

## COURT DECISIONS AND POSSIBLE SOLUTIONS TO SHARED CUSTODY IN CASES OF DOMESTIC VIOLENCE

### Summary

This article analyzes how the issue of shared custody in cases of domestic violence has been approached and decided by Brazilian courts. The study covers legislation, doctrine and jurisprudence to understand the practical application of the relevant laws. The Civil Code of 2002 and Law 13,058/2014, which establish shared custody as a rule, are discussed, but the recent Law 14,713/2023 significantly changed the rules, prohibiting shared custody in cases of domestic violence. Historically, Brazilian civil legislation has always prioritized the protection of minors, establishing that custody can be unilateral or shared. Shared custody, where both parents have equal responsibilities and rights, was the general rule, except in specific cases such as domestic violence, where the law previously allowed sole custody when justified. With the introduction of Law 14,713/2023, shared custody was prohibited in situations of domestic violence. This legislative change aims to protect children and victims of violence, ensuring that the aggressor cannot have joint custody. The article cites court decisions that confirm the prevalence of shared custody as a general rule and exceptions in cases of violence. In summary, Law 14,713/2023 represents a significant advance by prohibiting shared custody in cases of domestic violence, reflecting the need to protect victims and guarantee the safety of children. The article concludes that, despite improvements, there are still challenges in applying and raising awareness of legal changes.

**Key words:** Shared Custody; Domestic violence; Courts.

### Abstract

This article analyzes how the issue of shared custody in cases of domestic violence has been addressed and decided by Brazilian courts. The study covers legislation, doctrine and jurisprudence to understand the practical application of the relevant laws. The Civil Code of 2002 and Law 13,058/2014, which establish shared custody as a rule, are discussed, but the recent Law 14,713/2023 significantly changed the rules, prohibiting shared custody in cases of domestic violence. Historically, Brazilian civil legislation has always prioritized the protection of minors, establishing that custody can be unilateral or shared. Shared custody, where both parents have equal responsibilities and rights, was the general rule, except in specific cases such as domestic violence, where the law previously allowed sole custody when justified. With the introduction of Law 14,713/2023, shared custody was prohibited in situations of domestic violence. This legislative change aims to protect children and victims of violence, ensuring that the aggressor cannot have joint custody. The article cites court decisions that confirm the prevalence of shared custody as a general rule and exceptions in cases of violence. In summary, Law 14,713/2023 represents a significant advance by prohibiting shared custody in cases of domestic violence, reflecting the need to protect victims and guarantee the safety of children. The article concludes that, despite improvements, there are still challenges in applying and raising awareness of legal changes.

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### INTRODUCTION

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This article aims to analyze how the theme addressed by this work, namely, the possibility and challenges of shared custody in cases of domestic violence, has been treated and discussed in the country's Courts. In addition to the Legislation and doctrinal precepts, it is necessary to investigate the application of the law to the fact, in order to encompass the Legislation, doctrine and jurisprudence. Thus, judgments will be brought from the main Brazilian Courts with a view to achieving the objectives of this chapter.

The 2002 Civil Code (Brazil, 2002) reserved a chapter to deal entirely with the protection of children. In short, Civil Legislation was concerned with establishing standards and rules aimed at preserving what is known as the best interest of the minor, which means the set of actions, environments and treatments that provide him with broad well-being (Brasil, 1990).

In the process of divorce or when the parents do not have a loving relationship, it is

It is necessary to adopt fair and effective criteria so that children and adolescents can enjoy living with both parents (Delgado; Coltro, 2017).

Custody may be unilateral or shared, in accordance with the provisions of Civil Law (Brazil, 2002). In shared custody, the minor remains under the care of both spouses, alternately. It is an arrangement in which both parties have responsibilities and must observe the best conditions for the infant.

The adoption of a unilateral regime is an exception, being used only when there are reasons for not adopting the shared system or even when requested by the parties. The decision for one or the other will almost always depend on the analysis of the specific case or on the choice of those responsible, as provided in the Civil Code of 2002. And it is in this sense that the country's Courts have decided, as will be seen below.

