

EQUALITY AND SHARED PARENTAL RESPONSIBILITY

**- THE SITUATION IN PORTUGAL AND OTHER SELECTED
EUROPEAN COUNTRIES -**

GLEICHWERTIGE UND GEMEINSAME ELTERLICHE VERANTWORTUNG

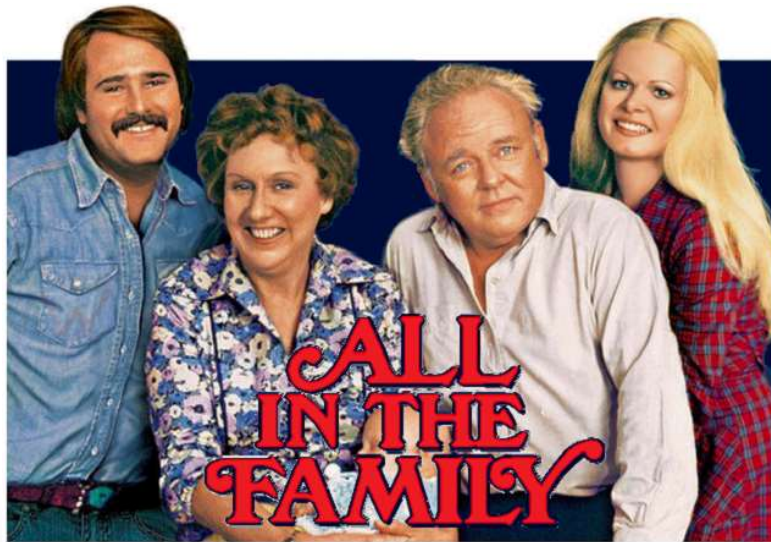
**- DIE SITUATION IN PORTUGAL UND IN AUSGEWÄHLTEN
EUROPÄISCHEN STAATEN -**



António José Fialho
Family Judge/Familienrichter
Ana Catarina Fialho
Lawyer/Rechtsanwalt

Berlin - 23.05.2019

WHAT ARE WE TALKING ABOUT?



TRADITIONAL POST-DIVORCE MODEL



CZECH CONFERENCE “NEW EUROPEAN TRENDS IN CARE OF CHILDREN” - 2010



CZECH DOCUMENTARY “STRIDAVKA”



DISCUSSION ABOUT SHARED RESIDENTIAL CUSTODY IN PORTUGAL

Documentário + Debate
António Fialho, juiz de família

Residência Alternada

Duas Casas – O Dobro dos Amigos



Conferência
Cooperação Ordenada e Interdisciplinar na Resolução de Conflitos Parentais - A Experiência do Tribunal de Cochem-Zell

Orador: Jürgen Rudolph
Juiz do Tribunal de Família de Cochem-Zell e autor do livro "Du bist mein Kind. Die Cochemer Praxis"

O objectivo desta conferência é divulgar a cooperação prévia interdisciplinar (envolvendo juizes, procuradores, psicólogos, mediadores e outros técnicos, para a resolução antecipada de conflitos parentais, que é aplicada pelo Tribunal de Família de Cochem (na Alemanha). Esta metodologia permite uma avaliação contextualizada dos conflitos parentais e uma tomada de decisão judicial fundamentada, em favor do desenvolvimento equilibrado das crianças nos casos de separação e divórcio dos seus progenitores, reduzindo o tempo dos processos e sendo por isso mais eficaz para todos os actores envolvidos. Espera-se assim que se dê início a uma discussão séria e consequente sobre a reforma dos Tribunais de Família e Menores em Portugal.

7 de Abril de 2011:
Local: Instituto Superior de Gestão,
Rua Vitorino Nemésio, 5
1700-306 Lisboa
Horário: 17:00 Horas
Moderador: Helena Boleiro (Juiz)

8 de Abril de 2011:
Local: Auditório do Estádio do
Boviseta, Rua 1ª Janeiro - Estádio
do Bessa (Século XXI, 4100 Porto)
Horário: 15:00 Horas
Moderador: Paulo Guerra (Juiz)

Inscrições:
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guaranteedparental@gmail.com
www.guaranteedparental.org
T: 96 910 07 14



1 ciclo documental sobre Igualdade Parental
entrada livre

Local - Auditório da EHTL
Escola de Hotelaria e Turismo de Lisboa
Rua Saraiva de Carvalho, nº 41, Lisboa

17 de Novembro

"A Morte Inventada" (Brasil)
Comentários: Hernani de Carvalho (jornalista)
Moderador: Isabel M. Santos (jornalista TV)

"Indizível- A Alienação Parental em Portugal" (Portugal)
Um documentário
de Alexandre Azinheira e Bárbara Bettencourt
Comentários: Catalina Pestana (Ps)
Moderador: Graça Ribeiro (jornalista do

