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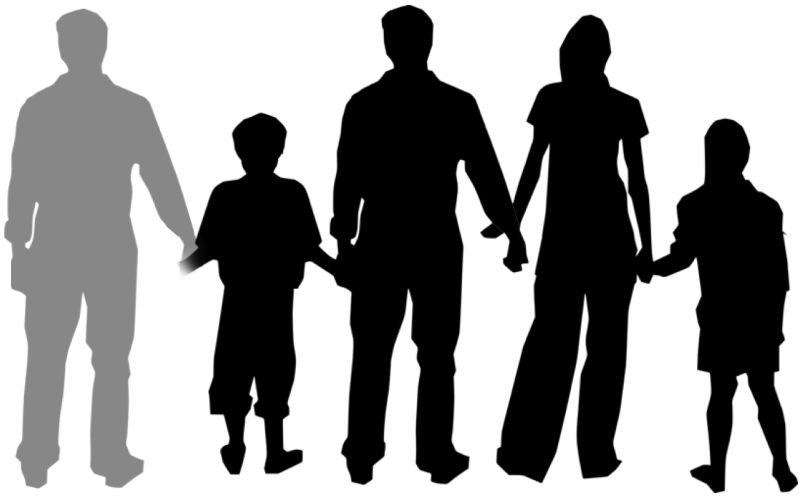
Vilnius Semi Final B – European Family Law

EMOTIONAL PARENTHOOD

AND ITS POSSIBLE LEGAL CONSEQUENCES



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"*It is not flesh and blood, but heart*
which makes us fathers and sons"
Friedrich Schiller

1 – Introduction

Currently, filiation and socio-affective parenthood are the important topics in Family Law. If, on the one hand, a biological filiation remains the most relevant criteria of a family bond, on the other hand it cannot be denied that this is now competing with the socio-affective criteria, as a principle for family bond.

The social developments observed in European and western societies, from the end of the 60's of the 20th century, with the appearance of de facto unions and, consequently, of socio-affective parenthood required a recognition by European Court of Human Rights, henceforth «ECtHR» and later on normative recognition of the socio-affective bonds, consummating the child's superior interests[1]. Family law standards will, thus, adapt to this social reality that is in constant transformation: the family.

In Europe, ECtHR, has been progressively taking out the monopoly of the biological criteria in the qualification of relations as a constituent of "family life" and, increasingly recognizing the importance of affection in interpersonal relations or social effectiveness of the family role in the qualification of family relations.

In accordance with the positive obligation of recognizing non-marital families, several European legal regimes came to recognize the role of the parent in a de facto union, thus legally protecting a socio-affective reality.

Although in Portugal, the biological paradigm still has a big role when it comes to the establishment of a filiation, Article 1904-A of the Portuguese Civil Code, thus forth «CC», provides for situations in which socio-affective parenthood is legally recognized. It considers the affective bonds established between a child and an adult, with whom its only parent has a relationship, forming amongst themselves a family relation – following Article 8 of the European Convention of Human Rights, thus forth «ECHR».

[1] Article 3 of the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on the 20 November 1989.

2 – New family realities

2.1 – Approach to the new family realities

The families of the past were closed and impenetrable to others. Family behaviors were 'institutionalized' under a set of established norms, this was the role model of a 'nuclear family' – based on marriage and consisting of a father, a mother and a children. The break with this scenario began at the end of the 60's of the 20th century, with the 'democratization' of the family. This, in turn, generated other family realities, such as: "de facto family unions", "single-parent families", and "recombined families", all of them presenting as a common trait the predominance of affective bonds.

Family became a structure for personal accomplishment for each of its members. It has disappeared, slowly and progressively, the unchanged and perpetual character of the above-mentioned family unit and nowadays, interpersonal relationships which are freely chosen and developed by its members prevails. It falls to the legislator to keep up and adapt to these new realities, refraining from imposing any static view on the concept of family. The modern family has released itself from marital and blood bonds and is concerning itself more with emotional and affective relations, seeing as it is the will of the members of these same family structures, which define the new concept of family.

