

## OPERATION AND ENFORCEMENT OF JUDGMENTS RELATIVE TO PARENTING RESPONSIBILITIES.

### SOME OBSERVATIONS BASED ON THE ITALIAN EXPERIENCE.

Since the end of the last century there has been a significant shift in both European and North American laws regarding the relationships between separated parents and their children relative to family break up.

That shift has occurred along two lines:

- The affirmation of equal rights of both parents in the exercise of parental responsibilities after separation;
- The active search for alternative ways of resolving disputes relating to the exercise of parental responsibilities, first among which is the use of family mediation.
- As to the first, equal parental rights and responsibilities in parent-child relationships – first in the courts and then in legislation and ordinances – is evidenced by the enlargement of time that children spend with the parent who does not live with them (the non-custodial parent). We have changed from simple “visitation rights” to parenting time that today, in many countries, including Italy, permit a non-custodial parent to have up to 35-40% of total time with their children. This is not a completely equal time sharing arrangement between the parents, but is based upon the concept that children should have a primary residence; I believe that this is consistent with the objective of creating parenting plans that respect the interests of the children to a peaceful and balanced life. Equal rights for parents are affirmed also by doing away with awards of exclusive custody of the children to one parent. Parental responsibility in most court orders is exercised jointly by both parents even after separation. In some countries, including Italy, after the

passage of law n. 54/2006 joint custodial responsibility results from awards of shared custody as a general rule for the resolution of conflict between the parents; in other ordinances the same result is produced by simply eliminating the term “custody” altogether and limiting the judge to making a determination of where the child will live after separation and at which times and how he/she will have parenting time with the other parent.

- The other shift mentioned above is connected with the considerations raised in a) above. Equality of parental rights and responsibilities after separation implies that family life after separation must be based upon a continual search for solutions to issues relating to the growth/development of the children. This collaboration presupposes that parents have the maturity to continue to act together in their parental roles notwithstanding the termination of their emotional union. As a natural corollary of this, most legislators emphasize the role of mediation as an instrument for solution of parental conflicts. In the context of a joint decision making a judge cannot resolve parental conflict but the parties themselves have to find a pathway to a dialogue in their children’s interests. Italian law article 337 of the civil code is the most salient example of this tendency where it is expressly provided that the judge may request that the parties to utilize the services of experts to attempt mediation.

These two evolutionary pathways, common to Western family law, surely represent a conquest, a sign of civility in family relationships after marital breakup. However they alone are not enough to guide the interests of minors and do not necessarily guarantee the rights of the adults involved in a separation.

Speaking of this, I must interject a comment in my reasoning. I am using the expression “rights of the adults” even though I am aware that it is an expression that is not politically correct. In fact it is customary, when dealing with separation, to place the interests of minors and their right to the most conflict-free life first; in the eyes

of the law the rights of adults are destined to take second place. This way of ordering the issue is based on an obvious presupposition (children's interests prevail over adults' interests), and in part brings the presupposition to an unacceptable result. It is not acceptable, in my opinion, for a judicial ordinance to look with suspicion, almost with hostility, at a parent who tries to safeguard his right to have a meaningful relationship with his child. We are talking about a fundamental human right which cannot be eroded just because the exercise of that right is put into the context of family discord. Equality of rights and of sharing of parental choices in a separated family, and the emphasis that is rightly placed on the value of mediation as an instrument for the solution of controversies, cannot allow us to forget that a large number of parents, after a separation, have great difficulty in communicating peacefully. And we cannot forget that mediation does not always work so agreement on how to raise the children is not always reached. So faced with parental conflicts, the observers (judges, lawyers, social workers) can only conclude that those conflicts are being fed by unhealthy and irremediable parental disagreement, both equally and symmetrically fueled by the desire of one to win over the other. But that is not always the case. Sometimes one parent just wants to erode the rights of the other parent.