1 de Dezembro

"The Evolution of Dad" (EUA)
Comentários: Sofia Marinho (socióloga, investigadora do OFAP/ICS)
Moderador: Patrícia Maia (jornalista do portal Boas Notícias)

**"Residência Alternada
Duas Casas o Dobro dos Amigos"** (R. Checa)
Um filme de Luboš Patra legendado em português

Documentário + Debate
Comentário: António Fialho, juiz de família

Residência Alternada

Duas Casas – O Dobro dos Amigos
um documentário de Luboš Patra

8 de junho de 2012, 21h
Auditório da Escola de Hotelaria e Turismo de Lisboa (antiga escola secundária Machado Castro)
Entrada pelo: Hotel da Escola, Rua Saraiva de Carvalho 41, 1700-306 Lisboa-Méio - Entrada de Rua

entrada livre

NOVOS MODELOS E TENDÊNCIAS NA REGULAÇÃO DO EXERCÍCIO DAS RESPONSABILIDADES PARENTAIS

- A RESIDÊNCIA ALTERNADA -



Faculdade de Direito da Universidade Nova de Lisboa
1 de Junho de 2012

**CENTRO
DE ESTUDOS
JUDICIÁRIOS**

BRATISLAVA CONFERENCE - 2013



CONFERENCES IN PORTUGAL (2011-2019)



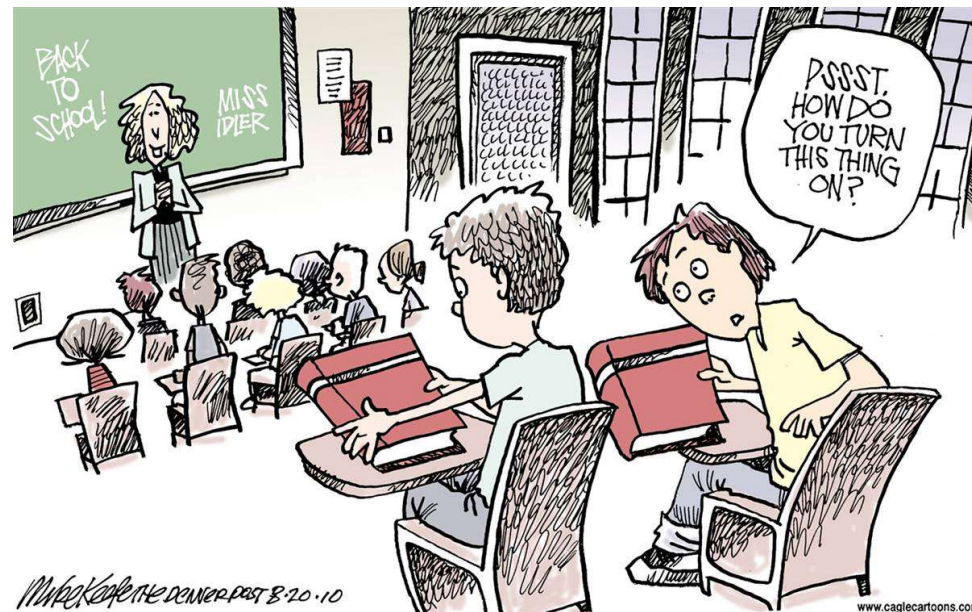
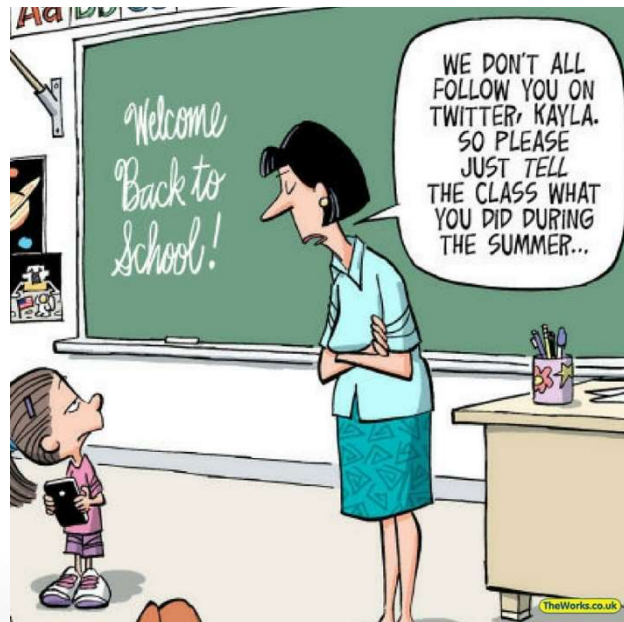
MASTER THESIS ABOUT SHARED CUSTODY AND JUDICIAL PRACTICE



FIRST LEGAL REFERENCE TO SHARED CUSTODY IN PORTUGAL

STUDENT STATUS AND SCHOOL ETHICS ACT

“If the child lives in shared custody with each of the parents, they must decide, by agreement, or in the absence of this, by judicial decision, the exercise of the functions of guardian of education.”