As concerns the exercise of parenthood, in the sense of replacing the purely biological for criteria of love, based on the desire of caring and voluntary assumption of such duty. That criteria can no longer discipline the entirety of contemporary society and the aspirations of its individuals. That is why, currently, the exercise of parenthood goes beyond the biological aspect and invades the social and psychological aspects.

Affections have come to be more valued in the establishment of relationships that unite adults and children. Truthfully, socio-affective parenting gains significance because it is based on the affections and love that brings together the members of a family unit and not because it is pre-established by the biological connection or by the legal parenting presumption[2] - it occurs from an affectionate interaction, making it therefore a parental bond.

[2] According to the article 1826 of the Portuguese Civil Code, it is assumed that the child born or conceived in matrimony has as a father the spouse of the mother.

2.2 – Recognitions of the *de facto* families

Keeping up with the socio-cultural transformations of the family structures in Europe, the ECtHR has developed an evolutional interpretation of Article 8 of the ECHR and the right to respect for private and family life, mentioning that the Convention is a live instrument which must be interpreted and applied in light of the new social realities in Europe. The Court has allowed the coexistence of the traditional definition of family, based on marriage, and the broader definition, which is founded in factual family bonds that unite a natural family.

The notion of family must be based on the existence of substantial affective and effective bonds between the people that are presented as a family. The ECtHR has already considered that family life demands and assumes a life effectively 'lived', sustaining that the simple fact of the existence of a biological relationship between a child and parent is not enough to assume the existence of a family life between them, not unless it is effectively 'lived' between them[3], pointing to the Court for the effective criteria of interpersonal bonds.

Concerning the bonds which involve a child and its biological parent, the Court begins by stating that the lack of common life between the parents, at the moment of the children's birth, does not impede family life[4], because the mere filiation bond amongst the child and its biological parent constitutes the *ipso facto* family life. Recognizing the evolution of family relations, the ECtHR came to consider, in another case, that the biological bond is not sufficient to create a family, requiring the existence of a family, resulting from a *de facto* union, to be shown by other factors[5].

The ECtHR recognizes that between parents and their children there is always a family relation, through birth. However, it also recognizes the fundamental

[3] Complaint no.16 944/90, M. *versus* Holland, 8 February 1993 – the situation in which a person donates its sperm exclusively to allow a woman to conceive through artificial insemination does not allow, in itself, the donator the right to the respect for his family life with the child.

[4] Ruling Berrehab *versus* Holland, 21 June 1988 – the birth of the child occurred after the parents divorce had been decreed, having ceased the cohabitation and not having the father the child in his care. This does not prevent the existence of a constitutive bond of family life between the child and the father.

[5] Ruling Lebbink *versus* Holland, 1 June 2004 – The Court understood, contrary to the usual, that a mere biological relatedness, without any other factual or law elements that would indicate the existence of an up-close relationship was not sufficient to guarantee the protection of article 8.

circumstances that can determine the inexistence of any relation, such as the lack of any real or personal bond between the child and the parent, besides the biological aspect. Therefore, what truly matters in the existence of life and family bonds is the effectiveness of the aspects that unite the people. For this reason, Article 8 of the ECHR protects the bonds that unite members of recombined families[6], such as the ones between a child and its stepmother/stepfather.

In the case Soderback vs. Sweden (28th October 1998), the ECHR made prevail the effective and affective family bonds between a child and its adoptive father, over the filiation bonds between a child and its natural father. The adoptive father had taken care of the child since she was eight months old having always acted has its father and being recognized as such. The ECtHR protected the family life in existence, in detriment of the relation of filiation between the child and the biological father, that is to say, the court ruled for the affective relation over the biological relation, since what had decreed the adoption was limited on solidifying and formalizing the *de facto* family bonds which united the child, mother and adoptive father.

It is natural that the child develops, with the spouse or the person with whom its only parent is in a *de facto* union, a relationship as profound or even more profound than the one it could have established with its biological parent. Hence, in the name of the child's superior interest, the Court has given a clear prevalence to strong socio-affective parenthood, instead of biological parenthood.

The case law of the ECtHR recognizes the existence of family life in *de jure* families *and* in *de facto* families, proven by effectiveness criteria of interpersonal relations or by the appearance of a family. The absence of a biological bond does not prevent the existence of a family life and, on the contrary, the existence of a family bond might not suffice to identify family life.