So, the mention I made a little while ago about the rights of adults is a call not to be burdened by the concept of theoretical parental equality and the value of mediation as a technique for conflict resolution: when a dispute survives all attempts at mediation, the judicial system must be able to find the root cause and responsibility and to provide solutions. Providing solutions means protecting the rights of one parent with respect to the other.

On the contrary – and not least in Italy, this happens more and more often – the judicial system reacts promptly to parental conflict and this prompt reaction translates into an almost automatic determination that the problem lies with both parties so the parties cannot expect the judge to make decisions about the children's welfare given their inability to agree among themselves.

This refusal to act to resolve conflicts has very serious consequences for the children's interests because it turns their daily lives into a kind of Wild West. This leads the child to become estranged from one of his parents because the other parent has succeeded in his efforts to alienate the child. So the parent who cannot enforce his parental rights, tired of a battle in which he feels abandoned by the system, finally abandons the child.

The Italian judicial system is a good example of this problem. I want to show you point by point the examples of this obvious unwillingness to deal with parental fights.

- There are no specific rules that regulate the exercise of parental responsibility and parental conflict in the Italian judicial ordinances. There are only generic rules dictated by the code of civil procedure applicable to carrying out obligations.
- Law n. 54/2006 (that is the law that introduced shared custody) added to article 709 3<sup>rd</sup> of the code of civil procedure the ability of a judge to order sanctions (even severe ones) against a parent who violates the provisions relative to the exercise of parental responsibility or in any case is guilty of acts that prejudice minors or impede custodial rights. But those provisions are rarely applied by the courts because judges almost never either want nor have the means to inquire into the cause of the conflict and they simply fall back on the fact that a conflict exists and attribute the fault to both parents.
- There is no easy post-judgment procedure for the resolution of controversies that present themselves in relation to the exercise of parental responsibility. On the basis of the same article 709 3<sup>rd</sup> of the civil code any controversy between parents after a divorce judgment or judgment of separation is under the purview of the court in a multi-judge session. This means that a controversy is aired at a hearing in the presence of 3 judges and both parties have to be present and represented by lawyers. The effect of these

requirements is that the process is long and costly and therefore inaccessible to the parties.

- The courts which deal with parental conflict are aided by territorial administrative social assistance services that work as an arm of the various cities and towns. These are the same administrative services that deal with economically and/or socially underprivileged families. There are no services that specialize in dealing with parental conflicts which operate under the auspices of a judge.

In an effort to learn something from the shortcomings of the Italian system described above I propose to outline the requirements of an efficient system for dealing with parental conflict. I have chosen to use the adjective “efficient” because I am convinced that the interests of minors and their parents can only be dealt with by use of an efficient and timely system that is capable of reacting promptly when violations occur and providing solutions when there is parental conflict over choices involving the lives and upbringing of children. Only efficiency of response can assure conflicts do not intensify due to the sluggishness of response which often allows the alienating parent to profit from his own wrongdoing.

- I believe that once a procedure regulating parental responsibility is put into place each parent must have the ability to go to a judge informally to complain of violations or to ask for assistance when an agreement about a choice relative to the upbringing of a child is not possible. There should be a special judge for parental conflict who is assigned to the parents so long as the conflict lasts.
- The same special judge should have the power to guarantee the implementation of the parenting plan and to oversee enforcement including the ability to order sanctions against a disobedient parent.
- The judge should have available to him an administrative office employing specialized personnel that can oversee a

family in trouble, with power to resolve individual problems with authorization under the direction of the judge. This office, to which both parents can go informally, should operate autonomously with regard to minor problems, and should be able to refer major problems to the judge for his guidance. It should be able to act on behalf of the children and, in serious cases, facilitate their rapprochement to a parent with whom contact has been cut off, utilizing “neutral space”.

A structure of this type should ensure rapid response and, as we said, efficiency. Only in this way can the interests of children and their parents be guided in cases where the conflicts survive all attempts at mediation. We have to do more than just say that parents have equal responsibilities and that they must resolve conflict by means of mediation in order to deal with the parental conflicts that we see every day.