RIGHT OF PETITION BEFORE PT PARLIAMENT



<https://igualdadeparental.org/peticao>

Residência alternada
e envolvimento *Parental*



As crianças têm um maior nível de satisfação geral;
mostram melhores resultados quanto aos fatores psicológicos [ex.: menos depressões]; mostram melhor relacionamento com ambos os progenitores; estão mais satisfeitas com a sua situação escolar; e são menos vítimas de bullying [Bergström, Fransson, & Hjern, 2015]



IGUALDADE PARENTAL
ASSOCIAÇÃO DE PROGENITORES PARA A IGUALDADE PARENTAL
E DIREITOS DAS CRIANÇAS

PETIÇÃO

LAW PROPOSALS IN PT PARLIAMENT

LAW PROJECT 1190/XIII (SOCIALIST PARTY)

The court shall give preference to the shared custody of the child with both parents, irrespective of mutual agreement and without prejudice the existence of some kind of alimony, when all relevant circumstances have been weighed - this is the best interest of the child.

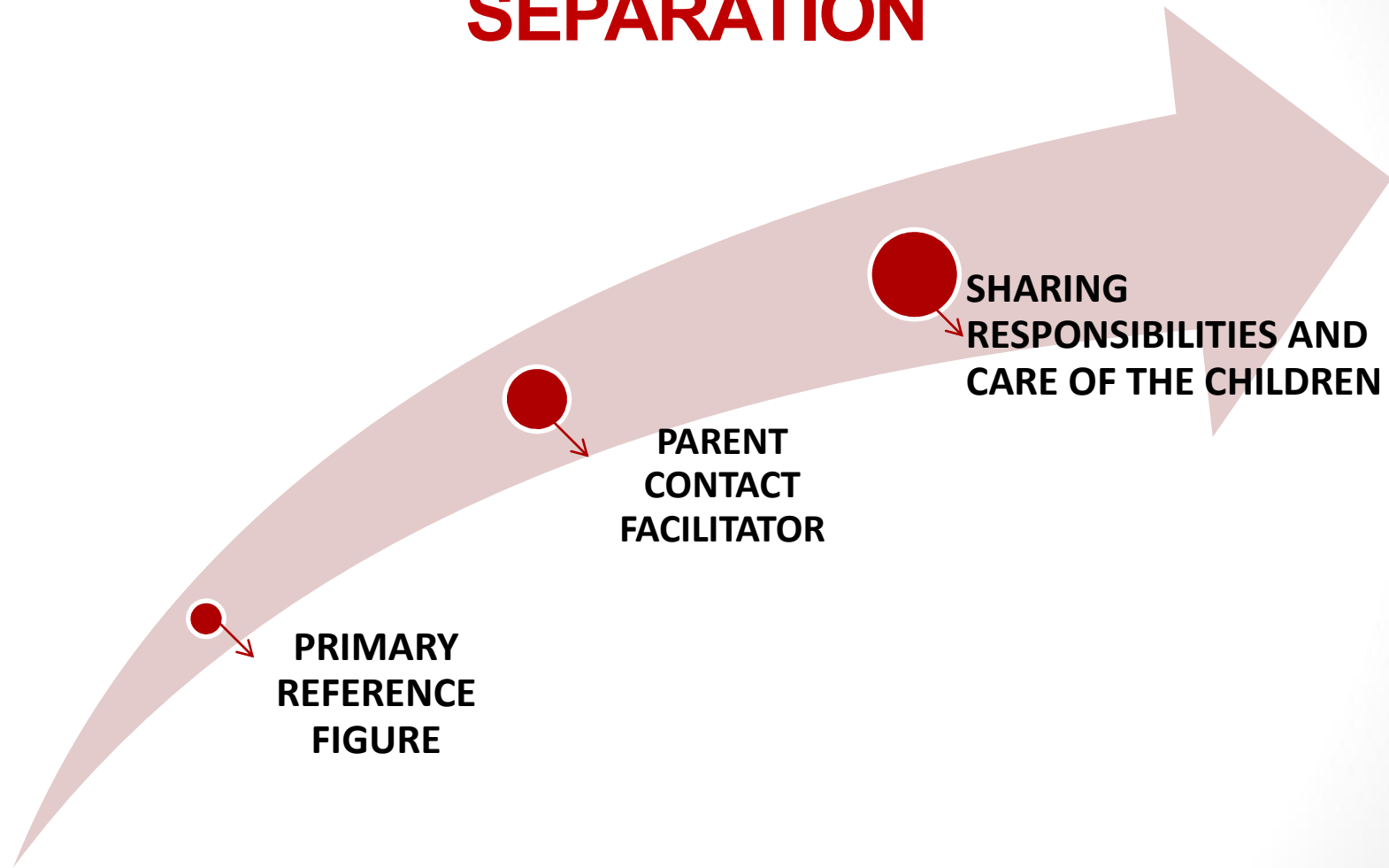
LAW PROJECT 1182/XIII (PEOPLE, ANIMALS AND NATURE PARTY)

The Court shall give preference to the model of shared custody, regardless the existence or not of any kind of agreement and whenever, considering all the relevant circumstances - this is the best interest of the child.