The respect for family life requires not only negative obligations (of non-interference) from the States, but also positive obligations, that are translated into a duty of adopting measures that assure the effective practice of the rights established in Article 8, in accordance with the principle of efficacy. The first time the Court clearly recognized the existence of a positive obligation of the State of assuring the safeguarding of family life was in the ruling of Marckx *vs.* Belgium on the 13 July

[6] The concept of "*recombined families*" translates the familial realities composed by a couple *de jure* or *de facto* with a child or children, in which at least one of the is the adoptive or natural child of one of the members of the couple.

1979, the State having the obligation to act in a way that allows familial bonds to develop naturally[7].

It is within the context of positive obligations that one can integrate the Law no. 137/2015, of 7 September, which came to alter the CC looking to reinforce the children's protection regarding the exercise of parental responsibilities.

According to the Portuguese legal regime, as a rule, immediately after birth all children must have an established filiation and, when this does not occur, it is the State that promotes the competent action to correct such omission (v.g. officious actions of investigation of motherhood and parenthood). Nonetheless, there are some situations in it is not possible to determine who the father/mother of the child is, in such cases this information is omitted in its birth register and continuing its maternal or paternal filiation as unknown.

On the other hand, Portuguese law predicts exceptions to the establishment of filiation. More specifically, when there is the use of medically assisted procreation, if the woman seeking the MAP treatments is not in a conjugal relationship, from the moment of birth there will only be the maternal filiation. The State declines, in this particular case, the development of any proceedings to establish the omitted filiation[8].

The Portuguese judicial system also predicts the establishment of filiation only in relation to one of the parents, in the case of individual adoption (see 1979 CC). For that effect, the previously existent filiations are extinguished by the adoption (see article 1986 CC), when the child is adopted only by one person. Thus, the adoptive filiation will only be determined in relation to that.

Having identified the situation which contemplates, in the Portuguese legal system, the determination of the filiation of a child only related to one of the parents, there is the need to ascertain that the social reality exceeds the legal reality. As such, even though the child does not have a legally recognized parent, it may come to have – and most times does have – a *de facto* parent.

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[7] According to Belgian law, there was no legal bind between a single mother and a child resulting just from birth, as to see the filiation accepted, the mother had to recognize her child. Therefore, the Court came to consider that the Belgian State stops the obligation to create a judicial mechanism which allows the integration of the child in its family from the moment of birth and because of this, without the need for recognition.

[8] See article 20 (3) of the Law 32/2006, 26 July.

Following a family "recomposition", the only parent of the child, may come to be a family consisting of a *de jure* or de facto couple, in which the child/ren is/are related to one of the members of the couple. In such situations, the other assumes the role of the *de facto* parent, and an affective and social relation emerges that is similar to the one that would be established between the child and its biological parent.

Determining that the superior interests of the child require it and considering the affective bonds between a child and its de facto parent, the Law allows him to exercise, together with the biological parent, the parental responsibilities related to the child.

Considering the effectiveness of interpersonal bonds or the social appearance of a family, the ECtHR has been qualifying the existent relationship between a child, who is the son or daughter of one of the members of the couple and the other member of the couple, as forming a "family life" that deserves to be protected under Article 8º of the European Convention of Human Rights. Following such evolution, the Portuguese legislator recognized that in certain situations, the superior interest of the child may dictate the prevalence of "socio-affective" parenthood over biological parenting.

3 – Presentation of the institute predicted on the article 1904.º-A of the Portuguese Civil Code

3.1 – The Institute of extension of the parental responsibilities

"***Article 1904.º-A***

Combined exercise of the parental responsibilities by the only parent of the child and by its spouse or de facto companion

1 – When the filiation is established only regarding one of the parents, the parental responsibilities may also be attributed, by judicial decision to the spouse or the de facto companion, exercising them, in this case, together with the parent.

2 – The combined exercise of the parental responsibilities, in the terms of the previous number, depend upon the request of the parent and its spouse or de facto companion.

3 – The Court must, whenever possible, listen to the minor.

4 – The exercise of parental responsibilities, in the terms of the present article, begin and is extinguished before adulthood or emancipation only by judicial decision, founded in the articles 1913 to 1920-A.

