JOINT CUSTODY IN BRAZIL

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1. Children’s custody in the Brazilian juridical order

Child’s custody has always been a matter of analysis in the Brazilian juridical order, particularly in these situations where the family conflicts were related to the determination of parental attributions.

In the last decades there has been a progress in the Brazilian legislative frame, which made the protection for children and teenagers a central point for family, society and State responsibility.

The significance of the custody institute may be shown with the legal evolution. The Law which introduced the Divorce in 1977, The Children’s Law in 1979 and The Child’s and Adolescent’s Statute in 1990 confirm the State concern to accompany the changes that took place in the family and in the relationships between parents and children.

There is no doubt that the normative landmark occurred with the article 227, § 6th of the 1988 Federal Constitution, which assured affiliations isonomy and prohibited the discrimination of children born out of the marital union.

The Código Civil Brasileiro from 1916, which was in force until 2003, determined that “in case of the conjugal bond breakup due to separation by mutual agreement, it will be observed what the spouses agree about the children’s custody. In case of judicial separation, the underage children will remain with the innocent spouse.” The law deemed “guilt” as determinant for the end of the marriage in order to attribute the custody.

Still in relation to the former Código Civil, if both the spouses were deemed guilty, the children would be granted to the mother’s custody, unless the judge found out that such a solution could bring more damage of moral order to the children. If the children couldn’t stay with neither the mother nor the father, the judge might award the custody to another notoriously qualified person from the family of either spouse, even though those might not have social relationship with each other, assuring, however, the right of visits. In serious cases the judge might even establish, for the children's good, a different rule for the situation in relation to their parents.
The Código Civil Brasileiro of 2002 ruled the custody institute founded on the parental authority, receiving legislative reference in the chapter that establishes about “Conjugal dissociation and bond breakup”. The article 1.583 and the following of the Chapter XI separated the custody discipline related in the children’s protection.¹

The approach of the matter in the new Civil Code is presented in similar way as that of the previous legislations and without significant changes, although the social context and that of the family relationship are entirely different. For determination of children’s custody it must be observed what the parents agree, and, in case of divergence the custody shall be attributed to the one that reveals better conditions for that.

It seems evident the need for interpretation having as a guide the principle of the children’s best interest, as the legislator has established that the attribution shall be granted to the father or mother who shows better conditions. Such determination is censurable enough, as the focus for a decision that involves a child must be based on the figure of the child and its happiness, not in the person of the parents. To analyze the

¹ Art. 1.583. In case of marriage or conjugal bond dissolution by consensual judicial separation, or by consensual direct divorce, it is observed what the spouses agree about the children’s custody.

Art. 1.584. In case of Judicial separation or divorce by decree, with no agreement between the parties concerning the children’s custody, this will be attributed to whom reveals better conditions for its exercise.

Sole paragraph. If its found out that the children shouldn’t remain under neither the father’s nor mother’s custody, the judge will award the custody to the person that reveals compatibility with the nature of this measure, preferably taking into account the kinship grade and the affinity and affectivity relationship, according to the provision in the specific law.

Art. 1.585. In case of precautionary body separation, it is applied to the children’s custody the provisions set in the previous article.

Art. 1.586. If there are serious reasons, the judge may, in any case, for the good of the children, regulate in a different manner from that established in the previous articles their situation in relation to their parents.

Art. 1.587. In case of marriage invalidity, if there are children in common, it is observed the provisions of the arts. 1.584 and 1.586.

Art. 1.588. The father or mother who celebrate new marriage do not miss the right to have the children with them, who can only be taken away by judicial order, in case of proof that they are not cared conveniently.

Art. 1.589. The father or mother who are not granted the children’s custody, may visit them or have them in their company, according to what has been agreed with the other spouse, or established by the judge, as well as supervise their support and education.

Art. 1.590. The provisions related to the minor children’s custody and alimony include the handicapped adult children.
parent’s better conditions is an excessively subjective task, and might lead to an unfair decision far from what is intended by the doctrine and the modern jurisprudence.

To think on the parents’ better conditions leads to situations of extreme arbitrariness, bringing about the reflection about what would be the parent’s better condition: better financial conditions, place of residence, emotional, moral and so many other conditions that may be present in the concrete cases. These are faulty and unclear criteria that do not necessarily meet the child’s best interest.

The pointed perspective is even more inadequate when the legislation takes into account the parents’ behavior before the separation as criteria for the attribution of the custody. The role of the guilt may become determinant, to the detriment of the children’s well-being.

The guilt for the termination of marriage is object of serious criticism in the Brazilian doctrine and jurisprudence, as they are extremely subjective issues concerning the family and the conjugal union. At the time of the separation, it refers to the determination of the parental role without considering what is essential and determinant: the children’s best interest.

The Civil Code also approaches the children’s custody in the chapter about affiliation recognition, determining that the child who is recognized, while under age, will remain under the custody of the parent who has recognized it, and, if both parents did it and there is no agreement about it, “under the custody of the one who best meets the child’s interests”. The rule that is described in the article 1612 is isolated in relation to the custody and the parental authority, but it is extremely significant as it mentions the principle of the child’s and the adolescent’s best interest.