In cases of domestic violence, the ideal is for the minor to remain with only one of the parents, the one who is not responsible for the aggression, preventing shared custody, due to the exposure to violence and the risk involved. Previously, such a decision was at the discretion of the Courts, which could establish a unilateral custody regime, if there were reasons for doing so. However, with the brand new Law 14,713/2023 (Brazil, 2023), which substantially changed article 1,584 of the Civil Code (Brazil, 2002), shared custody in cases of domestic violence is prohibited.

The respective change responds to a long-standing cry from society as a whole, from the doctrine and from legal practitioners, who have always defended the unfeasibility of shared custody of children in cases of domestic violence, given the delicate context that is imposed, the risk involved for the mother and the minor object of the legal dispute. Thus, law 14,713/2023 presents itself as a definitive solution to the situation.

## 1. Analysis of court jurisprudence on the subject

Article 1583 of the current Civil Code (Brazil, 2002) whose current wording was given by Law 11,698, of 2008 (Brazil, 2008) states that custody will be unilateral or shared, the latter being the rule and the former the exception. Jurisprudence has established the shared regime as the one most appropriate to preserving the interests of children and adolescents, as can be seen from the ruling below by the Court of Justice of the Federal District and Territories (TJDT, 2022) in case number 07138739620208070020, in consultation carried out on November 06, 2023:

1. Guardianship aims to preserve the interests of the minor in his patrimonial, moral and psychological aspects necessary for his development as an individual. 2. In matters involving the custody and responsibility of minors, the judge must preserve the interests of the child. 3. According to the preceptive insertion in § 2 of art. 1,584 of the Civil Code “when there is no agreement between the mother and the father regarding the custody of the child, and both parents are able to exercise family power, shared custody will be applied, unless one of the parents declares to the magistrate that they do not want custody of the minor.” 4. Shared custody has become the rule in the Brazilian legal system. It is understood, yes, as the modality that best meets the interests of the child, precisely because it allows children to live with both parents and, in addition, guarantees the exercise of parental authority and the joint responsibility of the two parents in raising common offspring ( art. 1,583, § 1). There is no place, however, when a parent declares that he does not want custody or is unfit to exercise family power.” (Judgment 1619454, 07138739620208070020, Rapporteur: MARIO-ZAM BELMIRO, Eighth Civil Panel, judgment date: 20/9/2022, published in DJE: 3/10/2022.)

**two** In the decision adopted by the Court of Justice of the Federal District and Territories, in a ruling of September 20, 2022, therefore recent, the Court states that the rule of the national legal system is shared custody, unilaterality being rejected (TJDT, 2022 ). The benefits arising from this system include social, patrimonial, moral and psychological factors. Subsequently, the Egrégia Corte recognizes that in decisions, the judge must observe the best interests of the child and adolescent, using reasonableness and legality to do so (TJDF, 2022).

The Civil Code prioritizes a consensual solution (article 1584, I, CC, 2002). That is, if there is an agreement between the parents regarding shared custody, what is decided by the parents must be observed,

therefore, it must obey the dictates of balance and justice (Regis; Coltro, 2020). Thus, there will only be interference by the Judiciary when there is no agreement between the parties or there are no serious reasons for its interference. In the decision in question, it is clear that one of the parents declares that he does not wish to have custody or is unfit to do so. In this case, unilateral custody will be adopted (TJDFT, 2022). However, a simple declaration that you do not wish to assume such responsibility is not enough; an evaluation judgment must be made and the reasons must be proven.