5 – In case of divorce, separation of people or assets, declaration or marriage annulments, de facto separation or cohabitation cessation between the parental co-responsible are applied the articles 1905 and 1906, with the necessary adaptations."

In light of the evolution of family composition that has been taking place, the Portuguese judicial system, through Law no. 137/2015 of 7 September, enshrined in Article 1904-A of the CC - the combined exercise of parental responsibilities by the only parent of the child and by its spouse or *de facto* companion.

Such a legislative alteration aims to protect and value the new and deep bonds of affection established between a child and the spouse or de facto companion of the parent, intending to conciliate the law with the new family realities.

The combined effort of parental responsibilities intends to preserve and protect the affective bonds between the child and the spouse or companion of its parent, appearing as a *plus* to the traditional family structure.

For the exercise of parental responsibilities to be attributed to both, it is necessary that certain requisites be determined, more specifically, that the filiation of the minor only be carried out by one of the parents and, simultaneously, that the request be expressed to the Court by the parent and its spouse or *de facto* companion.

Only after a judicial decision can parental responsibilities be carried out by both. After such a decision, in the eyes of the law, the affective bond is equivalent to the biological bond. Hence, resulting the co-entitlement of the rights and duties related to the exercise of parental responsibilities, which can only be taken back in cases of inhibition, according to Article 1904 (4) of the CC.

The content of parental responsibilities translates into a set of powers and duties that assure the moral and material well-being of the child, meaning the daily cares, personal relation, education, support, legal representation and the administration of the minor's assets. Considering the impact that such a bond based on affection has in the life of a child when the situation applies it is imperative that the decision of the concrete case taken by the Court be conducted with maximum demand. Therefore, a ruling must be made regarding the level of affection in the relationship that has developed between the child and the third non-parent and, also a prudent assessment of real capacities of the person, as the future co-holder of the parental responsibilities of the child. Furthermore, it must be considered the capacity of the third to respect and promote the conservation of the relationship of the child with its biological family, in the sense that the conservation of that relation will safeguard its superior interests.

This new legal regime is commonly known as parental co-responsibility, in the sense that the spouse or the de facto companion of the parent takes over the exercise of the parental responsibilities of the child, sharing such rights and duties with the

biological parent. In this way, more than fitting the third in the concept of "stepmother" or "stepfather" it is necessary to view this spouse or de facto companion of the child's parent as an "affective parent" [9].

The parenting co-responsibility comprehends the joined exercise of parental responsibilities and it is only in that aspect of the child's life that it has judicial reflexes.

In that way it can be understood that in cases of divorce and separation of people or assets, declarations of annulment or marriage annulments, de facto separations or the ceasing of cohabitation of the parents entitled as responsible, emerges the regulation of the parental responsibilities with the expressed remission for the current regime and in the same situations, for the biological parents, as presented in Article 1904º-A, (5) of the Civil Code. However, *in casu*, the fixation of a regime obligates both biological and affective parent. The affective parent continues to exert the parental responsibilities over the child, even after divorce, separation or the ceasing of cohabitation, as is the case where there are two biological parents. That is to say, the regime will provide for the interactions between the child and person with whom it no-longer resides, the child's maintenance and the way to provide it.

The regime aims to defend the relations of affection established between the child and the affective parent. The daily interaction, the affections and family moments with that person leads to the creation of a quality relationship of affection, already founded in the exercise of parental responsibilities.

It would be against the child's superior interest to break the affective bonds built and maintained with this person upon a divorce or separation with its parent, for as one knows, children build their memories and dreams, daily, on the people with whom they maintain a proximate and affective relationship, transferring to them their social references.

The content of the new article 1904-A of the CC, leads us to the concept of socio-affective parenthood/motherhood, putting into perspective situations that are based on affective bonds between the child and a third person with whom it does not share any biological relation, but that as far as the exercising of parenthood is concerned it acts like such relation existed, behaving like the "Father" or "Mother" of the child.