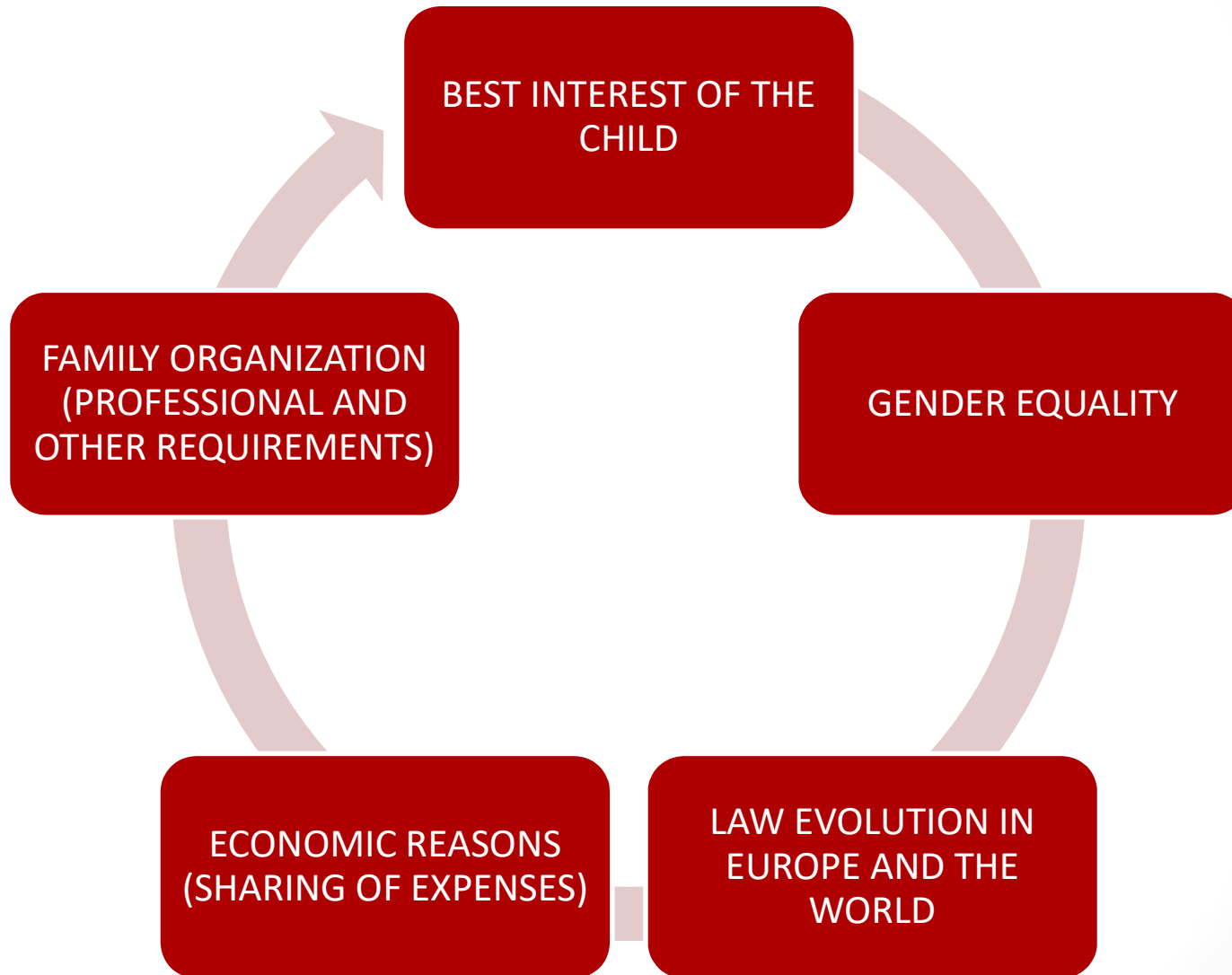
LAW PROJECT 1209/XIII (POPULAR PARTY)

