

PARENTAL ALIENATION

Change of Judicial Paradigm

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*"We have to become
that we want to see. "*

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1. Summary

In the present article we intend to analyze the treatment and approach that the parental alienation has received in the judicial world, with the objective of demonstrating the existence of a paradigm shift, still in formation, at the level of recognition of the concept and its legal relevance.

In order to do so, we present the factors that are thought to have contributed to the mistrust and reservations initially raised in this area and contextualize their overcoming in the context of the progressive relevance of the role of the child in the specific field of parental responsibilities and the changes verified in the context of the structure of the family relationship, in which emergence the principle of equality of spouses and of the equitable participation of the parents in the process of education and development of the children is particularly important, analyzing what is currently the majority in case law of our higher courts.

Having defined the concept of parental alienation and clarifying the terms of its jurisprudential acceptance, the possible answers to this problem are pointed out, within the current physiognomy (of the majority) of Courts with jurisdiction in the area of Family and Children and procedurally consented ways by this Jurisdiction at the present time.

Keywords: Parental alienation syndrome; affective and family deprivation; parental responsibilities; paradigm change; the best interests of the child.

2. Introduction

As an expression, at the level of the duty-being, of the values and principles that sustain society at every historical moment, law can not remain indifferent to the social transformations verified in the last decades in the context of family relations, in particular, in the field of marriage and parenting²⁶⁶, and the Courts, committed to the function of judging and thus involved in the application and realization of the law, can not remain detached from the social reality to which their decisions are directed.

Thus, the evolution verified in jurisprudence in the approach and treatment of the problem of parental alienation should be framed, in my view, in the transformations that have occurred in that field of family relations, which will facilitate the understanding of the paradigm shift that is being judicial context and will allow to contextualize and reinforce the one that begins to profile as the majority orientation of the Portuguese Courts in this matter.

However, since the Courts are independent and our legal system is not familiar with the mandatory precedent, which justifies, on the one hand, the existence of conflicting case-law in relation to the recognition of the concept of parental alienation and, on the other hand, procedures at the level of the first instance, the change I am presenting here is, in substance, the reason why I seek and of which, in the exercise of the judicial function of which I am responsible and always in the pursuit of the best interest of the child, I intend to be an instrument.

3. Discussion

To properly situate this paradigm shift requires a precise notion of the point from which we begin, in the certainty that we will better understand the point in which we find ourselves.

And to this end, I can not but acknowledge that the question of parental alienation began to be received with great distrust and reservations from the Judiciary, that there are still some remnants of some decisions of our Higher Courts.

For this, the inheritance received at the level of structuring the family relationship has contributed.

Indeed, after several centuries of man's supremacy in the family sphere, where he enjoyed exclusive rights over his children, the nineteenth century brought about important

²⁶⁶ It highlights the emancipation of women and the redefinition of their role in society and the family, with the subsequent crisis of traditional gender roles in the family (Wall, Amâncio, 2007), the recognition of a new place in the family for the children, with new functions and other rights (Cunha, 2007) and affirmation of the values of equality, processes of individualization, diversity and privatization of conjugality (Aboim, 2008).

changes in the status of the parents, and the mother gained powers now equivalent to the father of true supremacy over him in the attribution of the exercise of parental authority (Oliveira, 2007).

The most profound reason for this change is found in the great change of the productive system that operated during the eighteenth and nineteenth centuries, as a consequence of the Industrial Revolution.

Indeed, the discovery of the steam engine and the creation of large industrial units, which replaced home-made craft production by concentrating the production process in factories, forced the workers to move out of the house, thus, a phenomenon that would mark the evolution of the Western family and that is generally known by the "great absence of the father".

Under these conditions, mothers gained a position of supremacy in the domestic sphere and in the daily life of families, having become, in essence, the only parents who had contact with their children.

Adding to this phenomenon the emergence of the general movements of women's emancipation, there was a radical change in the status of mothers in the crises of the family, a statute that received an important reinforcement with the spread of the doctrines of Freud, in which the primordial attachment to the mother appears as a model of attachment (the love model) that the individual would repeat forever.

The expression of this change was the systematic delivery of "young" children to mothers in situations of family breakdown, a trend that in the United States took the form of "tender years doctrine" (Blakesley, Christopher L. 1981) and which has only recently been validly called into question (Washark, 2014).

Joining to this sociological reality is the fact that, until Law 84/95, of 31/08²⁶⁷, parental responsibility is invariably attributed to the processes of parental responsibility arrangements to the parent to whom the child was entrusted, the custody of the child was, in the overwhelming majority of cases, delivered to the mothers (often using the so-called primary caretaker preference, which in practice resulted in a true maternal preference), which were,

²⁶⁷ Until Law no. 84/95, dated 31/08, parental authority was invariably assigned to the parent to whom the child was entrusted, and the said Law consecrated the possibility of parental power being exercised by both parents, provided there was agreement. Subsequently, Law no. 59/99, dated 06/30, provided a new wording to the cited norm, while maintaining the need for parental agreement on the joint exercise of parental responsibility and imposing on the Court, in the absence of agreement, determined, through a reasoned decision, that parental authority was exercised by the parent to whom the child was entrusted. Finally, with the legislative amendment introduced by Law no. 61/2008, dated 31/10, as a rule and without the need for parental agreement, the joint exercise by both parents of the parental responsibilities with regard to issues of particular importance to the life of the child.

ipso facto, exclusive holders of paternal power, relegating the parents to the role of support for the satisfaction of the needs of the children, who were given, as compensation, a right of visits.