On the face of the legislative panorama, the conclusion is that the children’s custody is a very sensitive issue, as it involves, mostly, conjugal and subjective issues. With these conclusions, we look for an innovative conception for the parental relationship, preserving the principles that protect the family and the children starting from the doctrine formulations that may become effective in the juridical practice.
2. Criteria for determination of the custody: the search for the best interest

The theme of this work is directly related to the issue of the familiar structure. The juridical proceedings of custody dispute may represent conflicts, leading to the rupture of the relationship between parents and children.

To describe criteria for determination of custody, it must be provided to the child and to the adolescent a safe environment, where its growth is preserved, granting the search for the children’s high interest.

First, to find out the family reality for the continuity of the parental relationship and the determination of the attributions to both parents, with disregard to whether there is a conjugal relationship or not. In the cases of separation, divorce, marriage annulment or nullity or any hypothesis of breakup between the parents, the common custody is cut off.

The custody, as it comes from the parental authority, is up to the parents. When they live together in the same home, the custody is exercised by both of them, except in the hypothesis of delegation to third party, by agreement or by suspension or destitution of the family power. In the families where the one who has the parental authority lives a conjugal union, it becomes easier to accomplish the parental obligations and duties. The destination of the parental relationships seems to be more complex when the parents don’t live together in the same home; therefore, it is necessary the formulation of criteria for the analysis of the custody, that must coincide with the guarantee of the child’s best interest.

The custody division brings, as an inevitable consequence, the debate about the minor children’s interest, interfering as much in the communication between each of the parents and their children as on the aspect of the familiar group living together.

The conjugal breakup creates a monoparental family, and the parental authority, carried out so far jointly and equally by the father and the mother, accompanies the crisis and focus on just one of the parents, remaining to the other a diminished secondary role, with visits, food supply and supervision.

To define custody attribution is a hard task, as it implies the examination of the concrete case, considering the subjectivity and searching for what may seem the best interest. Bittencourt has taught that the child’s interest is an issue to be settled exclusively by the judge, applying the Law. Adding to this assertion the other parties
involved in the juridical proceedings, such as lawyers, prosecutors and, particularly, the technical professionals able to produce psychosocial reports.

The purpose of the juridical science is to protect the interests in a general and abstract way, the analysis being carried out on every case, in an individual manner. The concrete interests are used for shaping the decision that will establish the children’s custody.

It is the highest priority that the children’s custody determination be concerned with the contribution of the psychical aspects involved in a procedure that has impact on so many destinies. It is necessary to consider, particularly, the subjectivity and the emotion that involve the children, the parents, brothers and sisters, and the existing bond between them.

The criteria must analyze everyone interested — the children and each of their parents —, so as the found solution may be that one most beneficial for the children, but also focused on the parents, so that no one of them may be negligent in their children’s creation and education.

The event of the separation or judicial conflict requires a redefinition of the parental duties and rights that involves not only the custody, but the establishment of the visits and their timetable, traveling with their children and the respective judicial warrant issued by the judge, alimony and familiar relations.

The familiar structure, once re-structured, is more efficient for the continuity of the minor child’s relations with the parents, as it keeps the parental family, aiming to guarantee and protect the children’s development.

One of the criteria used by the Brazilian legislation for custody determination was the consideration of the guilt for the termination of the marriage. The role of the guilt is presented as reference for the judge decision about the custody and for analyzing the conjugal behavior (guilty or innocent) before the separation. It is an inadequate criterion, as it analyses the spouses’ or partners’ behavior in the union in detriment of the child’s interest.

Jurisprudence and doctrine disapprove guilt as determinant and try to investigate about the child’s best interest, although there are judgments that still refer to the guilt, in addition to the legislation presentation, in the chapter concerning conjugal dissolution, of the figures of innocent and guilty. In the contemporary understanding parental authority cannot be reduced to the criteria related to the guilt for the separation.
The conclusion is that the conjugal litigation may bring a devastating consequence for the children’s well-being, moving away and reducing the parents’ role in children’s education to a bunch of prerogatives and power founded on the conjugal controversy that becomes “an actual duel between careful owners about their confines”.

Some criteria are presented by the doctrine as rule for the custody attribution, such as age, sex, existing brothers and sisters, the minor child’s opinion, among others. It is remarkable that, in any case that reaches the Judiciary, there is a subjects’ particularity, which must be taken into account, as the juridical science cannot claim to bring answers to searches that surpass the Law guarantee.

3. Towards joint custody: the challenge of carrying out the joint parental authority

On the face of the considerations made in the previous chapters, the current work refers to the exam of the children’s custody starting from two axes: the family contemporary reality and the parental authority exercise in this new context.

The parental authority comes as the affiliation consequence. The 1988 Federal Constitution, in the article 277, § 6º, has consecrated the protection of the children’s rights and duties, independently of the affiliation origin.