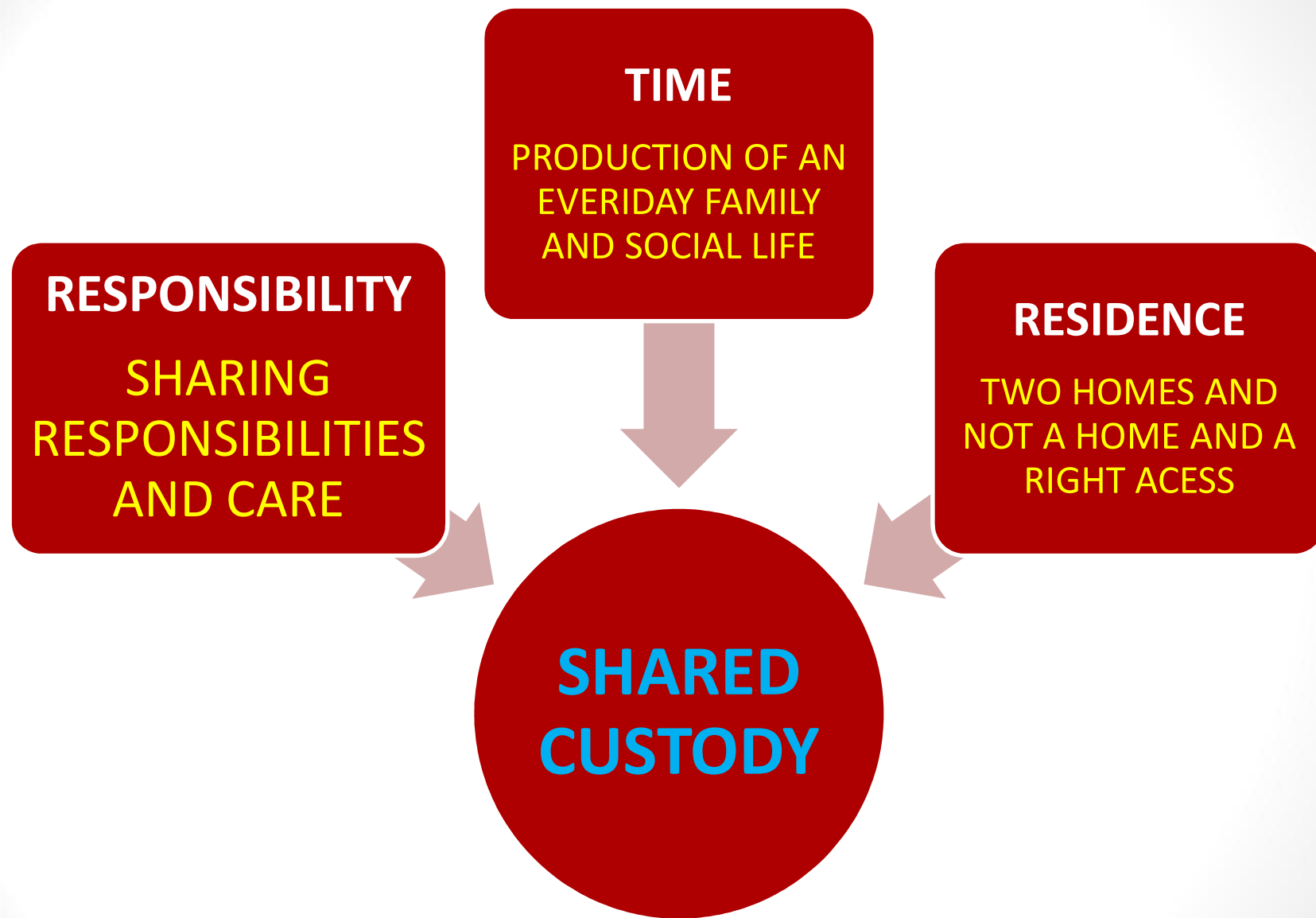
The Court may order shared custody of the child, under the terms agreed between the two, or, depending on the circumstances and the best interest of the child, as determined by the Court; this exercise shall be without prejudice to the application of provisions on maintenance obligations imposed by law.

EVOLUTION OF PARENTAL RESPONSIBILITIES IN DIVORCE OR SEPARATION



THE INEVITABLE CHANGE





EVERYDAY FAMILY AND SOCIAL LIFE ?

Fixation of residence **equitably** with each of the parents (Bilocation Law 2006 - Belgium)

Egalitarian and **rational distribution of the time** of each of the parents with the children (Ley 5/2011 - Valencian Community)

Substantial and significant time of the child with each of the parents (Family Law Ammendment Act 2006 - Australia)

Egalitarian and meaningful contact of the child with each one of the parents (Act 54/2006 - Italy)