The regime provided for in Article 1904-A (3) of the CC the establish the need to hear the child. Such requirement finds pure harmony in the ordained principle in the

[9] PEREIRA, Rui Alves, in "*Extension of the "stepmother" and "stepfather" Parental Responsibilities*", Magazine Locus Delicti, p. 4

Portuguese legal order of children's rights to participation and to be heard regarding matters that concern them[10]. The principle of participation and hearing of the child has come to be vividly modeled and morphed, reaching a larger expression with the acknowledgment of the child's right to be heard in judicial proceedings that concern them as an achievement of their superior interest[11].

3.2 – Critical appreciation of the Portuguese legal regime

The regime predicted by Article 1904-A of the CC presents undeniable advantages. Notwithstanding we must share certain concerns that might limit the effective applicability of that regime.

A first observation intimately relates to the prerequisites of the regime itself, because if the law demands that the extension of parental responsibilities occurs only when a unique filiation bond is established, such a prerequisite may compromise and reduce its practical applicability. Indeed, one of the most common and new family realities are named "recombined families", that is to say, child with an established filiation with two parents, but who after a divorce or separation, have a parent who finds a new partner(s) with whom to share his or her life and this new partner takes on an influential and affective role in the child's life. Also, in this case, one is faced with an affective parent with whom the child builds and shares a bond of affection. One question is: is the affective union unworthy of this same protection?

One has reason to believe the regime under the 1904-A should not have limited its application to cases when the filiation is already in place, regarding one of the parents. It should also take into account the situations where the filiation is established with both parents. Such limitation takes the majority of new family realities, more specifically recombined families, not to be covered by such regime.

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[10] Under the articles 4, (c) and 5 (4), (a), and 5 (7), (a) of the General Regime of the Civil Tutelary Process, approved by the Law no. 141/2015, of 8 September, with the alterations introduced by the Law no. 24/2017, of 24 May.

[11] In fact, the child's right to be heard presents as the Principle 3:6 of European Family Law regarding Parental Responsibilities, predicting several diplomas of international nature, from which the article 12 of the Convention on the Rights of the Child and the articles 3 and 6 of the European Convention on the Exercise of Children's Rights stand out.

In fact, recombined families have been gaining ground in relation to other types of family realities and, in these cases, the child and the affective parent build and established affective bonds that are deserving of protection, since they assume a predominant role in the child's life. It is not the fact that the filiation is established with one or both parents that influences the affective relationship between a child and the affective parent.

This delimitation can contribute for a lack or near inexistent application of the combined exercise of parental responsibilities.

However, it is worthy to note that the Portuguese legislator showed already in article 1903 (1) (a) of the CC the importance that the spouse or de facto companion of the parent assumes in the child's life, predicting that in case of impediment of both biological parents, the exercise of parental responsibilities be attributed, primarily, to the affective parent.

There is also the question of a late attribution of filiation to the child, due to omission in the register. Practically, this puts into question the coexistence of biological and affective parents. Pondering that the extension of parental responsibilities is decreed and later on the biological father legally recognizes the child[12]. To this end, the principle of biological truth is put in place, since any child has the right to the establishment of its biological filiation, also harmonizing and cautioning the right to know its genetic roots and the right to personal historicity – rights constitutionally guaranteed under Article 26 of the Portuguese Constitution.

Such rights assume an ethical-judicial value that is manifested by any individual's right to know his "whole", so as to form and build his "self", based on a sense of belonging and inclusion. However, relevant questions arise: should the established bond between child and affective parent be restricted? Under the assumption that such solution would be contrary to the defense of the superior interest of the child, how can one legally articulate the combined exercise of parental responsibilities, which has been judicially decreed, with the exercise of parental responsibilities by the biological parent who legally recognizes his/her child? Should the exercise of such parental responsibilities and, specially, the discussion of matters of particular importance to the minor be shared and debated by "three"?

[12] According with article 1854 of the CC, the father can recognize his child before or after its birth and even after the death of the child.

In the face of the described situation, one believes the exercise of parental responsibilities, looking at the specific case, must be exerted by the biological parents and affective parent. Only in this way can the superior interest of the child be safeguarded. However, we can distinguish two situations: the biological parent only legally recognizes the child without proposing the regulation of parental responsibilities[13] or, on the other hand, after the legal recognition of the child, the biological parent takes action over the regulation of the parental responsibilities.

