RCMOS – Multidisciplinary Scientific Journal O Saber.
ISSN: 2675-9128. Sao Paulo-SP.
Year IV, v.1, n.1, Jan./Jul. 2024. | submission: 07/29/2024 | accepted: 07/31/2024 | publication:02/08/2024

SHARED CUSTODY IN DOMESTIC VIOLENCE CASES

Summary

The article aims to analyze the feasibility and implications of shared custody in situations of domestic violence, addressing the relevant legislation and doctrine on the subject. Firstly, it is essential to define and understand domestic violence, its manifestations and the applicable legislation, with emphasis on the Maria da Penha Law (Law 11,340/2006), which seeks to protect women who are victims of violence in the domestic environment. Furthermore, Law 8,069/1990 (Child and Adolescent Statute) is analyzed to understand the protection of minors in contexts of violence. The study highlights that, although shared custody is generally promoted to ensure the equal participation of both parents in their children's lives, its application in cases of domestic violence can be problematic. The need to protect the woman and children from continuous contact with the aggressor makes shared custody unfeasible in most cases. The article also analyzes the jurisprudence and decisions of Brazilian courts, which often opt for unilateral custody to guarantee the best interests of the child and adolescent. Finally, the article proposes the need for a careful and careful assessment of each case, with continuous monitoring of families affected by domestic violence, to guarantee the safety of victims and the well-being of minors. The creation of public policies that take into account the complexity of these cases is advocated, promoting a balance between the protection of the vulnerable and the right to family life.

Key words: Shared Custody; Domestic violence; Maria da Penha Law.

Abstract

The article aims to analyze the feasibility and implications of shared custody in situations of domestic violence, addressing the relevant legislation and doctrine on the subject. Firstly, it is essential to define and understand domestic violence, its manifestations and the applicable legislation, with emphasis on the Maria da Penha Law (Law 11,340/2006), which seeks to protect women who are victims of violence in the domestic environment. Furthermore, Law 8,069/1990 (Child and Adolescent Statute) is analyzed to understand the protection of minors in contexts of violence. The study highlights that, although shared custody is generally promoted to ensure the equal participation of both parents in their children's lives, its application in cases of domestic violence can be problematic. The need to protect the woman and children from continuous contact with the aggressor makes shared custody unfeasible in most cases. The article also analyzes the jurisprudence and decisions of Brazilian courts, which often opt for unilateral custody to guarantee the best interests of the child and adolescent. Finally, the article proposes the need for a careful and careful assessment of each case, with continuous monitoring of families affected by domestic violence, to guarantee the safety of victims and the well-being of minors. The creation of public policies that take into account the complexity of these cases is advocated, promoting a balance between the protection of the vulnerable and the right to family life. **Keywords**: Shared Custody; Domestic violence; Maria da Penha Law.

INTRODUCTION

This article aims to analyze the possibility and feasibility or unfeasibility of shared custody in cases of domestic violence. In this way, the relevant legislation will be studied, also bringing the position of the doctrine on the subject.

Discussing shared custody in cases of domestic violence requires studying and conceptualizing, initially, domestic violence and its manifestations, as well as analyzing the legislation applicable to this situation. In this context, Law 11,340, of August 7, 2006 (Brazil, 2006), known as the Maria da Penha Law, which received this name due to the struggle of Ceará activist Maria da Penha in the defense of women victims of violence, comes into play. domestic worker, who also victimized her.

Secondly, it is necessary to analyze another legal provision of fundamental importance in the Brazilian legal system, Law 8,069, of July 13, 1990 (Brazil, 1990): this is the Child and Adolescent Statute, which establishes norms and procedures for preserve the best interests of minors in the face of different situations. Thus, the study will allow us to analyze shared custody in the context of violence

domestic and its viability and unfeasibility.

In this sense, it is clear that the two legal diplomas are subsequent to the 1998 Federal Constitution (Brazil, 1988) and are in line with the principles and legal provisions listed in the constitutional text. Among them, the dignity of the human person and the protection of children, adolescents and women, as will be seen below.

