardner (2002b, p.01) conceptualized SAP as:

[… is a childhood disorder that appears almost exclusively in the context of child custody disputes. Its preliminary manifestation is the denigrating campaign against one of the parents, a campaign made by the child and that has no justification. It results from the combination of instructions from a parent (what does "brainwashing, programming, indoctrination") and child’s own contributions to slander the target parent.

Gardner (1985) is the forerunner of the literature on parental alienation, which has been influenced by several other authors over time.

In any case, Gardner’s studies of SAP have, over time, been the subject of much discussion and theoretical support for the reformulation of some of his ideas. In Brazil, some authors like Dias (2010) came to use the expressions parental alienation and parental alienation syndrome as synonyms. Others like Silva (2011) and Fonseca (2006) prefer to differentiate them, but not in the same terms as Gardner (2002b). In any case, regardless of the controversy surrounding science, the legal community has been acknowledging parental alienation as well as the parental alienation syndrome - despite the fact that the medical community does not recognize SAP, attributing criticism to terminology. We will employ here the position of Silva (2011, p.208) in the sense of differentiating them, namely:

Parental Alienation (PA) characterizes the act of inducing the child to reject the target parent (with elusive, defamatory messages, even hate or allegations of sexual abuse).

The Parental Alienation Syndrome (PAS) is the set of symptoms that the child may or may not present due to the acts of Parental Alienation.
In the same sense, Fonseca (2006, p.164) states that:

[...] The syndrome of parental alienation is therefore not confused with mere parental alienation. That is usually the result of this, it means, parental alienation is the removal of the child of one of the parents, caused by the other, as a rule, the custodian. The parental alienation syndrome, in turn, refers to the emotional and behavioral sequelae suffered by the child victim of that coexistence prevention.

Briefly, parental alienation consists of the practice most commonly effected by one of the parents whose aim is to weaken or completely break the parental bonds between the former partner and child. And, depending on its intensity, may lead to the implementation of the syndrome of parental alienation - PAS.

Trindade (2010, p.25) conceptualizes PAS as: "a form of child abuse and abuse" capable of producing detrimental effects on children, varying according to the child's age, the type of bond previously established, etc., manifesting itself in various forms, such as "anxiety, fear and insecurity, isolation, sadness and depression, hostile behavior, lack of organization, difficulties in school, ...". Unfortunately, SAP can lead to serious behavioral and psychic consequences. Perhaps the most damaging form used for the destruction of parental bonds is the false accusation of sexual abuse against the alienated parent.

Gardner (1982 apud TRINDADE, 2012, p.208) classified PAS in three stages: light, medium and severe. At the light stage, the behavior of the alienating parent causes little or no disturbance to the visits and the child. Usually, the visits are calm, with some difficulty at the time of the change of the parent. And, when the child is with the alienated parent, the denigration campaign does not exist or is discreet. In the middle, the pattern of conduct intensifies, causing conflict of loyalty and guilt in the child. At the moment of the change of parent, the child, knowing what the alienating parent wants to hear, cooperates with the parent to begin the dentistry campaign. However, once in the company of the alienated parent and away from the alienator, the child is again receptive.

Coming to the severe stage, parental coexistence becomes practically impossible, with the child expressing excessive attachment to the alienating parent, often becoming fanatics. The child may panic at the thought of having to visit the other parent. And even if he can stay in the company of the alienated parent, and therefore away from the alienator, the child can not diminish his fears, anger, etc. Not infrequently, in the company of the alienating parent, the child
may escape, or even remain provocative or destructive, necessitating his return to the alienating parent. At this stage the conflict of loyalty and feeling of guilt cease to exist and the reality of the alienating becomes the child. It is usually at the serious stage that the alienating parent may file a false report of sexual abuse against the former partner in order to prevent their coexistence with the child, although nothing prevents that said accusation or any other is presented in the stages above. In order to diagnose the parental alienation syndrome, Gardner (2002a) argues that it is necessary to conduct joint interviews with all those involved in order to allow the professional to confront the information.