SHARED CUSTODY IN EUROPE

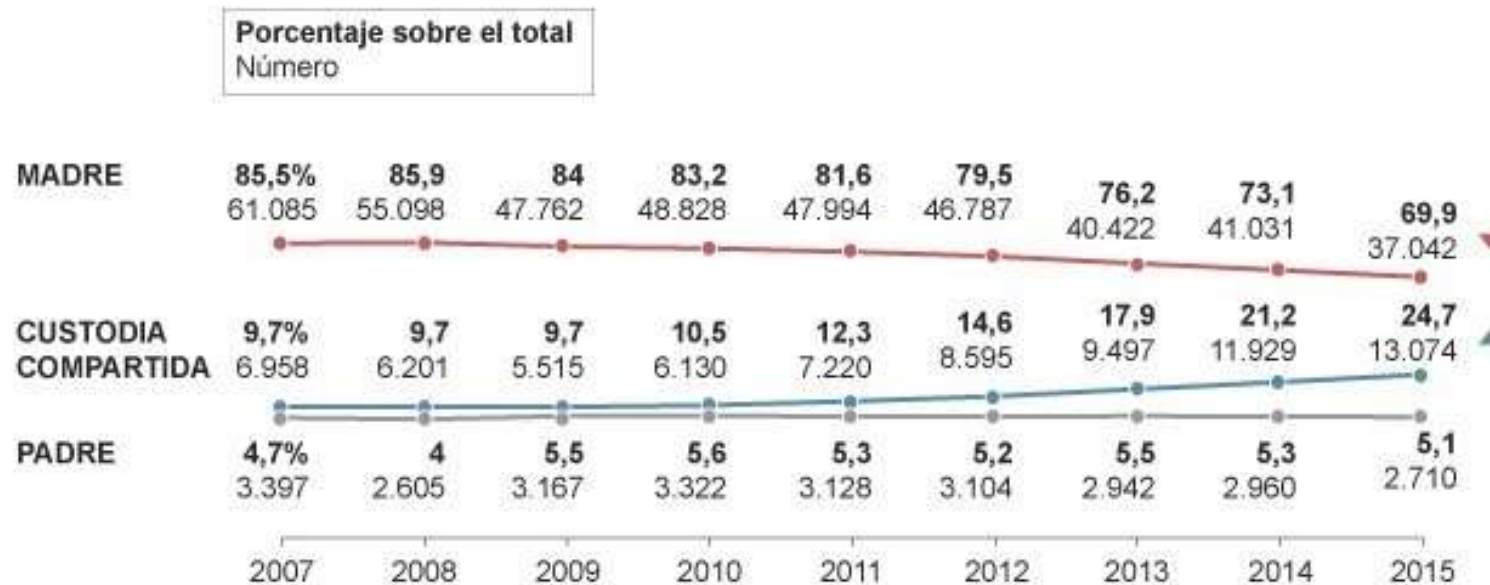
COUNTRY	MODEL	IMPACT
SWEDEN	Shared custody (50/50) for married parents (even without mutual consent). The parent whom doesn't want this model to happen needs to ask for the dissolution of this model	50/50 it's the most common (35%)
BELGIUM	The end of the couple's relationship shall have no effect on the children; the parents shall reach an agreement, if not, there are several mediation options, including the Court's decision	In 96% of the cases there is an agreement and a judicial decision takes less than 6 months.

SHARED CUSTODY IN EUROPE

COUNTRY	MODEL	IMPACT
DENMARK	Parents are encouraged to reach an agreement for shared custody of the support from the Social Services (90%). This agreement can be changed throughout the time (92% change its conditions, 40% because of the child's preferences)	In the 10% that goes to Court, 38% gets 60/40 and 18% gets 50/50
SPAIN	Parents shall reach an agreement, approved by the Court. If not, the judge shall decide taking in account the child's best interest. They've tried to legislate in favour of the shared custody but it wasn't possible to reach a majority yet	Shared custody went from 21% in 2014 to 32% in 2016. However this number gets lower when there is no agreement (17%)

SHARED CUSTODY IN SPAIN

Tipos de custodia en divorcios y separaciones



Fuente: INE.

SHARED CUSTODY IN EUROPE

COUNTRY	MODEL	IMPACT
FRANCE	It depends on the case circumstances. The law prefers the agreement and, since 2013, shared custody (50/50) is encouraged. Every agreement shall have the Court's approval taking in account the child's best interest. There are several guidance criteria.	Shared custody (50/50) grew from 10,3% in 2003 to more than 18%. Judges decide for shared custody on 50% of the cases when there is no agreement
NEEDERLANDS	Preferably shared custody but the timings can be changed by the parents agreement	70/30 is the most common option

SHARED CUSTODY IN EUROPE

COUNTRY	MODEL	IMPACT
ITALY	Preferably shared custody (without any timings definition or settlement of residence that can be changed with the parents agreement. There is a discussion towards the changing of the law in order to have 50/50 as its preferable model.	Shared custody on 90% of the cases 80/20 is the most common model

PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING PARENTAL RESPONSIBILITIES

Principle 3:20 Residence

(2) The child may reside on an alternate basis with the holders of parental responsibilities upon either an agreement approved by a competent authority or a decision by a competent authority. The competent authority should take into consideration factors such as:

- (a) the age and opinion of the child;**
- (b) the ability and willingness of the holders of parental responsibilities to cooperate with each other in matters concerning the child, as well as their personal situation;**
- (c) the distance between the residences of the holders of the parental responsibilities and to the child's school.**