The theme deals with the children’s responsibility on the face of the changes in the family sphere in the occidental world. The constitutional legislation has acknowledged the alterations in the social tissue, guaranteeing to the familiar entity a wide protection according to the very well consolidated principles that must be the foundation for the decision making in the concrete cases that arrive to the Judiciary Power.

In the current juridical order there is no room anymore for the inquiry about affiliation origin, as all the children are under the 1988 Constitution’s legal protection. There is, however, a major concern with the familiar rearrangements that involve the parental relation, leading to the parents’ responsibility on the face of the Law, as they don’t play the role anymore as a couple originated in the matrimony.

The conjugal union sometimes presents misunderstanding concerning the exercise of parental duties and rights. The situation seems good in the families where the couples live a relationship apparently balanced. However, the current reality presents the parents taking different places, which point out issues about the exercise of parental authority.
The approached issue about the theme is related to the parental authority exercise when the parents don’t live in the same home together or keep a less harmonious conjugal union. In these situations it is necessary caution and a careful analysis about the children’s custody, as it has been shown that this arises from the parentality and not from the conjugality..

While the family remains united, the children enjoy the relation with both the parents. The rupture creates a new structure and the parental authority is focused on just one of the parents, the other being reduced to a secondary role. In the social reality, more and more conflicts arise involving parental-filial relations; however, scarce are the clarifications for the effective protection of the legal rules about it. It is up to the doctrine and to the jurisprudence to establish solutions that give priority to the familiar bonds, according to the constitutional text.

According to that which was previously explained, the family doesn’t present a close model anymore, founded on the rules of the marital right; the familiar nucleus doesn’t present anymore a unique format, such as the patriarchal one. Therefore, the consequences of the family structures will be the focus for investigation and debate.

Due to the paradigm alterations in the familiar structure and the increasing number of lawsuits that arrive to the Judiciary Power, it is suggested an investigation that observes the situation of the children’s custody after the couple’s rupture. These are issues that involve multiple conflicts presented to the Law operators, as well as to the professionals that work with the Law interface.

It is up to the juridical world to develop the wisdom that may be able to lessen the effects, sometimes disastrous, of the monoparentality in relation to the children, searching for solutions that benefit all the family members.

The new configurations arising from the family fragmentation, as well as the new division of their roles, bring on judicial litigations on custody dispute, making difficult for the family to live together and the parental relationship. Ana Cristina and Marilene Silveira Guimarães, point out that “the third millennium family is organized in a different way and it is noticeable that the fathers became involved with the children’s care”.²

² In Brazil, during validity of the hierarchical patriarchal family model, the women were responsible for the children’s care, while the husbands took the role of mere providers.
What is seen in the current world is a variety in the family formation, which brings out the need for rethinking each of the aspects that involve the members of the familial group.

The family law traditionally dealt with the custody as a subjective right to be attributed to one of the parents, in case of the couple’s separation or breach. In opposition, the right to have the children’s company was given to those to whom the custodian position wasn’t granted.

However, in spite of the marriage and stable unions’ dissolution, parental authority is indivisible, and, therefore, it ends for misrepresenting the institute, particularly in relation to the custody, withdrawing its prime function to safeguard the child or the adolescent’s best interest.

Starting from this new approach, it is suggested an actual challenge for the juridical science and the forensic practice: the joint exercise of the parental authority. The suggestion’s objective is a new address to the parental relationship. This implies the parents in a major responsibility on the minor children, in spite of the existing subjective conjugal conflicts.

The formulation of a new insight for the children’s custody shows that some issues are essential not only for the children, but also for the parents who live the painful experience of a separation, of a relationship rupture. The exercise of the parental authority, in these cases, must be the “guidelines for the bewildered parents who follow new paths in these somber times.”

In the latter years, the parents’ co-responsibility has been defended in relation to children’s education, creation, custody, maintenance, and formation after the separation. There is a search for the parameters of the precedent situation, in spite of the conjugal breakup, in order to protect the minor child against distress and uncertainty feelings to which it is exposed by the parents’ disunion.

The theme approaches a new custody model and its insertion into the juridical order: the joint custody. Founded on the child’s best interest and on the genders’ equality, the courts started to suggest custody agreements between the parents, as the answer to the new family forms. It is the common exercise of the parental authority, keeping to each of the parents the right to actively participate in the decisions concerning the minor children. The balance of the roles, valuating the paternity and the maternity, brings a physical and mental development more adequate for the cases of family fragmentation.
This new suggestion is opposed to decisions of sole custody, showing advantages for the minor child’s well-being, keeping the affective bonds and the regular contact with the parents. The minor child’s interest is the determinant for the custody attribution, bringing about unprecedented reflections that favor the familiar relations. Custody has always been a very sensitive point in Family Law, as from it directly depends the child’s future. If until recently the issue didn’t generate major problems, with the familiar structure alterations new custody formulations are being searched that may be able to grant to the parents an equitable share of the parental authority.

For the psychoanalyst Sérgio Nick, “the search for building a new relational form for the couple is a consequence of the previous model decline, centered on coercion and the lack of dialogue”. Such a change has a favorable impact as well on the separated couples, as it is something that is linked to the innermost of the people involved and that goes as part of their behavior.