The Egrégia Corte, that is, the Court of Justice of the Federal District and Territories, has maintained this understanding in its decisions, being the national reference in this sense. From another ruling, issued on 08/26/2022, the following can be extracted (TJFT, 2022):

Children's rights must be interpreted in accordance with art. 227 of the Federal Constitution and the Child and Adolescent Statute – Law no. 8,069/1990.[1] The doctrine of integral protection of children must be considered, which comprises the principle of their best interests, identified as a fundamental right in the Federal Constitution (art. 5, § 2) due to the ratification of the International Convention on the Rights of the Child - Organization United Nations (UN)/1989.[2] The measures to be taken in processes involving children must always observe their best interests, an interest that must prevail over any others. The art. 22 of the Child and Adolescent Statute establishes that parents are responsible for the support, custody and education of minor children (...). Shared custody of children became the rule in the Brazilian legal system after Law no. 13,058/2014. Check out the art. 1,584, § 2, of the Civil Code as amended by the aforementioned legal diploma: Art. 1,584. (...) § 2 When there is no agreement between the mother and the father regarding the custody of the child, with both parents being able to exercise family power, shared custody will be applied, unless one of the parents declares to the magistrate who does not want custody of the minor. ("Wording given by Law No. 13,058, of 2014) Unilateral custody will only be adopted when the couple is not interested in sharing coexistence or when the best interests of the child are required. (Judgment 1605252, 07058127620208070012, Rapporteur: HECTOR VALVERDE SANTANNA, Second Civil Panel, judgment date: 8/10/2022, published in PJe: 8/26/2022.)

Decisions must be adopted in compliance with the provisions of the Federal Constitution (Brazil, 1988) and the Child and Adolescent Statute (Brazil, 1990). The best interest of the infant is a fundamental principle, encompassed and enshrined in article 5 of the 1988 Federal Constitution (Brazil, 1988). Thus, given the supremacy of the constitutional text over other norms, these must adapt to it, so that legal decisions and legislation are in accordance with what is established by the Greater Law.

In the case of domestic violence, it creates a situation that is difficult to resolve. The context is one of conflict and violence, unsuitable for the stay of a minor. Therefore, unilateral custody must be adopted. The law listed the possibility of having it precisely aimed at such situations (Tartuce, 2020).

Shared custody became mandatory with Law 13,058/2014 (Brazil, 2014) and should be the rule when raising children (Tartuce, 2020). It must be considered, however, that conflict between parents and domestic violence impede this rule. Jurisprudence has not excused itself from the issue:

1. Shared custody is the ideal to be sought between separated parents, even if this requires reorganizing the habits of the new families. This rule, however, gives way when the parents' disagreements go beyond mere dissent. 2. In this case, sharing custody is not recommended, as the relationship between the children's parents is marked by severe conflicts. Furthermore, until the situation of instability in the maternal home has been overcome, there is no way to establish shared custody without putting the safety of adolescents at risk." (Judgment 1603066, 07021925620208070012, Rapporteur: FÁBIO EDUARDO MARQUES, Fifth Civil Panel, judgment date: 9/8/2022, published in PJe: 1/9/2022).

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The decision is in accordance with what is recommended in article 1586 of the current Civil Code (Brazil, 2002). The legal text states that the magistrate may decide differently from what is stipulated in the law, if there is *serious* reasons or establish unilateral custody. It is not reasonable for a minor to remain in a conflict environment. Your best interests must be preserved (Federal Constitution, 1988) considering your well-being and safety (ECA, 1990).

In the case of domestic violence, the minor is exposed to a vulnerable situation. Therefore, it is not viable for the child to remain in contact with the aggressor, also avoiding discomfort.

to the victim (Engel, 2019). Therefore, there is a need for unilateral custody. In view of the above, the brand new Law 14,713/2023, approved by the National Congress and sanctioned by the President of the Republic, is now in force, which prohibits shared custody in cases of domestic violence.

Thus, the aggressor parent is prohibited from having custody of the child, which is assigned only to the other parent who is not responsible for the violence. In this way, the child and the person being attacked are preserved, since they will not have to see the other spouse when handing over the child to them and the latter cannot be the object of parental alienation or be exposed to violence.