1. What is domestic violence and the Maria da Penha Law (Law 11,340/2006)

This chapter intends to analyze what domestic violence is in light of doctrine, jurisprudence and, mainly, legislation. Thus, the forms of manifestation of violence against women and what the legislation says on the subject will be seen.

Violence against women, which occurs in the most different spheres of society, is a regrettable reality and requires multiple and joint efforts to protect them and guarantee a fair society for women. Among the most diverse forms of violence, domestic violence stands out, given its cruelty and incidence in society, since, in the environment where women should feel welcomed and safe, it is precisely where their physical integrity is suffered. , psychological, sexual, patrimonial and its other forms of manifestation, as recommended by the Maria da Penha Law (Brazil, 2003).

In this sense, in 1995, the United Nations promoted the IV World Conference on Women, the last held in this sense, in which the agreements and discussions promoted at this conference inspire the protection of women throughout the world to this day. Also called the Beijing Platform, the city where the conference took place, its theme was “Action for Equality, Development and Peace”, highlighting discussions about ways to effectively combat violence against women, as you can see from reading the excerpt:

> One of the twelve areas defined as priorities by the Beijing Platform for overcoming gender inequalities is combating violence against women. Violence, whether occurring within the family or community, perpetrated or tolerated by the State, is understood as one of the main obstacles to guaranteeing the human rights and fundamental freedoms of women and girls. In 1995, the Platform's text highlighted that discrimination and violence were a reality shared by women around the world and affected them at all stages of life, hindering the full development of girls, adult life and dignified aging for women. in the most diverse national contexts. (Engel, 2019, p. 3)

Violence against women should be a concern for everyone, especially the public authorities, which have a duty to adopt measures, mechanisms and actions with a view to eradicating this problem from society. In Brazil, until 2006, there was no legislation in this regard, so women only had the provisions of the Penal Code (Brazil, 1948) to protect them.

However, this was not enough, given that there were no effective discussions in society and the neglect that such situations received from police authorities, largely reflecting the cultural aspect (Barboza, 2013).

It is in this context that Law 11,340, of August 7, 2006, known as the Maria da Penha Law, emerged as a result of the efforts of Maria da Penha Maia Fernandes from Ceará to create a law that aimed to protect women from domestic violence. and other forms of aggression. Thus, in its article 1, the legal text states that the law must create mechanisms to curb and prevent domestic and family violence against women in accordance with the Federal Constitution and the International Conventions for the Protection of Women (Brazil, 2006) .

In this sense, it should be noted that the law aims to fully protect women in cases of domestic or intra-family violence. The text of the law itself defines what domestic violence is with a view to allowing its identification and punishment, treating it as any conduct that brings suffering and damage, whether physical, property, moral or sexual (Brasil, 2006).

Domestic violence against women, according to the aforementioned article, is violence committed against women within the domestic unit. The domestic unit is understood as the woman's continuous coexistence space, whether or not she has family ties and people with whom the woman lives sporadically, as stipulated in section I of article 5 of Law 11,340/2006 (Brazil, 2006). It is clear that the woman's continuous permanence is relevant to this concept of violence, even if there are no family ties, or

that is, violence committed by a person with sporadic contact.

Violence committed by a family member who does not necessarily have an emotional relationship with the woman will also be considered domestic violence, as stipulated in item II of article 5 of Law 11,340/2006 (Brazil, 2006). Therefore, any aggression that occurs in the family context will fall under the Maria da Penha Law. For the law, the family is any community made up of people united by natural ties or affinity relationships (Brasil, 2006).

The third section expands the interpretative range of the law by considering that all violence committed by a person with whom the offended party has had a romantic relationship, regardless of cohabitation or the time since the relationship ended, will be classified under the terms of the Maria da Penha Law, being considered gender-based violence, which then has an aggravating factor (Brasil, 2006).