It is indispensable to show to the parents submerged into conflicts that the organization and the structure of the parental duties jointly exercised aim to protect the children. A new co-parentality ideal arises through a more equalitarian conception, bringing about revitalization for the parental relationship, in spite of the conjugal litigations.

The purpose of the work is to investigate the theme of the joint custody in order to bring more subsidies about this that is deemed a great advance in the relationships of children from divorced or separated couples. The joint custody gives an opportunity for study, observation and comments inspired on a reflection posture maintained and stimulated by the debates arising through the modern family scenes, in the need of the contribution of the juridical thought and from other professionals of human sciences.

4. Building a concept for the joint custody

The shared or joint custody is a new model for the exercise of the joint parental authority. The term compartilhada is more used (in Portuguese) due to its

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3 NICK. Shared custody: a new focus on the care of separated or divorced parents’ children (um novo enfoque no cuidado aos filhos de pais separados ou divorciados), p.150.
4 GANANCIA. Justice and familiar mediation: a partnership for the service of the co-parentality, p.8.
5 Cf. GARCIA. Juridical Psychology: operators of the symbolic (Psicologia jurídica: operadores do simbólico, p. 52; NICK. Guarda compartilhada: um novo enfoque no cuidado aos filhos de pais separados ou divorciados, (Shared custody: a new focus on the care of separated or divorced children’s parents (um novo enfoque no cuidado aos filhos de pais separados ou divorciados) p.150.
meaning and its etymology.

The word compartilhada derives from the Latin prefixes *com* – *con* or *co* – *cum*, that means company, companion, combat, conjoined, condominium, compare, confrère, collaborate, cooperate. The Latin form *cum* is found in *cumprir, cúmplice and cumprimento*(accomplish, accomplice and accomplishment). Also about etymology, the term *companhia* (company), originated from the Latin *compania*, brings the meaning of a group of people who ate bread (*pane*) together, that shared the bread among them; with this use, the meaning became generalized.⁶

The joint custody notion has arisen from the instability of parental rights and a culture that removes the center of its interest on a child within a society with equalitarian tendency. The clear and acknowledged preference for the mother towards custody was being already criticized as abusive and contrary to the children’s equality and well-being.

Joint custody is a call to the parents who live separated in order to jointly carry out the parental authority. The continuity of the familiar intimacy with both the parents is indispensable for the children’s healthy emotional development. Therefore, it is not possible to keep unquestionably paradigms and forms for the solution of these surpassed issues.

Joint custody means a kind of custody in which both the parents share the legal responsibility on the children at the same time and share the significant decisions related to the child. It is a concept that should be the norm for custody attribution, evidently treating with respect the special cases. It deals with the child’s care charge to both parents, committed with respect and equality.

In the joint custody, one of the parents may keep the child’s material or physical custody, but always keeping in mind that both of them share the emerging rights and duties from the parental authority. The parent that doesn’t have the physical custody is not limited to supervise the children’s education, but will effectively participate in that as a holder of the power and authority to decide directly about the education, religion, health care, leisure, study, finally, in the child’s life.

Joint custody allows for the children to live in close relation with both parents, there is a co-participation with equality in rights and duties. It is a nearness of the maternal and paternal relationship, aiming at the children’s well-being. They are gorgeous benefits

⁶ Cf. NASCENTES. *Dicionário etimológico da língua portuguesa*, p.130.
that the new proposal brings to the familiar relations, without overloading none of the parents and avoiding anxiety, stress and distress.

The joint custody seeks to reorganize the relations between parents and children within the disunited family, diminishing the traumas of the separation from one of the parents. The convenience of the joint custody must be determined always taking into account the minor child’s best interest and the peculiarities of the actual case.

The conclusion is that the joint custody favors the contact between parents and children in the disunited families, giving co-responsibilities and avoiding the omissions so frequent in the imposed models. The role of the jurisprudence is remarkable on the acceptance and functioning of this kind of custody. The work of the doctrine is the education towards the maintenance of the parental authority and the equal participation on the children’s creation and education. The solution of the joint custody respects the principles of the constitutional text, besides privileging the family.

With that, it is clear that the joint custody must be always considered, within the perspective and availability of each couple. It is necessary to warn about the Law operators’ responsibility in the formulation of the adequate concept and in the pertinent discussion about children’s custody.

Joint custody is founded on the parental authority that is indivisible and must be exercised with basis on the fundamental principles already described. Therefore, it is not possible to misrepresent the institute for the satisfaction of those parents who want to pursue an actual conjugal war, using their children. The analysis on children’s custody is extremely significant, as it will have influence on the child’s individual structure as subject.

The joint custody imposes an innovative debate in which the parental relationship after the conjugal breakup is not limited to the determination of the sole custody by one of the parents – usually the mother —, imposing the “visit duty” to the other, strictly and authoritatively fixed.