And - it should be noted - a right of visits always surrounded by extreme caution, for example, preventing overnight stays with the parents in the cases of children of young age and limiting the periods of conviviality to the weekend, thus leaving safeguarding the continuity of the educational function, whose performance was attributed exclusively to guardian mothers.

This sturdy practice continued without a hitch until the end of the 20th century and it was with her that I was confronted at the beginning of my career in the judiciary, already in the 21st century.

However, in a similar situation, the appearance of a father claiming the effectiveness of his right to visit, imputed to the mother figure the creation of obstacles to the conviviality with the children and demanding the realization of this right was, in the end, an eccentricity, which, in most cases, was not given due attention, and in a large number of situations the Courts limited themselves to declaring that they had not complied with the system of cohabitation, which was almost always justified by the fact that the child did not want to maintain contacts with the father, applying, at most, fines to the non-breeding parent.

To my reservations concerning the acceptance of the concept of parental alienation, I have also, in my view, contributed to the way in which the question was first introduced in the Courts.

In fact, the use of the term "syndrome" for its name led to the problem being initially situated in the mental health plan, with parental alienation as an individual pathology, which was the focus of intense controversy for psychiatrists, pediatricians and psychologists and, consequently, also for the courts²⁶⁸.

Thus, the fact that the term Parental Alienation Syndrome is not accepted in the current classification systems most commonly used in Psychiatry, does not include, in particular, the DSM (Diagnostic and Statistical Manual of Mental Disorders) or ICD-10 Classification International Association of Diseases of the World Health Organization), associated with the fact that this concept is not currently recognized by either the American Psychiatric Association or the American Medical Association (Cintra, Salavessa, Pereira, Jorge and Vieira, 2009) determinant of its rejection by some higher Courts.

²⁶⁸ It is, moreover, a controversy still unresolved, and authors continue to struggle for their inclusion in the Diagnostic and Statistical Manual of Mental Disorders (DSM), either as a mental disorder or as a problem (DARNALL, Douglas, Parental Alienation, LOWENSTEIN, Ludwig, The Long Term Effects of Parental Alienation in Childhood, BERNET, William, Parental Alienation Disorder and DSM-V).

Expression of this rejection of the concept is found, for example, in the judgment of the Court of Appeal of Lisbon, 19.05.2009²⁶⁹, which explicitly rejected the scientific validity of the Parental Alienation Syndrome thesis and therefore denied its application, provisionally suspended the contacts of the parent, who was said to be "alienated" in order to respect the will of the children, which he considered freely expressed and without coercion or manipulation by the mother (that is, despite the unproven practice of such were charged in the proceedings).

Also in the judgment of the Court of Appeal of Lisbon, 08-07-2008²⁷⁰, an implicit rejection of the concept of Parental Alienation Syndrome appears, and the Court states that "It can not be said that a parent who obstructs family coexistence of the mother, its not a good parent to the extent of changing the custody of the child "(...)"

The refusal of the concept continues, to nowadays, being expressed, albeit not openly assumed, in the judgment of the Court of Appeal of Porto, 27-09-2017, in which, although it was considered that "The mother in all this process played a negative role, trying to shape the daughter's will and making her contacts with her father difficult, so that today the coexistence between both became unfeasible", it was decided to condemn only the mother in the payment of a fine, as a sanction for the failure to fulfill his obligations in the case, it being understood that in cases where the minor states expressly and unequivocally his intention not to have contacts

²⁶⁹ Accessible at www.dgsi.pt, in the summary of which it is stated, moreover, the following: "(...) The will of minors has to be weighed considering the state of their development and maturation already on the verge of puberty. . There is no evidence that they have been subject to moral coercion and psychological induction of the mother, nor can the existence of a parental alienation syndrome (SPA) be confirmed, if the even has a scientific basis. Where it must be concluded that the will of minors in refusing to see their father has been freely determined and therefore has to be respected (...)"

²⁷⁰ Decision also available at www.dgsi.pt, issued in a case concerning a child who had been entrusted to the custody of the father with whom she had lived for eight years, because of the mother's economic difficulties. Although the Court has found that on several occasions the child's father and step-mother did not open the door to the mother or give her the child, and that the mother has suffered a great deal because she can not be in contact with the mother, no change in the custody of the child was justified because "any abrupt attitude of change would always be dangerous and could cause damages that are difficult to repair in the minor" (...) "it does not make sense that the minor is involved in an instrumental way by the parents, forgetting their well-being, embodied here in their emotional stability. Neither should the child be penalized by conduct to others' (...)"

with the non-custodian parent, those contacts should not be imposed on him by the court, forcing him into an unwanted coexistence^{271/272}.

However, a different case law chain is being drawn in the judicial world, which, by placing the question of parental alienation in a phenomenological perspective, points to its recognition as a way of affective and family deprivation, shifting the focus of the problem of the alienated parent for the child, deprived of the conviviality with him and his affection.

In my opinion, this has contributed to the gradual increase in the role of children in the specific field of parental responsibilities, which has ceased to be seen as an object of rights²⁷³ to become recognized as a holder of rights and, more than a subject of rights capable of being the holder of legal relations, as a person endowed with feelings, needs and emotions²⁷⁴ and lacking protection, due to his special situation of vulnerability.