In both situations, the judicial decision of regulation of parental responsibilities must safeguard the maintenance of parental "co-responsibilities" by the affective parent. Once this is assumed as a pillar of stability and security in the emotional and social development of the child, which cannot be neglected by the appearance of the other biological parent. Truthfully, it does not make sense that a person who, over a period of time, has assumed functions of "father", suddenly ceases to do so[14].

Though, how can such exercise be adjusted exercise "to three" when the legal regime established in the articles 1877 and subsequent of the Civil Code is foreseen for the combined exercise of parental responsibilities by two people? One understands the current regime of parental responsibilities must be reinterpreted to face these new realities. Thus, when it comes to the child's current life acts, the parental responsibilities must be exerted by the parent with whom the child resides, under what is set forth in Article 1906, (3) of the CC, where the parent must not go against the most relevant educational orientations. In turn, related to matters of particular importance there will be the need for an agreement amongst parents, biological and affective, and when such does not happen they will have to go to court, resembling what is already provided for in Article 44 of the General Regime of Civil Tutelary Process.

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[13] In this case, the Public Prosecution must propose a regulatory action of parental responsibilities in representation of the child for the defense of its superior interest. According to articles 3 (1) (a) and 5 (1) (c) of the Status of Public Prosecutions, it is under the Public Prosecution the defense of the interests of incapable minors. By contrast, the extension of parental responsibilities predicted on article 1904-A of the CC must be jointly required by the biological and affective parent, having the Public Prosecutor legitimacy for such action.

[14] It is relevant to point out that under the article 1904-A (4) of the CC, the exercise by the affective parent of parental responsibilities can only be extinct in case of adulthood or by judicial decision, after verified the conditions for limitation or inhibition (articles 1913 to 1920-A of CC)

In case of separation or divorce of the parent and affective parent, under the terms of Article 1904-A, (5) of the CC, the parental responsibilities will be regulated as in the divorce or separation of the two biological parents. The case may be that the child can, inclusively, come to live with the affective parent if that in its superior interest. It is also important to note that the affective parent will also obliged to pay child maintenance under Article 1878 (1) of the CC, which must be actualistic interpretation (see Article 9 of the CC).

Apart from that, one question arises and it concerns the possible implications that may come from the child's opposition to the combined exercise of parental responsibilities. How does one proceed when there is opposition in this regard?

The opposition of the child to the combined exercise of parental responsibilities must always be analyzed according to his or her age and maturity, but above all, to the superior interest of the child. Notwithstanding, the judicial authorities having to consider the opinion and reasons invoked by the child, the truth is that *in casu* and caring for its superior interest a compromise may be reached in order to adjust the combined exercise of parental responsibilities.

4 – Analyses of judicial regimes with similar solutions

Currently many of the existing families all over the world are now rebuilt families (blended or recombined), that is to say, families that result from the union of elements that were previously separated. Certainly such family realities were previously marginalized, but the truth is that an increase in occurrences led to a paradigm shift. There were social movements and political debates all over the world that argued for the acceptance of these new forms of family life, and they have come to be gradually accepted.

In the space of the European Union, different legal orders have slowly been regulating the new reality of the de facto families, although not evenly or with equal coverage.

Actually, if some legal orders have come to accept the acknowledgment in catalogue of the affective parent, giving not only rights, but also duties in relation to the child. Others, on the other hand, refuse such allocation, reserving the parental responsibilities and its exercise to the parents, biological or adoptive. One can divide the legal systems of the Member States into two groups: one recognizing some rights (even

if, as said, with different scopes) to the affective family and the other where such this is denied. In the first group one should include countries like Germany, Denmark, France, England, Wales, Ireland and Holland. In the second group: Italy, Belgium and Spain (without any liability to the legislation of the independent Spanish communities of Catalonia and Aragon). However, none of the European legal orders that recognize the right to others besides the parents (biological or adoptive), do it so in the same terms as the Portuguese, by not demanding, as a requirement for this allocation that the filiation be established only in relation to one of the parents.