## **two. Challenges in complying with relevant legislation**

Article 1583 of the current Civil Code (Brazil, 2002) imposes that custody of children, especially with a view to their protection and security, must be unilateral or shared, in accordance with what the analysis of the practical case requires. Unilateral custody is one in which guardianship is assigned to one of the parents or whoever can replace them. Joint responsibility linked to the effective exercise of the rights of father and mother who do not live in the same home is what is meant by shared custody (article 1583, §1, Civil Code, 2002).

The law, therefore, didactically clarifies both situations, listing the possibility of two regimes (Tartuce, 2020). There must be balance as a driving force behind shared custody, if it is adopted. The time spent together must be divided equally, so that there is no burden on one or the other and so that there is a healthy and useful coexistence (article 1583, §2, Civil Code, 2002).

In the case of parents who do not live in the same city, the basis that meets the best interests of the children will be considered (article 1583, §5, Civil Code, 2002). The rule, therefore, is that the minor remains at the address where his social life and insertion factors are. This is what Maria Helena Diniz (2005, p. 311) asserts when listing the three points considered bases for establishing what is in the best interests of the minor: the affectivity continuum, the social continuum and the spatial continuum.

In effect, affection concerns who the child feels most comfortable with. The social aspect concerns the child's life, the school they attend, the friendships they have, that is, where their social life is developed, since this interaction is fundamental to their development. Finally, the spatial element is pertinent to their physical safety and meeting their most basic demands, such as a suitable home, etc. (Diniz, 2005, p. 311).

In view of the above, it appears that in the case of domestic violence, the ideal is for the minor to be kept away from the aggressor, even if the child is not attacked, since it is not uncommon for the child or adolescent to be a victim of violence. which is understood as parental alienation (Tartuce, 2020). However, some challenges arise regarding the topic. In several cases, attacks are not brought to the attention of the courts or public authorities, due to the financial dependence of one of the spouses on the other, resulting in underreporting (MPCE, 2021).

In this case, the child is exposed to an inadequate environment, without being removed from living with an aggressor, contrary to the provisions of the Federal Constitution of 1988 and the Child and Adolescent Statute (Brazil 1988 & 1990). In view of this, the ideal is for the person attacked, almost always the woman, to request the legal protection listed by the Maria da Penha Law (Brazil, 2006) and obtain unilateral custody (article 1584, CC, 2002), preserving the woman and the smaller.

Article 1584 of the Civil Code (Brazil, 2002) with the changes promoted by Law 11,698, of 2008 and Law 13,058, of 2014, establish a broad system of protection for children and adolescents, encompassing the various possibilities to preserve the best interests of the child. Thus, item I of the aforementioned article establishes that shared or unilateral custody may be "(...) requested, by consensus, by the father and mother, or by any of them, in an autonomous action of separation, divorce, dissolution stable union or precautionary measure(...)" (Brazil, 2002)

Unilateral custody may be requested in an autonomous action, in the case of a precautionary measure, and may and should be granted by the judge, depending on the reasons invoked. The assaulted woman, therefore, may request the adoption of such an institute, often lacking clarification for the lay public so that appropriate measures can be adopted.

This possibility occurred with the changes promoted by Law 14,713/2023, which amended the Law 10,406/2002, the Civil Code, and Law 13,105/2015, the Civil Procedure Code. Therefore, it is up to the Judiciary and those fundamental to justice bodies, such as the Public Defender's Office and the Public Prosecutor's Office, to promote publicity and awareness campaigns so that women in situations of domestic violence can request shared custody.

### 3. Solutions and possibilities to preserve the best interests of the minor

Domestic violence against women is one of the most pressing issues in Brazilian society (Engel, 2019). Every day, several cases are registered and brought to the attention of the authorities, and there is also a significant number of cases that are not reported. According to data released by the Federal Senate electronic portal (Federal Senate, 2023), three in every 10 women have been victims of domestic violence.

Therefore, debating this topic becomes of special relevance, considering that, in addition to violence against women, sometimes these are mothers, also affecting the person of their children (Dias, 2020).