Indeed, under the aegis of child and youth protection, family and parenting have been the subject of considerable political and social attention, expressed in national and international legislation that has been produced for this purpose.

At national level, the ratification by Portugal of the Convention on the Rights of the Child (21-09-1990), Constitutional Law no. 1/2005, of 12 August (seventh constitutional revision), Articles 67, 68, 69 and 70), the Law on the Protection of Children and Young People in Danger (approved by Law no. 147/99, of 01/09) and the regulation of their promotion and protection

²⁷¹ Decision available at www.dgsi.pt, with the following summary: "I. In the exercise of parental responsibilities in case of divorce, the court must always decide in accordance with the interests of the minor. II - If, in a situation of non-compliance with the visitation procedure, the 11-year-old minor states expressly and unequivocally his intention not to have contacts with the non-guardian parent, such contacts should not be imposed by the court, -or an unwelcome conviviality. III - The right of conviviality with the father should not overlap with the preservation of the mental health and the emotional integrity of the minor. IV - However, since it has been shown that the mother, as guardian parent, obstructed the child's contacts with her father, failing to comply with the visitation regime, must be sentenced to a fine."

²⁷² The current case law cited is, moreover, supported by the doctrinal contribution of Maria Clara Sottomayor, who, with great echo in the judicial world, has defended that: "these processes, in which the child is often not heard and brought to the parent applicant, under coercion of the police forces, treat the child as an object, property of the father and ignore their feelings and desires; if we think it unthinkable to force conviviality and affection towards adults who do not want them, why coerce the children into living with the non-custodial parent? Is it up to the court to impose affects? Will the child learn to respect others when the judicial system does not respect you? Children are assessed as ill for participating in parent denial campaigns, which may include false allegations of sexual abuse, and alienating parents are diagnosed with hysteria; The figure, in the opinion of this author, has only contributed to the allegations of sexual abuse in the process of regulating parental responsibilities, are presumed to be false and to demonize the mother, who intends to protect her children "(SOTTOMAYOR, Maria Clara , A Critical Analysis of Parental Alienation Syndrome and the Risks of its Use in Family Courts, *Julgar Review*, no. 13, January-April 2011, p.73 et seq.).

²⁷³ Parecer do Conselho Consultivo da Procuradoria Geral da República n.º 8/91, de 16 de janeiro, *BMJ*, 418.

²⁷⁴ SOTTOMAYOR, Maria Clara, *Regulação do Exercício das Responsabilidades Parentais nos Casos de Divórcio*, 5ª edição, Almedina, Coimbra, 2011, p.13.

measures and, more recently, the General Regime of the Civil Guardianship Process (approved by Law no. 141/2015, of 08/09).

At the international level, in addition to the Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989 (UNICEF, 1989) and the commitment to ratification by all countries, the efforts made by the Council of Europe (2006, 2011) to promote policies to support positive parenting.

It is indeed in a context of child protection that the concept of positive parenting defined in the 2006 Council of Europe Recommendation (19) has emerged as parental behavior based on the best interests of the child to meet their main needs and their training, without violence, providing them with the recognition and guidance necessary for their full development, pointing out, among the measures promoting the exercise of such parenthood to be implemented by the Member States, the need to adopt an approach based on the rights, treating children and parents as holders of rights and obligations, recognizing that parents are primarily responsible for their children, and ensuring their equal participation in the process of the education and development of children with respect for their complementarity.

This growing importance of the need for child protection and parental responsibility for its parental role was expressly enshrined in the law by the publication of the aforementioned Law on the Protection of Children and Young People in Danger²⁷⁵, parental responsibility²⁷⁶ and the prevalence of the family²⁷⁷, and was the basis of the legislative amendment introduced by Law no. 61/2008, of October 31, through which, in addition to the terminological change effected with the transfer of the traditional (paternal) power in (parental) responsibility, the joint exercise by both parents as regards issues of particular importance to the child's life, recognizing the need to share parental responsibility and seeking to safeguard the equitable and complementary participation of parents in the process of child growth and education. More recently, effective legal protection of the alleged need for affective attachment of the child was

²⁷⁵ According to which the intervention must take priority attention to the interests and rights of the child and the young person, in particular the continuity of relations of quality and significant affection, without prejudice to the consideration due to other legitimate interests in the scope of the plurality of interests present in the specific case - cf. article 4, al. a) of the Law on the Protection of Children and Young People in Danger.

²⁷⁶ Imposing that the intervention be effected so that the parents assume their duties towards the child and the youth - cf. article 4, al. f) of the Law on the Protection of Children and Young People in Danger.

²⁷⁷ By virtue of which, in the promotion of rights and in the protection of the child and the youth, prevalence must be given to measures that integrate them into their family or promote their adoption - cf. article 4, al. g), of the Law on the Protection of Children and Young People in Danger, in the wording prior to Law no. 142/2015, of September 8 (principle now contained in letter h), of the said norm, with the following wording: " of rights and in the protection of the child and young person should be given priority to the measures that integrate them in family, or in their biological family, or promoting their adoption or other form of stable family integration.

pursued by Laws no. 142/2015 of 08/09 and 141/2015 of 08/09, which enshrined the primacy of the continuity of psychological relations as a guiding principle, respectively, of intervention to promote the rights and protection of children and young people in danger and of the application of civil protective measures²⁷⁸.