PRINZIPIEN ZUM EUROPÄISCHEN FAMILIENRECHT BETREFFEND ELTERLICHE VERANTWORTUNG

Prinzip 3:20 Aufenthalt des Kindes

(2) Das Kind kann sich abwechselnd bei den Inhabern der elterlichen Verantwortung aufhalten aufgrund einer von der zuständigen Behörde genehmigten Vereinbarung oder aufgrund einer Entscheidung der zuständigen Behörde. Die zuständige Behörde berücksichtigt Umstände wie:

- (a) das Alter und die Auffassung des Kindes;**
- (b) die Fähigkeit und Bereitschaft der Inhaber der elterlichen Verantwortung, in den das Kind betreffenden Angelegenheiten zu kooperieren, sowie ihre persönliche Situation;**
- (c) die Entfernung zwischen den Aufenthaltsorten der Inhaber der elterlichen Verantwortung und zur Schule des Kindes.**

PARENTING MODELS AFTER DIVORCE

To minimize the impact of divorce, there must be large periods of coexistence

Emotional stability depends on the nature of the affective ties and the opportunities of sharing rather than the changes of physical space

Models of shared parenting allows both parents to ensure personal moments of intimacy, dating or simple living, free from the children (“child-free time moments”)

TIMES OF SHARING BETWEEN PARENTS AND CHILDREN



THE MYTH OF THE FOUR “C”

CONSENSUS – 50/50 IS ONLY POSSIBLE IF
BOTH PARENTS AGREE

COMMUNICATION – SHARED CUSTODY
REQUIRES PARENTS TO COMMUNICATE
FREQUENTLY AND WELL

CO-PARENTING - PARENTS HAVE TO WORK
WITH ONE ANOTHER AS A TEAM

CONFLICT - BETWEEN PARENTS, THERE
CAN NOT BE CONFLICT, OR THIS MUST BE
NEARLY NULL

THE REALITY OF THE FOUR “C”

CONSENSUS - 50 TO 80% OF THE
PARENTS DO NOT AGREE INITIALLY WITH
SHARED CUSTODY

COMMUNICATION - LIMITED, FORMAL
AND RARELY PRESENT

CO-PARENTING - MOST IS AT VIA THE
PARALLEL AND NOT FOR PARENTHOOD
CO-PARENTING

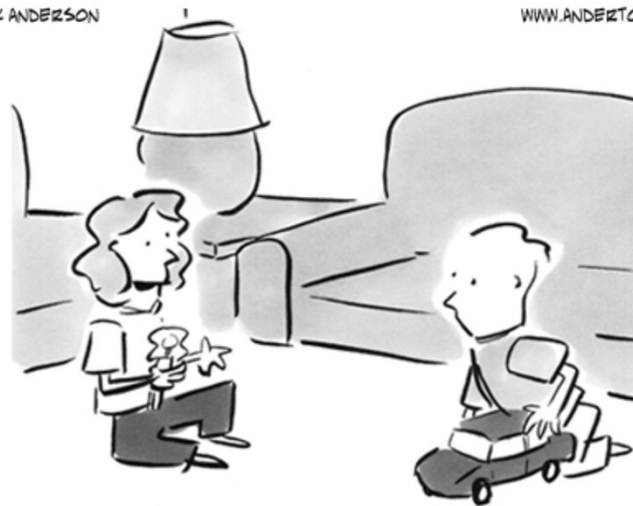
CONFLICT - PARENTAL CAPACITIES ARE
NOT RELATED TO THE CONFLICT WHICH
HAS TO DECREE FULLY IN SHARED
CUSTODY

SINGLE CUSTODY ALTERNATING WEEK-ENDS (26/4)

M	Di	M	D	Fr	Sa	S	M	Di	M	Do	F	Sa	S	M	Di	M	D	Fr	Sa	S	M	Di	M	D	Fr	Sa	S	M	Di
o		i	o			o		i		r		o		o		i				o		i		o			o		i
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30

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"Let's play house. I'll be the mommy and twice a month you can be daddy."

SINGLE CUSTODY - ALTERNATING WEEK-ENDS AND A WEEK DAY(24/6)

M o	Di	M i	D o	Fr	Sa	So	M o	Di	M i	D o	Fr	Sa	So	M o	Di	M i	D o	Fr	Sa	So	M o	Di	M i	D o	Fr	Sa	So	M o	Di
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30



SHARED RESIDENTIAL CUSTODY EACH WEEK

Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30

My parents love me enough to
co-parent



Shared Parenting Works

SHARED RESIDENTIAL CUSTODY HALF MONTH

↓																														↓				
M o	Di	M i	D o	Fr	Sa	So	M o	Di	M i	D o	Fr	Sa	So	M o	Di	M i	D o	Fr	Sa	So	M o	Di	M i	D o	Fr	Sa	So	M o	Di					
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30					