When data on violence against women is analyzed, the scale of the problem becomes evident. Data collected through the National Household Sample Survey (Pnad, 2019) shows that every year 1.3 million women are assaulted in the country.

However, it is worth stating that even if the numbers were small, the problem should draw the attention of society as a whole, as any form of violence against women is unacceptable. According to information collected by author Cíntia Liara Engel (Ipea, 2019), the following is clear:

It is estimated that, in 2009, 2,530,410 people suffered physical aggression in Brazil, of which 42.7% (1,447,694) were women. The black population is more vulnerable to physical aggression. Of the total number of men attacked, 39% were white and 61% were black. In turn, among the women attacked, 44% were white and 56% black. In general terms, of all people physically attacked in 2009, 35% were black men, 24% black women, 22% white men and 19% white women. (Engel, 2019, p. 09)

The data highlights a latent problem in the country, requiring broad action from public authorities with a view to reducing it. The problem continues to be recognized by society, which is aware of the incidence of cases, as well as knowing the law, especially the Maria da Penha Law. In this sense, the law is the main instrument for protecting women in Brazilian society, having been used and applied since its entry into force, representing a milestone in the fight against gender-based violence:

The majority of the population is aware of the Maria da Penha Law: 66% believe they know a lot or something about the law, and 32% say they know what the law is, but know little about it. Only 2% of the population says they do not know the Maria da Penha Law. However, the protection network for women victims of violence is less known, with the exception of the Women's Police Stations, known to 97% of the population. The way the law works and supports women through other institutions is unknown to the majority of the population: 24% know about special courts, 28% know about specialized health services and 32% know about temporary shelters. (Engel, 2019, p. 44)

In view of this, what is sometimes lacking is effective action from public authorities to resolve the problem, not only by punishing the aggressors, but by treating the problem at its root, through awareness-raising education in schools and within society. It is clear that in these cases, not only the woman is affected, but also her children:

Violence against women, especially by their partners, is a burden on health services due to the costs it generates. This violence not only causes physical and psychological harm to women, but also poses risks to their children. Witnessing violence within the family increases children's chances of suffering depression, anxiety, conduct disorders and delays in their cognitive development. Furthermore, it increases the risk of becoming, in turn, victims of mistreatment or future attackers. (Casique; Furegato, 2006, p. 6)

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The Civil Law (Brazil, 2002) did not hesitate to address the problem, adopting an effective solution: the unilaterality of child custody, a topic widely discussed in this work. Thus, according to Law 10,406 of 2002, custody can and should be unilateral, when there are serious reasons for doing so. Therefore, the chapter of the Civil Code that deals with the Protection of Children (Brazil, 2006) is in line with the Maria da Penha Law and the provisions of the Child and Adolescent Statute.

Therefore, women in situations of domestic violence must seek justice in order to obtain their protection and also request custody of their children. On the other hand, the state must offer ways for women to report and seek help in safe conditions:

The mandatory protection, by the State, of each member of the family is an express result of what is constitutionally established. However, due to several factors, one of the main obstacles to combating domestic violence is the silence of victims who, out of fear, do not ask for help or report their attackers. (Lourenço, 2016, p. 12)

Bearing in mind that the Civil Code of 2002 (Brazil, 2002) reserved an entire chapter to deal with the protection of the person of children, in line with the principle of the best interests of the minor, with the Federal Constitution (Brazil, 1988) and with the Statute of Children and Adolescents (Brazil, 1990) it is necessary for the State to guarantee the application of the law, providing security for women to report their aggressors and also protecting children, removing them from an environment where violence occurs.

**4. The new Law 14,713/2023 and the changes promoted in article 1,584 of the Civil Code of 2002** Law 14,713/2023, approved this year, modified the 2002 Civil Code, prohibiting shared custody in cases of domestic violence. This legislation demonstrates consistency with what is researched in this work, as it substantially changed the content of article 1,584 of Law 10,406/2002 and the provisions of Law 13,105/2015 regarding the custody of minor children.