On the other hand, the emergence of the jurisprudential current cited can not be separated from social movements that have accentuated the role of affection in parenting, emphasizing that the bond that the child establishes with his caregivers goes far beyond the satisfaction of his physiological needs, translating it also seeks safety and comfort in the relationship with the adult, that is, in a particular need for attachment²⁷⁹.

In fact, this specific need of the child to create affective bonds with parental figures to comfort, stimulate and love him in a special way posits, in cases of separation, a special commitment of parents towards their children to respect their right to maintain a good image of each of them, thus safeguarding the bonds created before the break in the marital relationship, requiring both to actively collaborate in the repair of episodic situations of conflict²⁸⁰.

By imposing on the parents the preservation of children's affective bonds, safeguarding their need for attachment points, therefore, to the existence of a framework of sharing responsibility for their destiny, involving both in the daily life and in the education of the child, so to foster mutual coexistence and mutual relationships after marital rupture, increasing the participation of one and the other in the process of their development and growth and allowing the sedimentation and strengthening of the joint authority of the parents²⁸¹.

²⁷⁸ Nos termos do artigo 4º, al. g), da Lei de Proteção de Crianças e Jovens em Perigo, na redação introduzida pela referida Lei n.º 142/2015, de 08/09, o indicado princípio impõe que a intervenção tenha por critério e limite o respeito pelo direito da criança à preservação das relações afetivas estruturantes de grande significado e de referência para o seu saudável e harmónico desenvolvimento, devendo prevalecer as medidas que garantam a continuidade de uma vinculação securizante. Por seu turno, a mencionada Lei n.º 141/2015, de 08/09, que aprovou o Regime Geral do Processo Tutelar Cível, acolhe o mesmo princípio como critério orientador da aplicação das medidas tutelares cíveis aqui previstas (designadamente, a regulação das responsabilidades parentais), face à expressa remissão para os princípios estabelecidos na lei de proteção de crianças e jovens em perigo, operada pelo artigo 4º, deste diploma legal.

²⁷⁹ SÁ, Patrícia Carneiro de, *Vinculação ao pai e à mãe: Contribuições Específicas para o Ajustamento Escolar em Crianças*, Faculdade de Psicologia da Universidade de Lisboa, 2010, p. 5, available in URL: http://repositorio.ul.pt/bitstream/10451/2505/1/ulfp035830_tm.pdf.

²⁸⁰ CAMPOS, Maria Teresa, *Um Estudo Fenomenológico da Experiência de Rapto Parental*, Tese de Mestrado em Psicologia Clínica, ISPA, 2012, p. 11.

²⁸¹ In this sense, it can be read in the Judgment of the Supreme Court of Justice September 28, 2010, reported by the Board Member FONSECA RAMOS, accessible at <http://www.dgsi.pt/>, "Law 61/2008, of October 31, was to change not only legal terminology, but also to substitute parental responsibility for parental responsibilities, thus seeking on behalf of the superior interests of minors affected by their parents' family situations, to defend them and to involve parents in measures affecting their future, co-involving them and making them responsible, notwithstanding marital breakdown, preserving relations

However, on the basis of this sharing of responsibility, which is particularly strict for parents, the Courts can not fail to assess, with equal rigor, the way in which they respond, in situations of marital breakdown, to the need for safety and comfort of their children, enabling them to create conditions that ensure their stability and enable them to understand the situation of disruption to which they are exposed, helping them to manage this new reality and overcome the insecurities and fears with which they perceive the separation of their parents.

Thus, since parents have not been able to fulfill their responsive and securizing function and have exposed their children to the harmful effects of the disruption of their marital relationship (especially their conflict), such conduct must necessarily be displaced from the sphere of the relationship of parents to the proper field of parenting and parental responsibility, where it is assumed as a frontal violation of the right of the children to maintain the conditions appropriate to their sound and balanced development²⁸².

Finally, the consecration of principles such as parental equality²⁸³ and that children should not be separated from their parents²⁸⁴, except when they do not fulfill their fundamental duties towards them (Pineiro, 2015), and the attribution of legal force to the parents called "friendly parent provision"²⁸⁵, allowed us to situate ourselves on a level of legality²⁸⁶, in which the Courts the prevaricating conduct of one of the parents after the termination of the conjugal relationship necessarily prevails, thus requiring the adoption of measures that reaffirm the validity of the contravened norm, recognize the right violated, and prevent or remedy the violation and, if necessary, its enforcement²⁸⁷.

of proximity, and consecrating a legal regime in which even the parent who does not have paternal power must be heard and thus be co-responsible for the education and destiny of the child ", which is a question of" matters of particular importance to the life of the child ", which, as a rule, are jointly exercised and reciprocally informed".

²⁸² In fact, if it is true that the separation of the parents does not in itself lead to negative consequences for the children, the negative experiences of this separation are likely to place them in a situation of vulnerability, being a risk factor for the development of emotional problems and behavioral disorders (SANTOS, Maria do Carmo, *Mental Health Problems in Children and Adolescents, Identify, Evaluate and Intervene*, Edições Sílabo, Lda., Lisbon, 2013, pp. 170-171).

²⁸³ Cf. Articles 36, 5 and 13 of the Constitution of the Portuguese Republic; Article 18 of the Convention on the Rights of the Child.

²⁸⁴ Contained in article 36, paragraph 6, of the Constitution of the Portuguese Republic.