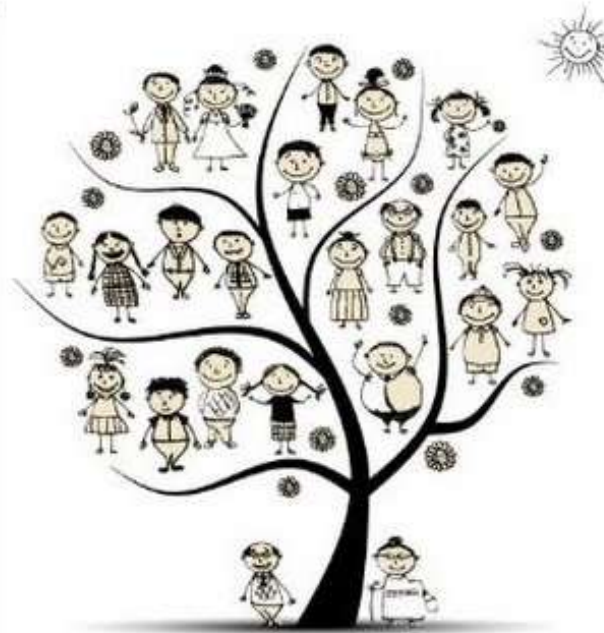


CHILDREN ARE NOT PROXIES FOR BATTLES

Family disputes can have a devastating impact on children.

Parents have the responsibility to shield their children from the negative effects of family discord.

They should seek to mediate peacefully disagreements about their children's future.



FAMILY CONSTELLATIONS

Practical way to dissipate old family patterns (conflicts and diseases) which impair the free flow of love between the members of a system.

The constellation acts directly on the issues of the family system, opening space for a new understanding and healing of those parents.

Look at the systemic links that exist there and with positions or situations being relief and peace.

The basic system order is reestablished.

Method of conflict resolution, with a therapeutic bias, which purpose is to conciliate, deeply and definitively, the parents, at a psychic level, through the knowledge and understanding of the hidden causes that generate disagreements.

SHARED RESIDENTIAL CUSTODY

Singular mode of co-parenting after a family dissociation, characterized by a rotary division and tendentionously joint of the resident times, care and education of children, between father and mother



Based on two criteria;

- Tendentionously symmetric rotating division of time;
- Production of an everiday family and social life with the child

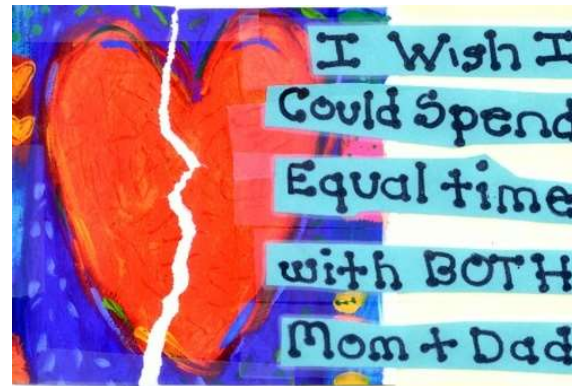
CRITICS

- It serves the interests of the parents rather than the children
- It is detrimental to the consolidation of the habits, values, and the personality formation pattern
- It contradicts the principle of home continuity
- It may cause the child emotional and mental instability



ADVANTAGES

- It contributes to a greater emotional attachment between the child and both parents since it integrates the household (the child is not seen as "visit" at the other parent's house)
- It allows to mitigate the effects of poverty among lone parents and to ensure an equal distribution of times and charges
- It allows both parents free time for themselves



GUIDANCE CRITERIA

- ☒ **The child's best interest**
- ☒ **The ability to dialogue, understanding and cooperation between both parents**
- ☒ **A common educational model or consensus on its fundamental guidelines**
- ☒ **The geographical proximity**
- ☒ **The child's will and the child's age**
- ☒ **The emotional bond with both parents**
- ☒ **The availability of parents to maintain direct contact with the child during their residence period**
- ☒ **Economic and housing conditions of each of them (equivalent or sufficient)**

THEIR LIFE, THEIR VOICE

I live with my parents but I have two houses.

My father lives in one house and my mother live in another house ... that's the way my family is.

I'll allways be my parents' son. They are mine and I belong to them.

But they don't belong to each other ... do you know what I mean ?



(R., 7 years old)

WILL THERE BE AN IDEAL REGIME ?



NO.

Each family has its own unique identity and dynamics.

It is difficult to identify a system of parent-child contacts that meets the needs and idiosyncrasies of all families

The best distribution of the times is one that ensures the involvement of both parents in the daily routines of the child (sleeping rituals, school trips, leisure activities, times when one is sick, meals, homework, etc.)

THE FUTURE

The effort to ensure that children have post-divorce parenting arrangements which promote good social and psychological adjustment **is an ongoing one, involving dialogue and debate at all levels**

Our children deserve no less than this





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