Notwithstanding, stigmas (are less common) related to these new (and more frequent) family realities, it is important to keep in mind that there is a necessity to safeguard its internal functioning, mainly the relations between the spouse or companion of the parent and the son/daughter to protect the child's interest in having a legally recognized family. As Maria Teresa Duplá Marín clarifies "*it is fundamental to find a balance between the responsibilities of the biological parents and the stepfathers present in the new rebuilt family, but also find a reciprocation in the parent/son and stepfathers/stepsons relations"*[15][16].

In this sense, in England and Wales the Children's Act of 1989 predicts the possibility of extension of parental responsibilities to others, namely stepfathers and stepmothers.

In agreement with the aforementioned diploma and together with the Civil Partnerships Act 2004, when the parent of the child is married or in a de facto union with another, who is not the parent of the child (even though of the same sex), this "other" can start exercising the parental responsibilities of the child. Those legal orders can happen in four ways: *i)* through the celebration of an agreement with the parent with whom he or she is married (or resides in a de facto union) and that exercises parental

[15] "*La autoridad familiar del padrastro o madrastra en la legislación aragonesa: del Apéndice Foral de 1925 al artículo 72 de la Ley 13/2006 de Derecho de la Persona*", in Revista Critica de Derecho Inmobiliario, N.º 717, 2010, p. 66.

[16] Just like it happens in Portugal, the European legal systems, by the international tools they follow, hearing the child is mandatory and essential to making a decision, namely in situations of extension of the parental responsibilities. In the European Union space it is beneficial and desired a standardization of proceedings. It is in the Legislative Power of the Member States the way that this right can (and must) be exerted in courts and other entities with competence in matters of family and minors. That is the reason why there are still plenty and significant differences in the way this right is safeguarded in the different European legal orders.

responsibilities, determining that such exercise is combined, *ii)* through the celebration of an agreement with both parents that the parental responsibilities are exerted in consonance by both parents of the child – in this case the responsibilities would fall on the three subscribers of the agreement, *iii)* through a parental responsibility order made by the court on an application by the stepparent (one which will be based on an analysis of the child's superior interest), *iv)* through a family arrangements order, either for residence or contact (in this situation it is not necessary that the relationship of the biological parent with the affective parent be judicially recognized).

When the exercise of parental responsibilities is decided this way, it can only be terminated by judicial decision through the requirement of the person that exerts the parental responsibilities over the child or by the child's own request (requiring to be, in this case, authorized to do so by the court).

Even if the parent's spouse does not have parental responsibilities, he is obliged, in case of danger, to practice all acts necessary to remove the danger and to inform the parent that exercises the parental responsibilities.

The French legal system does not assign to stepfathers and mothers a legal status. However, through the 4 March 2002 diploma (Loi sur l'autorité parentale) it allocated the "role" to the person, that although not being a parent, lives daily with the child of the spouse, through the possibility of *"délégation-partage volontaire de l'autorité parentale"*.

This regime, though not very commonly used, has come to be especially popular among same sex couples. However, it is important to discern that this delegation consists only of the shared exercise of parental responsibilities, which will be exerted by three people. All of this, without risking the parents' right (biological or adoptive) to the exercise of parental responsibilities.

This delegation of parental responsibilities can be established in two different levels: totally or partially. The partial delegation is the one that better suits rebuilt families, because it is left to the grantor the establishment of its effects and boundaries and they must be in accordance as to the type of duties and rights that will be conceded to the third person in question. This type of delegation will, through rules, focus on the day-to-day acts of the child's life, namely picking the child up or leaving the child at school, signing her up in for sports activities or accompanying her to medical appointments. In turn, the total delegation compares the third non-parent to the biological parent. All rights regarding the child will be in its care, with the exception of

the right of authorizing adoption. This remains, exclusively, in the scope of the biological parents. A key requisite for the acceptance of any type of delegation to the parental responsibilities is proving that the third person that intends to exert these responsibilities has a real and positive role for the child.

The procedure that allows for the extension of parental responsibilities is dependent on a judicial decision which must be preceded not only by a hearing of the parents, but also the affective parent and in accordance with the European legal instruments to which France is bound, also the hearing of the child's[17]. A legal opinion must be reached by the Public Prosecutor.