²⁸⁵ Consecrated in article 1906, paragraph 5, of the Civil Code, in the wording introduced by Law 61/2008, of October 31, under which the court will determine the residence of the child and the rights of visit according to the interest taking into account all relevant circumstances, in particular the possible agreement of the parents and the willingness expressed by each of them to promote the child's habitual relations with the other.

²⁸⁶ Pursuant to article 203, of the Constitution of the Portuguese Republic, the Courts, being independent, must obey the Law (cf., also, article 4, of the Law of Organization of the Judicial System, approved by Law no. 62/2003, of 26/08).

²⁸⁷ Cf. Article 2 (2) of the Code of Civil Procedure.

It is, therefore, within this legal framework and in this perspective of child protection that the question of parental alienation must be situated, here residing the core of the change of the judicial paradigm to which it is aspired, being now the time to abandon the controversy that has so much motivated the medical sciences, about the qualification of parental alienation as a disease and to assume the recognition of this reality and the effects that it can present to the children who are exposed to these behaviors (Sá e Silva, 2011).

In this sense, moreover, most recent case law has been pronounced, reinforcing the idea that the so-called paradigm shift is effectively gaining shape in the judicial world.

Thus, in the recent Judgment of the Court of Appeal of Guimarães, October 19, 2017, it was considered that "(...) parental alienation, not having been scientifically recognized as a syndrome, constitutes a social practice of emotional withdrawal from the child to one of the parents by an intentional, unjustified and objectionable action of the other, in particular because it is determined by selfish and frivolous interests of their own, and not by the "best interest" of the child²⁸⁸.

Also in the Judgment of 04-12-2012, the same Court accepted the application of the concept of parental alienation, having considered that "(...) regarding the regulation of the exercise of parental responsibilities in case of divorce and/or judicial separation of persons and property, is art.º 1906 (7) of the Civil Code, quite clear and incisive in determining that "(...) the Court will always decide in accordance with the interest of the child including maintaining a close relationship with the two parents (...) "²⁸⁹.

²⁸⁸ Available in URL: www.dgsi.pt.

²⁸⁹ In the cited judgment, also accessible at www.dgsi.pt, it was considered that the right of access "also constitutes a right-duty, a right-function, that is, a right to be exercised not in the exclusive interest of its holder (it is not a subjective right stricto sensu), but above all in the interests of the minor (see article 1906, paragraph 5, of the Civil Code). It is important not to forget that it is essential to take into account that the child needs [so that in physical and mental growth he can gain and structure a personality and a harmonious and healthy mental and mental balance] "likewise of the father and mother and that, by nature, none of them can fulfill the function that the other has "and therefore, it is essential that the relationship of the minor with the parent to whom he is not" (...) is entrusted if it is carried out normally and without resistance or difficulties, part of the parent to whom his or her guardianship belongs, whether in the second line, on the part of the minor himself ", arguing further that " it is essential to safeguard the satisfaction of the basic need of the child for continuity of their affective relationships under pain to create serious feelings of insecurity and to affect their normal development, "which means" the denial or suppression of the right of visit of the parent without the custody of the children only by justified - and as the last "ratio" - in the context of an extreme conflict between the interest of the child and the right of the parent ", the Court of First Instance being alerted, whose decision was revoked there, for the parental alienation is not always always obtained by active means, "being sometimes carried out in a silent way, which happens eg when the custody spouse, faced with the child's unjustified resistance to the other parent, is limited to not interfering, making it difficult to comply with an agreement approved by sentence, that is, a judicial decision. "

Positioning also in favor of the acceptance of the concept of parental alienation, the Judgment of the Court of Appeal of Lisbon, of 01/26/2010, considered "(...) the so-called Parental Alienation Syndrome, as a disorder that arises mainly in the context of the disputes for the custody and trust of the child, characterized by a set of symptoms resulting from the process (parental alienation) by which a parent transforms the consciousness of his child, with the purpose of preventing, hindering or destroying the child's bonds with the other progenitor (...)", and is therefore an enabler of the alteration of the regimen of regulation of parental responsibilities previously defined²⁹⁰.

In the same sense, it was considered in the Judgment of the Court of Appeal of Porto, July 9, 2014 that "(...) the so-called Parental Alienation Syndrome (PAS) is characterized by interference in the psychological formation of the child or adolescent, carried out or induced by one of the parents, other relatives or even third parties who have the child or adolescent under their authority, custody or vigilance, in order to cause a significant break or damage in the affective ties proper to the existing membership between the child and the target parent, without there being a moral or socially acceptable justification (...)", clarifying that, not being a disease, the Parental Alienation Syndrome exists as a social phenomenon, resulting in interference in the psychological formation of the minor that constitutes moral abuse and is qualified as maltreatment²⁹¹.

Joining the current jurisprudential case, the Evora Court of Appeal observed in the Judgment of April 11, 2012 that "(...) parental responsibility is a functional duty-power that must be exercised altruistically in the interests of the child, in harmony with the function of law, embodied in the primary objective of protection and safeguard of their interests; the supreme interest of the child is the true reason for being, the criterion and the limit of parental authority... "whose exercise"... should be attributed to the parent who is better able to respond to the interest of the child ... " ²⁹².