All this effort to conceptualize violence, its scope and ways to combat it results from the recognition of the damage that this problem causes to the female population. The state, in its duty to organize and protect society, acts through the law with the aim of protecting the female population from such harm, therefore:

> Violence against women is a complex phenomenon, which in different situations takes on a specific dynamic and which can express itself in different ways according to the sociocultural context in which it appears. It constitutes a violation of their human rights and affects their physical, psychological and moral integrity, and at the same time this violence is based on the dynamics of society where men and women still live in unequal conditions of access to power, economic resources and basic rights. (Moura; Simões, 2021, p. 5)

The manifestations of this problem are not only physical, but also patrimonial, sexual, psychological and moral. The law considers the various dimensions of domestic violence in order to also expand the range of protection. Thus, in Article 7 of Law 11,340/2006, we have different forms of manifestation of violence.

Therefore, domestic and family violence against women will immediately be considered physical violence, that is, one that causes physical harm and harm to your bodily health, in accordance with item I of article 7 of the Maria da Penha Law. (Brazil, 2006) This is the most widespread form of violence and the best known.

However, it is worth highlighting that violence does not only manifest itself in this way. Section II of the article under discussion clarifies that psychological violence will also be punished and restrained (Brasil, 2006). Psychological violence is understood as conduct that causes emotional harm, reduced self-esteem, threats, embarrassment, constant surveillance, repeated persecution, blackmail, etc. In short, any behavior that affects a woman's mental health, psychological balance and emotional well-being may be classified as domestic or family violence against women (Brasil, 2006).

The other form of violence committed against women is common in our society: sexual violence. Under the terms of the aforementioned article, sexual violence is understood as conduct that induces women to maintain, witness or participate in sexual intercourse without their consent, through threat, intimidation, coercion or use of force (Brasil, 2006).

The other two forms of violence that stand out are patrimonial and moral, in accordance with sections IV and V of article 7 of the Maria da Penha Law (Brazil, 2006). The legal text states that any conduct aimed at destroying, causing damage or in any way harming a woman's assets and values will be considered property violence. In addition, conduct that leads to defamation, slander or insults against women will be moral violence. (Brazil, 2006)

Therefore, it is clear that the legislator is concerned with protecting women from various forms of violence. Society has the false impression that violence is only physical, when, in fact, it can present itself in different ways (Souza et al, 2018). Violence is, therefore, everything that causes harm, harm or physical or psychological suffering to a woman, as well as any action with the aim of damaging her image or her assets:

> Physical violence was the most recognized modality, however, psychological and moral aggression had a higher prevalence despite being less perceived as abusive. Thus, it was found that violence of a psychological and moral nature was the most common in dating. (Souza et al., 2018, p. 40).

Discussing this topic is necessary because, in many situations, there are also children involved in the context of domestic violence. Thus, the issue becomes even more complex, posing challenges regarding the custody of these children and adolescents and the viability of shared custody in this context, which is the possibility of the child living with both parents (Tartuce, 2020).

In most cases, the adoption of shared custody becomes unfeasible. This is because it is advisable to move away the woman living with her attacker. Therefore, it is not plausible that the woman continues to see her attacker and has to share custody of her children with him (Lacerda, 2020).

In this regard, a study will be made later on of the relevant legislation and decisions in this regard with a view to understanding the best solution in the face of such a challenging context. The Maria da Penha Law (Brazil, 2006) states in its article 30 that it is the responsibility of the multidisciplinary care team to provide subsidies that support the adoption of protective measures.

There is, therefore, a concern when violence occurs in a family context with children, with protection being provided for them, in order to reduce their exhaustion and exposure to the situation of violence. To better understand the scenario, Law 8,069, of July 13, 1990, the Statute of Children and Adolescents, should be studied, work to be carried out in the next chapter.

two. The protection of children and adolescents in light of the ECA (Law 8,069/1990)

Enacted in 1990, the Child and Adolescent Statute, Law 8,069, of July 13, 1990 (Brazil, 1990) is based on the full protection of children and adolescents, replacing the previous Minors Code, archaic legislation, in a that the ECA represented a significant improvement in the protection of children and adolescents. The structure of the law is based on principles or guidelines to be followed in achieving the objectives sought by the legal diploma (Fuller, 2018).