Given the context of parental alienation, mediation is undoubtedly an alternative to reach a solution to the conflict. Undoubtedly, the mediator in identifying the issues and interests of the parties involved in parental alienation has numerous effective tools and techniques to stimulate the construction of a solution. Often the mediator enables the alienator to place himself in the place occupied by the alienated parent, stimulating a reflection towards a change of behavior. The use of techniques aims not only at the approximation of the parts, but also at the very preservation of the neutrality image of the mediator.

However, innumerable factors can hinder the work of the mediator, among them, the degree of commitment of the alienator, who sometimes becomes completely irreducible in his attitudes. In any case, the mediator must have the sensitivity to identify the feelings expressed by the parties so that they can feel understood. And in the case of the alienator, the mediator must have the ability to deconstruct the alienator's defenses and harmful accusations, leading him to cooperate to resolve the dispute.

3. Criticism of the Presidential Veto to art. 9th of Law 12.318/2010

In Brazil, the fight against parental alienation gained importance due to Law 12.318/2010, which in its art. 2.º of the Law on Parental Alienation (12.318/2010) defines it as:

(...) interference in the psychological training of the child or adolescent promoted or induced by one of the parents, by the grandparents or by those who have the child or adolescent under their authority, custody or supervision to repudiate a parent or cause damage to the establishment or to maintain links with it.

Of the articles contained in this report, two have been vetoed by the presidency, among them art. 9.º, which provided for the possibility of mediation in the context of parental
alienation. However, the president of the time, Luís Inácio, understood that the assessment of the child/adolescent's unavailable right to family coexistence under Article 227.º of the Federal Constitution by extrajudicial appeals would be unconstitutional, leaving only judicial mediation to settle such cases. Such a position was a step backwards to the policy of conflict reduction, since there is no unconstitutionality in the fact that the parents decide, through an impartial third party, the issues concerning the children in common. On the contrary, mediation facilitates the resolution of internal conflicts of each part - the order of the unconscious - through dialogue. Such a mechanism should have been maintained, since it encouraged the adoption of a culture based on cooperation and patience in the existing within the family context as the wording of the article sought wider alternatives for the solution of conflicts.

In spite of the presidential veto to art. 9 of the law on parental alienation, which provided for the application of mediation, professional experience shows us the imperative need to apply the said method self-resolution in the context of PA. Molinari and Sani (2016: 86) argue that mediation is a skillful tool to minimize the conflicts resulting from separation, "because there will be a concern to (re)create bonds, establish a dialogue and transform and prevent new conflicts."

In mediating the role of the mediator is fundamental, because as a facilitator, it will enable dialogue between two parties to help them find a solution to their problems, an alternative to those who do not want to give decisions about their lives to the judiciary. By the way, when the solution was reached, the greatest victim, the child, in compliance with the doctrine of the integral protection of the child, based on three principles: a) child and adolescent as subjects of rights; b) child / adolescent as recipients of absolute priority and; c) respect the peculiar condition of a developing person.

4. Final considerations

We have seen that the NCPC has expressly ruled on mediation. The mediator acts as a facilitator in order to establish a communication that flows dynamically and leads to an agreement built by the parties. This is because it is not the role of the mediator to propose agreements, but to create and stimulate means for the parties to be able to visualize alternatives to a composition.

Therefore, the purpose of mediation is to establish or restore quality in the communication between those involved avoiding new disputes, and the agreement is only one
of its possible consequences. Hence the importance of applying it in the context of parental alienation, a practice harmful to the preservation of the parental relationship.

We have shown that parental alienation can erupt as a result of mourning that has been ill-prepared by the end of separation. Thus, once the mediation has taken place, it is up to the mediator to ensure that those involved can see beyond the mourning the end of the relationship and its emotional unfolding. If a relationship is established that is at least civilized among the parents, mediation may reduce the chances for the development of parental alienation with the consolidation of the Parental Alienation Syndrome. This would be a singular benefit to be sought through mediation during the process of dissolution of the marriage of the couple.

It is important, therefore, that the mediator, after validating the externalized feelings, encourages the parties to seek solutions by themselves, with which they can identify themselves and, consequently, commit themselves. All for the well-being of those involved and preservation of the integral protection of the child.

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