²⁹⁰ In the decision cited (available at www.dgsi.pt), the Lisbon Court of Appeal further considered that "(...) the desired breakdown of the relationship with one of the parents necessarily implies an impoverishment in the multiple areas of the child's life, in the case of interactions, learning and exchange of feelings and supports, but also, being able to generate, in view of the presence or possibility of approaching the non-guardian parent, reactions of anxiety and anguish, in themselves equally pathological. ...) the apartment of a parent, without justification that imposes it, fostered by the other parent, even without a systematic programming of a whole process, aimed at generating, and obtaining, a real and effective removal from the minor in relation to the parent who does not can not but be prevented, but above all combated, and necessarily weighed, together with their parental responsibilities, in the intervention of the court, with a view to changing the regime of regulation of parental authority defined above (...)"

²⁹¹ The full text of the Judgment is also available at www.dgsi.pt.

²⁹² By accepting the so-called friendly parent provision clause, as provided for in Article 1906 (5) of the Civil Code, the Court considered that it is not in a position to correspond to the interest of the minor that

From the above-mentioned decisions, which are reinforced, they form part of a chain that can be considered as majority in the higher courts, it is deduced that, situated in a phenomenological perspective and in the margin of the discussion about its scientific nature, parental alienation is judicially recognized as an unjustified form of affective and family deprivation of the child, consisting of the intentional behavior of one parent, even if carried out in a veiled or disguised way, animated by the purpose of breaking the child's affective bonds with the other, depriving them of their relationships, affections and care, in view of the exclusiveness of affection and family coexistence (Feitor, 2016)²⁹³.

The alienating behavior thus denies the child his need for safety and comfort, thus representing a malignant and negative parenting that comes to disrupt family relationships and cause breakages in the child's relationship with one of his parents and other relatives, (Molinari and Trindade, 2013).

Where, in the light of such jurisprudential current, parental alienation constitutes a form of emotional abuse, psychological and emotional abuse, ending an abusive exercise of parental responsibility which, in my opinion, constitutes a cause of civil liability and the concomitant

the parent who in a process of alienation parental prohibits or prevents any contact between the child and his / her parent, denigrating his / her image to him / her and to third parties, imputing him / her aggressive behavior and sexual abuse, removed on the basis of his / her own investigation (in the criminal proceedings instituted and in the gynecological examinations carried out) and maintaining a behavior of obsessive protection of the child, refusing any collaboration with the Court in this area, the child being in this danger, in danger of being negatively affected in their right to development are normal and in the plan physical, moral, spiritual and social intellectual in the face of the manifest situation of parental alienation of her mother, which imposes a cut with such a situation, which is only possible, given the total refusal of any collaboration, by the radical measure of alteration of the custody of the child, with its delivery to the father, while safeguarding the maintenance of the affective relationship of the child with the through an appropriate system of visits (see Full text of the decision at www.dgsi.pt).

²⁹³ The current jurisprudence indicated is therefore based on the concept introduced by Richard Gardner in 1985 when he defined the phenomenon of parental alienation as "the disorder by which a parent transforms the consciousness of his children through various strategies, aiming at prevent, conceal and destroy existing links with the other parent, which arises chiefly in the context of the dispute over the custody of children, through a defamation campaign against one parent without justification" (GARDNER, Richard Recent Trends in Divorce and Custody Litigation, in Academy Forum, Publication of the American Academy of Psychoanalysis, Volume 29, Number 2, Summer, USA, 1985, available at <http://www.fact.on.ca/Info/pas/gardnr85.htm>).

obligation to indemnify²⁹⁴, a reason for inhibiting the exercise of parental responsibilities²⁹⁵, and may even be a source of criminal responsibility²⁹⁶.

This change in the approach and treatment of the problem of parental alienation can not be separated from the current profile of most Courts with competence in the area of Family and Children and the ways opened by the procedural rules currently in force.

In fact, it is the Courts that are constitutionally entrusted with the duty of administering justice²⁹⁷. It is the task of the Courts to resolve the conflicts generated by the exercise of parental responsibilities, always in the best interest of the child, but also in the stability and security of family relationships.

However, the specific characteristics of the jurisdiction of the family and children requires the creation of Courts with special characteristics. Experience has shown that, in the cases under analysis, where the regulation of parental responsibilities takes place in contexts of authentic deregulation of feelings and affections, rather than a legal response dictated by the dryness and objectivity of a sentence, the users of justice require an authentic therapeutic work, which does not dispense the use of specialized technical advisory services in a framework of interdisciplinarity and a dialogue as fruitful as possible with the various entities involved in the lives of children and young people (hospitals, psychologists, kindergartens ...).

This step was decisive among us, with the entry into force of Law 62/2013, of 26/08 (which approved the Law of the Organization of the Judicial System) and Decree-Law No. 49/2014, of 27/03 (which approved the Regime for the Organization and Functioning of Judicial Courts), law that led to the establishment of specialized jurisdictions in the area of family and children, whose competence began to cover almost all of the national territory²⁹⁸.

²⁹⁴ Pursuant to Article 483 (1) of the Civil Code, under which "anyone who intentionally or unlawfully violates another's right or any legal provision designed to protect the interests of others shall be obliged to compensate the injured party for damages resulting from the breach".

²⁹⁵ In accordance with article 1915, paragraph 1, of the Civil Code, which states that "at the request of the Public Prosecutor's Office, any relative of the minor or person entrusted with custody, de facto or de jure, may the court shall order the disqualification of the exercise of parental responsibilities when any of the parents is guilty of wrongful misconduct, or when, due to inexperience, illness, absence or other reasons, he or she is unable to perform those duties".