Originating from Bill 2491/2019, authored by Senator Rodrigo Cunha, through the new law, shared custody is prohibited in the event of any type of domestic violence against one of the parents, and the minor must remain under the custody of only one of them, obviously away from the aggressor (Brasília, 2023).

Given the novelty of the law, which came into force on October 30, 2023, there are almost no comments on the doctrine, and it is pertinent to make observations based on the legal text itself. It should be noted that the respective law clarifies an issue widely discussed in doctrine (Diniz, 2005, p. 313) regarding the viability of shared custody in the event of domestic violence.

In view of the above, Law 14,713, of October 30, 2023 (Brazil, 2023) significantly changed § 2 of article 1,584 of Law 10,406, of January 10, 2002, the current Civil Code (Brazil, 2002) which became have the following wording:

§ 2 When there is no agreement between the mother and the father regarding the custody of the child, and both parents are able to exercise family power, joint custody will be applied, unless one of the parents declares to the magistrate that they do not wish to have custody of the child. or the adolescent or when there are elements that demonstrate the likelihood of a risk of domestic or family violence. (Brazil, 2023)

Thus, if there is a situation of domestic violence or even the probability of its existence, the obligation of shared custody is ruled out, by law, highlighting the unilateral nature of custody, and the minor must remain under the guardianship of someone who does not pose a risk to him or her. parent not responsible for the violence. Thus, for example, a woman attacked due to domestic violence, who has minor children, may have full custody of them (Brazil, 2023).

Therefore, the child is not exposed to the risk of having to come into contact with their aggressor and the child is protected from the hypothesis of parental alienation and the possibility of being attacked:

According to the new Law, in custody actions, before the mediation and conciliation hearing begins, the judge must ask the parties and the Public Prosecutor's Office whether there is a risk of domestic or family violence, setting a deadline of five days for the presentation of evidence. or relevant evidence. If applicable, unilateral custody will be granted to the parent not responsible for the violence. (Federal Senate, 2023)

6 However, changes were made to the Civil Procedure Code (Brazil, 2015). In it, it was stipulated, through the change in article 699-A that before the hearing begins, the judge must investigate the risk of domestic violence or whether it has already been established with the aim of assigning custody to the parent not responsible for the violence (Art. 699-A, Code of Civil Procedure, 2015).

Thus, Law 14,713/203 promoted important changes in the legal diplomas that dealt with shared custody, thus allowing women victims of domestic violence to have unilateral custody of their children, removing them and their children from the aggressor.

## CONCLUSION

An examination of judicial decisions and recent legislative changes reveals significant progress in the protection of minors in contexts of domestic violence in Brazil. Law 14,713/2023, by prohibiting shared custody in cases of domestic violence, represents a decisive step in defending the rights and safety of the children involved. Current legislation aligns with constitutional principles and the precepts of the Child and Adolescent Statute, prioritizing the best interests of the minor and recognizing the unfeasibility of shared custody when there is a risk of violence.

The analysis of jurisprudence shows that Brazilian courts have recognized the importance of shared custody as a general rule, however, they have also adapted their decisions to ensure adequate protection of children in situations of violence. The predominant understanding is that shared custody, although ideal in many cases, should not prevail when there is a risk to the minor. The courts' decision, therefore, reflects a sensitive interpretation adapted to the complexity of domestic violence situations.

However, the effective application of the new law faces challenges, such as the need for public awareness and access to clear information about legal rights and procedures. Domestic violence statistics and reports of underreporting highlight the need for a more accessible and proactive justice system that can serve victims and protect minors effectively.

Therefore, Law 14,713/2023 appears as a necessary and expected response to the problems identified in the protection of children in contexts of domestic violence. To ensure that legislative changes bring real benefits, it is essential that public authorities and justice institutions intensify efforts to implement the new legislation, promote awareness campaigns and ensure that protective measures are properly applied. Only in this way will it be possible to ensure a safe environment conducive to the development of affected children and effectively tackle the complex issue of domestic violence in Brazil.

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