The first principle listed by the law in question is that of Absolute Priority. This states that the State must adopt the protection of this public as an absolute priority, due to their vulnerability (Brasil, 1990).

Primacy is therefore consistent with the dignity of the human person, the guiding principle of the 1988 Federal Constitution (Brasil, 1988). There is a clear line with the constitutional text, prioritizing the full protection of children and adolescents, a duty of the state and society as a whole.

> Despite apparently stating the obvious, this provision brings an important innovation in relation to the system prior to the ECA, in that it recognizes children and adolescents as subjects of rights, and not mere "objects" of state intervention. This provision is also a reflection of what is contained in art. 5th, of CF/88, which, by granting everyone equality in individual and collective rights and duties, logically also extended them to children and adolescents. The true principle contained in this provision has repercussions not only in the scope of substantive law, but also applies in the procedural sphere, and it is not permissible, for example, for teenagers accused of committing infractions to fail to faithfully respect all guarantees procedural procedures guaranteed to defendants in general, whatever their age[...] (Digiácomo; Digiácomo, 2017, p. 5 and 6)

Children and adolescents, previously solely the concern of their families, now receive attention and protection from the State. This paradigm shift is fundamental as, from then on, governments must work to achieve the objectives listed in law, ensuring a welcoming and humanized society for the younger population (Lenza, 2020).

In this sense, other rights will also be listed in the text of the law, such as the right to life and health, education, protection against abuse and exploitation, family and community coexistence, adoption, among others. All with the aim of promoting the full protection of children and adolescents, as listed in article 1 of the law in question. However, article 5 will say:

> No child or adolescent will be subject to any form of neglect, discrimination, exploitation, violence, cruelty and oppression, and any attack, by action or omission, on their fundamental rights will be punished in accordance with the law. (Brazil, 1990)

Therefore, it is everyone's duty to guarantee these prerogatives. Schools, hospitals, public offices, public authorities, police and the Judiciary ensure the full protection of children and adolescents. Freedom also stands out among their rights, under the terms of article 16, which stipulates that children and adolescents have the right to come and go, frequenting public places and community spaces, therefore that

legal restrictions are respected (Brazil, 1990).

However, the right to express oneself and give an opinion must be respected, to guarantee the minor a space for their full development. In addition, children and adolescents cannot be deprived of family life, a life without discrimination, and must receive assistance, guidance and refuge, all in accordance with the law. (Brazil, 1990).

It is clear, therefore, that the Child and Adolescent Statute aims to protect minors comprehensively, prioritizing their physical and emotional well-being, adopting, to this end, various protection mechanisms. It is in this sense, therefore, that Brazilian courts have decided when it comes to shared custody in cases of domestic violence. Unilateral custody has been adopted with a view to protecting the best interests of children and adolescents, removing them from the environment of domestic violence:

> It is unreasonable for an assaulted woman to still have to see her attacker when picking up or dropping off her child. However, it is important to consider whether the aggressor has the legitimacy to keep a minor under his or her custody. In this matter, unilateral custody is required, and the judge must observe the practical case (Dias, 2019).

The Courts have ruled on the inadmissibility of shared custody in the context of domestic violence, largely due to the so-called best interests of the child and adolescent, which, in short, is the set of actions, factors and care that provides the child's full well-being. , as defined by Law 8,069/1990, which is the Child and Adolescent Statute (Brazil, 1990).

3. The best interests of the child in Laws 8,069/90 and 13,058/2014

Defining the best interests of children and adolescents requires an interdisciplinary and contextual analysis. In the case of shared custody or living together, the best interests of the child will obey the analysis of the practical case, taking into account the material and immaterial aspects to achieve this objective (Brasil, 2014). It is therefore unreasonable for a child to be under the custody of their father when he has assaulted or committed any other form of domestic violence against the mother.

And in this sense, the country's Courts have understood, as will be seen later in the study of relevant jurisprudence. Immediately, it is necessary to analyze the principle of the best interests of the minor, with a view to understanding its application in the factual case. The principle extends to various aspects of family law, including family planning.