²⁹⁶ The conduct indicated may be included in the offense of child abduction, foreseen and punished by article 249 (1) (c) of the Penal Code, in the practice of which "repeatedly and unjustifiably fails to comply with the established regime for the coexistence of the minor in the regulation of the exercise of parental responsibilities, by refusing, delaying or significantly impeding their delivery or reception."

²⁹⁷ Cf. Article 202 of the Constitution of the Portuguese Republic.

²⁹⁸ However, the path opened by the aforementioned diplomas was a major setback with the entry into force of Law 40-A / 2016, of 22/12, which, under the pretext of bringing the Courts closer to citizens, in matters of family and children to various judgments of generic competence. In my opinion, it was a question of a dubious legislative option (in particular, because there were ways in which the specialized judgments previously installed could be brought closer to the populations they served, either by means of teleconferences or by the very movement of judicial places which are further away from the seat of the

On the other hand, the procedural laws that presently regulate the procedures pertaining to the tutelary protection²⁹⁹ court and the civil defense courts³⁰⁰ allow a differentiated and interdisciplinary response to situations of parental conflict, especially when such conflict reaches the level of affective and family deprivation that parental alienation closes, reinforcing the existence of conditions for the desired change of paradigm in this matter, where it stands out the support in the figure of the manager of the process³⁰¹ and in the multidisciplinary technical advice³⁰² that, because they are endowed with specific technical and scientific knowledge on family and parental conflict, are more apt to identify cases of alienation and to identify the type of conflict, intensity and dynamics and to point the possible ways to overcome them³⁰³.

Thus, judging from their specialized structure and the technical advice available to them, Family and Juvenile Judges are now in a position to give a more adequate response to the problem of parental alienation, which, necessarily, by psychological evaluation of the actors and children, in order to avoid the cause of affective and family withdrawal that is intended to be overcome, can be achieved through the specialized monitoring of parents and children during

Court). It seems that, in the medium term, judicial practice will show that the guarantee of access to law and effective judicial protection (see Article 20 of the Constitution of the Portuguese Republic) is more effectively safeguarded with the existence of a specialized judge than with the possibility of appealing to a territorially closest judge.

²⁹⁹ Since the child's exposure to the parents' conflict and the affective and familial deprivation of one of them is likely to constitute a danger to his or her being and integral development, it is shown, in these cases, and in relation to the provisions of article 3, n 1 and 2, al. f) of the Law on the Protection of Children and Young People in Danger, legitimizing the State's protective intervention and establishing a process of promotion and protection.

³⁰⁰ In particular, in the processes of regulation of parental responsibilities, breach of parental responsibilities and changes in previous regulations - see, respectively, articles 34 et seq., 41 and 42, of the General Regime of the Civil Tutelary Process.

³⁰¹ Under Article 82a of the Law on the Protection of Children and Young People in Danger, the actors and resources available to ensure, in a global, coordinated and systemic manner, all support, services and child or young person and their family need, providing information on the whole of the intervention developed.

³⁰² Ensured by multidisciplinary technical teams, which, under the terms of article 20, of the General Regime of the Civil Tutelary Process, is responsible for supporting the investigation of civil suits and their incidents, supporting children involved in the proceedings and monitoring the execution of decisions.

³⁰³ Under the terms of article 20, paragraph 1, of the General Regime of the Civil Tutelary Process, these multidisciplinary technical teams should preferably work with Family and Juvenile Courts, which presupposes the existence of a body of advisors integrated in the Ministry of Justice and distributed by the various Courts. This legislative purpose is not yet fulfilled, which is why, and because the interdisciplinarity mentioned in the main text does not correspond to the structure, hierarchies and bureaucracy of the Social Security Institute, in the Family and Minors Court of Coimbra, a response to that legislative challenge was made through the assignment of technicians of that Institute to each of the judges who held office there, by streamlining the channels of communication between the two institutions (Court and Social Security Institute) and succeeding, thanks to the collaboration of the Childhood and Youth Center of the Coimbra District Center of the Social Security Institute, the permanent counseling referred to in the cited norm.

the execution of provisionally regulated regimen of parental responsibilities³⁰⁴, or even in sessions of family therapy and / or psychotherapeutic follow-up, before a final decision is made, when it is considered that the removal of the obstacles raised to the healthy coexistence of the child with each of the parents does not suffice a possible supervision of meetings, a more invasive and specialized intervention will be sought, which will seek the root of the problem and seek to give it a solution in this therapeutic perspective³⁰⁵, which can be achieved either in the field of civil defense courts, by means of a stay of proceedings,³⁰⁶ or in the scope of the tutelary protection court, during the monitoring of the implementation of the support measure with the parents³⁰⁷. Lastly, the response of the Family and Juvenile Courts to this problem can also be fulfilled even during the implementation of the parental responsibilities arrangements established, whenever there is a risk of non-compliance³⁰⁸, in particular, the settlement rules defined there³⁰⁹.