It is necessary to be brave enough to face that the joint custody brings out a new approach that must be founded on the rules and principles above mentioned and will have an impact on the forensic practice, that will not admit any more the “accommodate”

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7 Tender Years Doctrine, that assumed the presupposition of the maternal preference for tender age small children, has still influence on the determination of the sole custody to the mother.
imposition in which the mother’s and father’s figures are reduced uniquely to vigilant, “caretakers”, visitants and providers.

The judiciary posture has been to grant the custody, unilaterally and exclusively, to the mother, promoting a deep difficulty for the relationship and communication between the parent who doesn’t keep the custody and its children. “The peripheral father or mother is born”.

The destruction of the “conjugal couple” should not provoke the disappearance of the “parental couple”, that is, that of the parents’ community, therefore, the risk of disagreement or conflict between the former spouses that equally exists in the exclusive custody cannot be taken as impediment for the joint custody establishment.

Once more the definition of parental authority is taken for the construction of the joint custody, as it is not possible any more to admit the determination of custody that takes it apart from a major concept. The couple’s separation or disunion cannot have influence on the parental relations, neither, much less, take apart the persons entitled of the children’s rights and duties, according to that established in the article 1.579 of the new Civil Code, that determines that “the divorce will not change the parents’ rights and duties in relation to the children”.

Since the divorce without guilt has become possible, reducing or almost vanishing the competition between the parents, the shared custody is the tool that privileges the minor child’s best interest.

The chapter on “the protection on the children’s person” in the Código Civil Brasileiro in force deals with the children’s custody, but this provision doesn’t refers to the joint or shared custody — that one where both parents participate in close relationship, education and further duties inherent to the parental authority. The new Civil Code legislator missed the opportunity to present the form of the parental duties exercise which preserves the children’s interests.

The possibility of judicial homologation about the shared custody is viable, as the judicial sentence that establishes the custody will always be subject to review in case the rules in force do not preserve the minor child’s interests. This solution gives priority to the minor children and is enclosed in the article 1.586 as follows: “In case of serious reasons, the judge may, in any case, for the good of the children, regulate in a different

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8 Cf. GRISARD FILHO. Shared custody: a new model of care (and justice) for the children of the divorce (Guarda compartilhada: um novo modelo de cuidado (e justiça) aos filhos do divórcio).
manner from that established in the previous articles their situation in relation to the parents.” The principle of the mutability of the sentence that settles the children’s custody is acknowledged in the doctrine and jurisprudence.¹⁰

Accepting these arguments on the custody settlement – in any case, either for the children born within the marriage or not – the continuity of the familiar relationship must always predominate, as it is the most appropriate and safeguards the shared custody for the parents and the children.

5. Parallel between the types of custody

In Brazil, the most common legal model is still that of the uniparental custody, sole, exclusively to just one of the progenitors. This keeps not only the physical custody, for the daily proximity with the child, but the juridical custody as well, that is — as is taught by Orlando Gomes —, the right to “guide the child’s person, directing its education and deciding about every issues concerning its highest interest”.¹¹

It is noticeable certain resistance from some judges and from some representatives from the Public Prosecutors Department in granting and deciding favorably towards the shared custody. It is true that any changes or innovation must be slow and careful, but in order to make it happen it is necessary to know the modalities of custody and of familiar rearrangement.

Frequently the magistrates understand the shared custody as another kind of custody, generating misunderstanding, with the influence of lawyers that distort the intended concept of the “joint parental authority”.

It is necessary to differentiate the types of custody in order to avoid an approach that is not corresponding to the one which seems the most adequate. The custody models are: the alternate, the divided, aninhamento ou nidação and the shared or joint custody.¹² The “exclusive”, “sole” custody gives room to these new custody modalities.

The alternate custody is characterized by the possibility of each of the parents to keep the custody alternatively, according to a time rhythm that might be one year, one

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¹⁰ CAHALI. (Divorce and Separation)Divórcio e separação, p.964ss.; STRENGUER. Guarda de filhos (Children’s custody), p.121ss.; RT 782/358; RT 772/300; RT 610/224; RT 606/108; RT 604/33; RT 433/101; JTJ/SP 202/149.
¹¹ GOMES. Direito de Família, p.?.(Family Law)
¹² Cf. MOTTA. (Shared Custody: new solutions for the new times) Guarda compartilhada: novas soluções para novos tempos, p.84-88.
month, one week, part of the week or a distribution organized day by day. Therefore, during this time period, the parent keeps, in an exclusive form, the totality of the power-duties that integrate the parental authority. At the end of the period, the roles are reversed. It is the attribution of the legal and physical custody to each of the parents in turns. This is a type of custody strongly opposed to the principle of the continuity, which must be respected in order to preserve the child’s well-being. It is inconvenient for the consolidation of the habits, values, patterns and the formation of the minor child’s personality, as the high number of changes provokes a huge emotional and psychical instability. The jurisprudence has discredited it, which is not accepted by most of the world’s legislations as well.

The divided custody is present when the minor child lives in a set home, determined, receiving periodical visits from the parent who doesn’t have the custody. It is the visits system that has a destructive effect on the relationship between parents and children, as it propitiates an increasing distance between them, slow and gradually, until total disappearance. Frequent meeting failure and repeated separations occur. The parents themselves complain and look for new ways of granting a greater participation and more commitment in their children’s lives.