Although family planning is free, responsible parenting requires that parents or guardians act appropriately and always aim for the best interests of their offspring, as the duties fulfilled guarantee the realization of the fundamental rights of children and adolescents, and, therefore, , of their formation as individuals and citizens of the Democratic State of Law. This is a right to freedom, which should not be exercised irresponsibly, as there are consequences such as crimes of material and moral abandonment, and the very removal of family power (Gonçalves, 2023).

These changes to the current civil law were introduced with the publication of Law 11,698, of 2008, which completely modified articles 1,583 and 1,584, of the Civil Code of 2002 (Brazil, 2002). In view of the above, the law suggests the possibility of custody being unilateral. Observing the factual reality and noting that to preserve the dignity and integrity of the minor, only one of the parents, or none of them but a capable family member, may assume custody of the children.

Therefore, although it is harmful for the child to live with only one of the parents, it is even worse for the child to remain in a context of domestic violence or for them to be under the custody of the aggressor parent. Therefore, the judge, observing the particularities of each situation, may impose custody on only one of the parents.

5 CONCLUSION

Shared custody, although ideally promoted to ensure equal participation of both parents in their children's lives, faces significant challenges when applied in contexts of domestic violence. Analysis of legislation, doctrine and jurisprudence reveals that, in these cases, the priority must always be the protection and well-being of the victims, whether they are women or children.

The Maria da Penha Law and the Child and Adolescent Statute provide robust legal bases for protection against domestic violence, but the application of shared custody can often contradict

rify the principles of safety and security established by these laws. Brazilian courts, recognizing this complexity, often decide on unilateral custody, with the aim of guaranteeing the best interests of the child and removing victims from continuous contact with their aggressors.

The conclusion of this study points to the need for a careful and personalized approach in each case of domestic violence. Judicial decisions must be informed by ongoing, multidisciplinary assessments that consider all aspects of victims' safety and well-being. Furthermore, public policies and protective measures must be strengthened and rigorously implemented to ensure that shared custody does not perpetuate the cycle of violence.

Therefore, while joint custody remains a valuable objective under normal circumstances, its application in cases of domestic violence should be the exception rather than the rule. The safety and physical and emotional integrity of victims must be the top priority, guiding all decisions related to custody and family life. Society and the justice system must continue to evolve to offer the best possible protection to victims of domestic violence, ensuring that their needs and rights are fully met.

REFERENCES

BARBOZA, Patrícia.**Domestic violence and the Maria da Penha Law**. Social Justice Publisher, 2013.

BRAZIL.**Law No. 11,340, of August 7, 2006**. Maria da Penha Law. Official Gazette of the Union, Brasília, DF, 2006.

BRAZIL.**Law No. 8,069, of July 13, 1990**. Child and Adolescent Statute. Official Gazette of the Union, Brasília, DF, 1990.

BRAZIL.**Federal Constitution of 1988**. Official Gazette of the Union, Brasília, DF, 1988.

DIAS, Maria Berenice.**Shared custody and child protection in cases of domestic violence**. Editora Forense, 2019.

ENGEL, Débora.**The Beijing Platform and violence against women**. In: *Brazilian Journal of Gender Policy*. v. 3, no. 1, p. 1-15, 2019.

FULLER, Daniel.**The Child and Adolescent Statute and its application**. Editora Cidadania, 2018.

GONÇALVES, Flávio.**Rights and duties in responsible parenting**. Editora Familia e Direito, 2023.

LENZA, Pedro.**Fundamental rights and child protection**. Atlas Publisher, 2020.

MOURA, Ana; SIMÕES, Carla.**Violence against women: Psychological and legal aspects**. Psique Publisher, 2021.

SOUZA, Jessica; OLIVEIRA, Bruno; SILVA, Mariana.**Physical and psychological violence in the family context**. Editora Realidade, 2018.

TARTUCE, Bruno.**Shared custody and the implications of domestic violence**. Legal Editor, 2020.