However, it should be emphasized that intervention with better guarantees of success is necessarily preventive, which can be implemented in recent cases of family breakdown in which signs of attempts by one parent to deprive the child of living with the other, providing the Courts with a procedural means sufficiently ductile for this purpose, being able to make provisional or precautionary decisions³¹⁰ which may consist, in particular, and whenever the necessary conditions exist, in the implementation of an shared residence arrangement, which promotes the exercise of positive parenting and a consistent coexistence with both parents, being a relevant factor of pacification of tensions and conflicts, above all, by placing the parents

³⁰⁴ In particular, when a system of supervised relationships is instituted that allows specialized technicians to evaluate and perceive the degree of attachment of the child to the parent whose affection and conviviality has been deprived - cf. Article 28, paragraph 1, final part, of the General Regime of the Civil Guardian Process

³⁰⁵ Cf. Article 22, of the General Regime of the Civil Tutelary Process.

³⁰⁶ Cf. Article 272 (1) of the Code of Civil Procedure, considering that, when a diagnosis of parental alienation has been made, referral of the family to the therapeutic response referred to in the main text constitutes a justified reason for suspension for the necessary time to the completion of therapy.

³⁰⁷ Cf. Pursuant to Articles 35, paragraph 1, al. a), 39 and 40 of the Law on the Protection of Children and Young People in Danger, this support measure with parents presupposes, in particular, the provision of psycho-pedagogical and social support, as well as parental education for better exercise of parental functions.

³⁰⁸ Cf. Article 40, paragraph 6, of the General Regime of the Civil Tutelary Process.

³⁰⁹ In the Family and Minors Court of Coimbra, the monitoring referred to in the main text has been requested from various entities, namely the advisory team of the Court (from the Social Security Institute), the Community Service Center of the Faculty of Psychology of University of Coimbra, the Integrated Family Support Center of Coimbra (CEIFAC) and even to the various Centers for Family Support and Parental Counseling (CAFAP) that provide services in the municipalities covered by the jurisdiction of that Court.

³¹⁰ Cf. Articles 28 and 38, of the General Regime of the Civil Tutelary Process, and 37, of the Law on the Protection of Children and Young People in Danger.

in a position of strict equality³¹¹, as it is a model that can, in my opinion, be implemented in the margins of the agreement of the parents and independently, presenting the best conditions to respond to the obligation, contained in Article 1906 (5) of the Civil Code, in order to regulate parental responsibilities, the court will make decisions that promote large opportunities for contacts with both parents and for sharing responsibilities between them (Figueiredo, 2017).

Finally, it should also be noted that, in order to ensure the success of intervention in these cases, the Courts may resort to mechanisms of a compulsory nature, such as imposing fines for each violation of defined arrangements³¹², the issuance of driving orders, to be complied with by police agencies, accompanied by specialized technical advisory teams³¹³, the commencement of the crime of disobedience to violations of the defined living arrangements, alteration of the child's residence, provided that the parent with whom the child lives does not reveal the ability to promote and encourage the child's relationship with the other, it is understood that the latter has conditions to guarantee the child's residence and to provide for the maintenance of the relationship with the child³¹⁴, the commencement of the crime of disobedience to each violation by the guardian progenitor of the defined living arrangements and, in extreme cases, the delivery of the child to the custody of a third person, namely the family member or affectively relevant person, or even the host family or institution, with a view to safeguarding the child's coexistence with that of whom he has been deprived and allowing the prevaricator to reflect on his behavior and to reassess the way he has exercised parenting³¹⁵.

4. Conclusion

Arrived here, I think it fair to say that is really taking shape in the legal universe a real and effective paradigm shift to the issue of the level of parental alienation, given the emergence of a new jurisprudential current, overcoming the reservations initially raised the acceptance of

³¹¹ Esta forma de residência e a partilha de responsabilidades que implica pode, de facto, ser uma forma de manter ambos os progenitores presentes na vida dos filhos e pacificar as tensões e conflitos, nomeadamente, fazendo-os participar igualmente na vida dos filhos, por forma a evitar a tendência para a exclusão de um deles (KRUK, Edward, Co-parenting and High Conflict: separating former marital disputes from ongoing parenting responsibilities, 2012, Sixteen Arguments in Support of Co-parenting, 2012, trabalhos acessíveis em <http://www.psychologytoday.com>).

³¹² Cf. Article 41, paragraph 6, of the General Regime of the Civil Tutelary Process; In this respect, the Judgment of the Court of Appeal of Coimbra dated January 14, 2014, accessible at www.dgsi.pt, where it was considered that "(...) nothing prevents that in common tutelary action a pecuniary sanction compulsory and fixed in favor of the State the amount of € 200.00 for each time the mother of the minor, the right judge, does not grant grandparents the company of the granddaughter, in the terms judicially set ...".

³¹³ Cf. Article 41, paragraph 5, of the General Regime of the Civil Tutelary Process.

³¹⁴ Cf. Article 1906 (5) of the Civil Code.

³¹⁵ Cf. Articles 35, no. 1, als. (b), (c), (e), (f), 40, 43, 46 and 50 of the Law on the Protection of Children and Young Persons in Danger; Article 1918 of the Civil Code.

the concept, you now recognize legal significance, for which contributed decisively to move this scientific field theme to the area of phenomenology, the new configuration of family relationship based on the principle of equality of spouses and parents of equal participation in the process of education and development of children, and recognizing the need for emotional attachment of the child, existing today, given the current structure (of the majority) of the Courts with jurisdiction in the area of Family and Children and the legal remedies available, conditions that promote the resolution effective and assertive treatment of the affective and family life of the child, whose superior interest should still and always be the sole criterion and the ultimate limit of judicial intervention.

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