The aninhamento ou nidação is a rare type of custody, in which the parents, in turns, move to the home where the children live in alternate periods. It seems an unreal situation and, therefore, a model of little use. This modality becomes too expensive for the families, besides presenting the need for a person in charge to live in the home settled for the minor children.

It is noticeable a great mistake concerning the definition of shared and alternate custody. Frequently the judges deny the request formulated as “custody sharing” when actually it deals of an alternate organization for the exercise of the parental responsibilities.

A major disagreement against the alternate custody is the permanent rupture between parents and children, on the contrary to the principle of the close relationship and the minor children’s best interest. It seems traumatic for any person to live in diverse homes, an eternal change of the physical space, reminding the old nomads, but within a much smaller period of time.

Grisard suggests that the alternate custody, although discontinuous – here with one, there with the other parent – isn’t unique. The repeated breaks in the continuity of the relationships and affective environment, the high number of separations and coming backs
provoking in the minor child emotional and psychical unbalance, jeopardizing the normal development and bringing, sometimes, irretrievable retrocession. Everything leads to the non recommendation of the alternate model, a grotesque division for the half in which the parents are obliged by the law to divide in halves the time spent with their children.\textsuperscript{13}

Maria Antonieta Pisano Motta made an important elucidation: the new model must be understood “as that custody form in which the children have a main home and which defines both the parents from the legal point of view as holders of the same duty of keeping custody of their children”.\textsuperscript{14} Therefore, in the shared custody, there is a established home for the child or adolescent, which cannot avoid the maintenance of the close familiar relationship and the exercise of the parental authority in all its aspects.

Leila Brito follows the same thought and emphasizes that the shared custody doesn’t mean a strict division of the time the child spends with each parent, provision denominated as “alternate custody”. In the joint custody model, in spite of the child living with one of the parents, there must be the guarantee of a wide close familiar relationship with both the parents, responsible for the children’s education. If, during the conjugal union validity the children mean care and responsibilities that must be shared, after the separation what is reconfigured is the state related to the conjugality, not to the parentality.\textsuperscript{15}

Sérgio Gischkow Pereira, shared custody is the “situation in which stay as holders of the juridical custody on a minor child people who lives in separated locations”.\textsuperscript{16}

The perplexity about the custody modalities may be seen in the reasoning of the Court’s decisions (acórdãos), which deny the “shared custody” in the “alternate” presentation. In a recent decision, the Tribunal de Justiça do Estado de Minas Gerais determined “the permanence of the shared custody, changing it and establishing a fortnightly rotation, allowing the parties the visitation right on Saturdays, from 12 noon to 4 pm”.\textsuperscript{17}

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\item \textsuperscript{13} Cf. GRISARD FILHO. Guarda compartilhada: um novo modelo de cuidado (e justiça) aos filhos do divórcio (Shared custody: a new model for care (and justice) for the children of the divorce).
\item \textsuperscript{14} MOTTA. Guarda compartilhada: novas soluções para novos tempos (Shared custody: new solutions for new times), p.84.
\item \textsuperscript{15} BRITO. Guarda conjunta: conceitos, preconceitos e prática no consenso e no litígio. <http://www.ibdfam.com.br/4congresso_palestras.asp (Joint custody: concepts, preconceptions and practice in the consensus and litigation)
\item \textsuperscript{16} PEREIRA. A guarda conjunta de menores no direito brasileiro, p.53-64. (Minor children joint custody in the Brazilian law)
\item \textsuperscript{17} MINAS GERAIS. Tribunal de Justiça de Minas Gerais. Minor children custody – permanence with the father – situation since the couple factual separation – determination of shared custody – impossibility. It is
The decisions show the importance of the deep study of the theme and the doctrine’s elucidating function so as the shared custody may correspond to the continuity of the relationships between parents and children and the non-exposure of the minor child to the parental conflict and to the unfair consequences that the monopoly of the sole parental authority provoke.

The shared custody seeks to lessen this negative impact, keeping both parents involved on their children’s creation and education, assuring their common participation in the child’s destiny.\(^{18}\)

\textbf{6. The shared custody practice and the other consequences of the parental authority}

The practice of the shared custody already exists in the reality of the Brazilian families, in some cases without such a denomination or any judicial interference. In many families, the parents manage to organize themselves harmoniously so as the children’s may have a healthy physical and emotional development, thus in need of mutual cooperation.

The shared custody in the Brazilian practice may be analyzed through the jurisprudence checking and the arrangements achieved in the cases that come until the Judicial Power. It has already been mentioned that the Brazilian jurisprudence presents, in most of the judged cases, a misunderstanding concerning the \textit{shared custody} concept, frequently presenting an alternate custody instead. Therefore, it is not possible the conclusion about the reflection of the shared custody on the courts, as the suggested model is too recent. Again, it is remarkable that the equalitarian division of the time spent in the close familiar relationship is not beneficial for the children and is corresponding to the definition of alternate or uniparental custody.\(^{19}\)

deeded non-recommendable to authorize the shared custody, remaining the tender age children under the father’s custody since the couple’s factual separation, due to adultery committed by their mother. Appeal allowed (Torna-se não-recomendável autorizar a guarda compartilhada, permanecendo as menores de tenra idade sob a guarda do pai, desde a separação de fato do casal, em virtude de adultério cometido pela genitora daquelas. Recurso a que se dá provimento. EMENTA. AGRAVO Nº 000.261.535-9/00 – COMARCA DE FRUTAL – AGRAVANTE(S): ADRIANO DE OLIEIRA ASSUNÇÃO – AGRAVADO(S): GRACIELE MARIA SILVA ASSUNÇÃO – RELATOR: EXMO. SR. DES. KILDARE CARVALHO ACORDÃO (SEGREDO DE JUSTIÇA).)\(^{18}\)

\(^{18}\) Cf. GRISARD FILHO. \textit{Shared custody: a new model of care (and justice) for the children of the divorce (Guarda compartilhada: um novo modelo de cuidado (e justiça) aos filhos do divórcio.)}

\(^{19}\) Marilene Silveira Guimarães e Ana Cristina Silveira Guimarães suggest that “the alternate custody is a form of arrangement that may bring damage to the child, particularly in some stages of its life. Dealing of small children, it may endanger its need for experiences of continuity, that transmit trust and safety to guarantee its development. For the older children, it may disorganize the personal and the school routine. Dealing of adolescents, these may oppose to the constant home moving, as this may represent a restriction to...
For the exercise of the shared custody in the forensic practice, it is necessary the study of the concrete case, considering the family configuration forms after the marriage or stable unions dissolution. New divisions arise from the roles that provoke lawsuits on custody litigation, but which must guarantee the continuity of the close familiar relationship protecting children’s well-being.

Dealing with decisions on custody issues requires an effort from all those involved in the judicial proceedings for the organization of the parental relationships, avoiding that regrets, resentments or the conjugal hardships may interfere on the children’s best interest. This principle applicability must come from the judges, the Public Prosecution representatives and the lawyers seeking for the most appropriate solution for the conflict, presenting new custody models.

The lawsuits on children’s custody require an interdisciplinary integration that requires the aid of social workers, psychologists, psychiatrists. The interdisciplinary considerations in the lawsuits are essential for the most coherent decision related to the children’s well-being. It isn’t worthless that magistrates, before deciding about the minor child’s interest, refer the case to qualified professionals for a detailed psychosocial analysis of the case. Such a practice has been very efficient for checking parental relationships in conjugal lawsuits.

On the face of the importance of the subjective aspects, the need for a multidisciplinary team work including qualified professionals is emphasized, in order to have a careful evaluation of the claim of the person who requires de custody, its conditions not only material - how to support and provide an adequate environment to the child – but psychical as well, investigating the conscious and unconscious motivations for requiring the custody, considering its life history, bonds and affections of each of the parents. It is important to be alert for what represents the attribution of the custody for each of the parents who requires the custody.

The custody claim must avoid a more traumatic situation for the children, as that is a moment of crisis of the conjugal relationship which reflects as well on the parental relations. Therefore, it is necessary to be sensitive to a new address that places the parental relationships above all the divergences between the couple.
It is not possible to accept that the custody proceedings may occupy the environment for a “war of what remained from the marriage”. The children’s interest must stand out of the parents’ divergences.

Within this context, ethical issues must always be imposed to give priority to the minor child’s interests, avoiding stirring up the conjugal conflict. The lawyers’ behavior in the custody claims must be cautious and mediating, avoiding greater suffering for parents and children.

Some Law professionals, in Brazil as in other countries, suggest agreement models in which there are rules for the exercise of the shared custody\textsuperscript{20} It seems that the elaboration of a “form”, that must be filled out by the parents and homologated by the judge, presents a fallible possibility not very realistic for the organization of the issues that involve the affectivity and, therefore, with strong presence of subjective aspects, besides the impossibility of judicial execution of this “agreement” in case of breach by the parents or even by the children.

In the practice of the shared custody it is necessary to remember that there are other consequences for the parental authority, which must also be exercised by the entitled persons. Besides the attribution of custody, it is up to the parents to direct the children’s creation and education, to consent or deny that they may get married, to nominate legal guardians in their will or any authentic document, to represent them until they are sixteen years old, in the acts of the civil life and to assist them after this age, in the acts in which they are parties, supplying their consent, to claim against someone that illegally keeps them, require their compliance, respect and the services appropriate to their age and conditions.

All these consequences form parental authority will be exercised by both parents jointly, particularly in the model presented for sharing custody. This is the major proposal of this work: that the parents may exercise jointly the responsibilities in relation to the minor children.

The management and fruition of the minor children’s properties may be organized according to the parents’ convenience and availability, aiming at the children’s interests. In case of separation the shared custody will not prevent the exercise of these

\textsuperscript{20} See Model for shared custody wide agreement from the State of Wisconsin, USA; Model for shared custody agreement from the State of Colorado, USA; Model for shared custody agreement from Australia. GRISARD FILHO, Waldyr. \textit{Shared Custody: a new model for parental responsibility \textit{(Guarda compartilhada: um novo modelo de responsabilidade parental)}, p.217-234.
duties, as the concrete case and the equality principle will build up the decision with the most appropriate arrangement.

Concerning the minor children’s support, the general rule is clear and coherent enough in the chapter that deals with alimony, in the Código Civil Brasileiro. This chapter declares that alimony will be paid to the children according to the need for living in a way that is compatible with the family’s social condition, that is, it deals of a material contribution for the children’s survival with dignity. To fix the alimony quantum for the minor children, it will be observed the proportion of their needs and the resources of each of the parents. The rule aims at the balance of the parents’ material contribution according to their financial possibilities, so as to make viable the exercise of the shared custody.

The continuous conflicts of the parents who discuss the alimony cannot be a restriction to the shared custody. It is inadmissible the negotiation of values using the argument of the division of responsibilities that the theme suggests.

The convenience of the shared custody must be always determined by the minor child’s best interest and by the separated parents’ collaboration attitude The shared custody favors the contact between parents and children in the disunited families, sharing responsibilities and avoiding omissions so frequent in the imposed models.

7. Conclusion

A new look for the exercise of the parental authority in the family context in the modernity lead the current work to analyze the children’s custody. In such a reality that isn’t corresponding anymore to the sole custody and to the right of visit for the parental relationship, the shared custody arises as a form for re-structuring the “parental” family.

To think the shared custody as a model for the joint exercise of the parental authority is a challenge for the human sciences.

The request for a careful and judicious reflection that reunite the public and private grounds requires the implantation of a familiar policy that is no more limited by the traditional patterns, but that spreads itself beyond the “pre-concepts”, to the daily life facts.

One of the considerations is the family as a place for affect, making the affectivity presented as a relevant element in the Family Law analysis. At first, such feelings remain within the particular circuit, until the conflicts that extrapolate the private sphere arise and seek for the State juridical protection.
This approach has leaded the Law professionals to rethinking the family issue with more caution and importance. The initial proposal of the 1988 Federal Constitution, reaffirmed by the Civil Law, is that the parents have equal, common responsibilities in relation to their children. It remains for the jurists to find fair and more efficient ways to guarantee the Social Right efficiently and the insertion of radical changes occurred within the familiar circuit. People’s interest is relevant, because they are the major beneficiary, as the family relationships reflect a society’s structure.

The work seeks a way of balance for the parental relationships in the families where the parents don’t live together in the same home. This is the beginning of a new address that must be elaborated and made effective, thinking on children’s well-being and the maintenance of the close familiar relationship.

The shared custody tries to reorganize the parental-filial relationships within the disunited family, lessening the traumas originated by the increasing distance from one of the parents. This new model favors the contact between parents and children, sharing responsibilities and avoiding the omissions so frequent in the imposed models. It is the common exercise of the parental authority, keeping for each of the parents the right and the duty to actively participate in the minor children’s decisions. The balance of the roles, valuing the paternity and the maternity brings a physical and mental development more adequate for the children in the cases of parents’ conjugal dissolution.

It is noticeable, with this work, that the concept of shared custody is still being built in Brazil and the jurisprudence has a remarkable function in order to make possible the understanding, acceptance and functioning of this modality of custody.

New addresses intend to contribute for the beginning of an innovative understanding about the institute of custody, being a step for the practice of the joint parental authority in the claims that reach the Judiciary Power.

The definition and specific study of the theme are extremely important so that the judges, Public Prosecution Department representatives and lawyers may orient themselves, so as the decisions comply with the minor children’s best interest.

The research deepening is intended for the consolidation of the parental authority joint exercise as general rule, avoiding misunderstanding with other custody arrangements. The work intends to avoid that the shared custody is mistakenly taken for the “alternate custody” which intends the strict time division, causing periodical ruptures of the relationship between parents and children. In Brazil as in other countries that adopt
the shared custody, there have already been fights against the alternate custody, deemed inconvenient for the consolidation of habits, values, patterns and to the formation of the child’s personality, as the high number of changes provoke great emotional and psychical instability.

The tendency is the acknowledgement of the shared custody as the most appropriate and beneficial for the relationships between parents and children, useful for consecrating effectively the principle of the minor child’s supreme interest. In this perspective, the shared custody must be understood as a new model for the exercise of the parental authority that allows the consecration of the equality between the parents and comply with the principle of the child’s best interest. The Brazilian juridical order has already permitted the implantation of this model, allowing that it may be applied and favoring the children and adolescent’s interest, which is to have a close familiar relationship with the parents for their structure as individuals.

I finish leaving a reflection for all of you: Separation and divorce must happen only between the couple, not between parents and children, therefore “It is necessary to think, more than thinking, it is necessary to feel, it is necessary to act, with almost divine wisdom, when we practice in the Justice that involves family, children and adolescents”.