The German Law regulated for the first time, in 2001, the role of the stepfather and stepmother (§1687 b BGB), giving to the spouse of the parent (of the same or of different sex from the parent) parental responsibilities to the child, even though limited, in the sense that it is demanded apart from the agreement with the parent, that the decisions are in consonance with the *"current live acts"*, this means to say, related to the child's daily life and not about other matters of high relevance, as it is the case of religious education, going under surgical procedures that might put the child's life at risk.

In practice, for this parental responsibility to be meaningful, even though limited, it is crucial that they are exercised exclusively by the spouse of the third. It is also relevant that the child has already established a close relationship with this party. The court must always primarily tend to the superior interest of the child[18].

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[17] The French legal system predicts that the child has the right to be hear in the family context, as well as in any administrative or judicial proceeding (whether having asked or officiously) that concerns her and where a decision can be taken that affects her, either in regards to family, socially or personally, with having a fixed a minimum age for the exercise of this right (see article 338, (1) of the Code de Procédure Civile). This hearing is usually directed by the judicial magistrate, in court and normally in its office. The child may be accompanied by a lawyer or a person of its trust. This presence can denied by the court if it is perceived to be harmful.it is also worth noting that without prejudice for the favor of the hearing in court, the French legal order does not put aside the possibility of the child being heard by a specialist.

[18] The German Law establishes as mandatory the hearing of the child since 14 years of age (article 159 of Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, from 17 of December). However, the same rule predicts the possibility of hearing younger children, when their will appears to be relevant in the Court's ruling. In both situations, the Court may dismiss the hearing when the reasons so demand.

It is also worth noting and without any prejudice to the extension of parental responsibilities (which can be suspended or even extinct if the superior interest of the child so imposes), the spouse of the child's parent is obliged, in case of danger, to practice all acts necessary to remove that danger and to inform afterwards the parent that exercises the parental responsibilities.

It is worth mentioning that unlike what happens in other legal orders (namely the Portuguese and Dutch), German law predicts that the exercise of parental responsibilities be terminated in cases of divorce or separation, the Court having to analyze, case by case, whether a contact order with this third person is justified.

In Denmark, parental responsibilities can only be exerted by two people at time, therefore its extension can only be admitted by an agreement with the parent who has sole parental authority. This agreement needs to be approved and the court will grant it, if it is not considered to be inconsistent with the Childs' best interest. It is important to mention that the extension of parental responsibilities is only admitted to married partner of the biological parent, and has marriage, in Denmark, is only admitted between to people of different sex, the biological and affective parent must be from opposite sexes.

In case of separation or divorce the parental responsibilities will have to be ruled has in a case of divorce of the biological parents, however it is also possible to demand for the joint parental authority to be terminated.

In Ireland, the concept of guardianship means the rights and duties of parents in respect the upbringing of their children. These rights and duties are normally granted to the biological parents, however nowadays in certain circumstances they can also be attributed to a step parent, a civil partner or a person who has cohabitated with a parent for at least three years if they have co-parented the child for more than two years or even to a person who has provided for the child's day-to-day care for a continuous period of more than a year, if that same child had no parent or guardian.

In turn, the Dutch legal order predicts the possibility of extending parental responsibilities with a larger scope than the other Member States. Title 14 of the Dutch Civil Code starts by distinguishing parental responsibilities – they can be exercised by both parents, by one of them or by one of the parent coupled with a third (by a maximum of two people) – of custody in itself, one that can be conducted by one or two people that are not the parents.

Therefore, a third (the new parent's spouse or a person with whom the parent finds itself in a *de facto* union, but also another family member, for example, an uncle or aunt) to whom it does not fall, as a rule, the exercise of parental responsibilities of a child, may still be entrusted such duties (and rights) when requested, together with the parent that exercises the parental responsibilities (this request can only be accepted by the court if the parental responsibilities are being carried out by one person, having the aforementioned imposition of these responsibilities being carried out by a maximum of two people).

Essential to the acceptance of the extension of parental responsibilities is also that the third applicant has developed a close and personal relationship with the child[19] and if legal family ties exist it is also necessary for that third person to have been executing the responsibilities, together with the parent that legally detains this right, by a minimum period of a year and revealing, in that sense, the maintenance of relation beneficial to the interests of the child.

The court cannot disregard the interests and rights of the parents that have not been exercising parental responsibilities up to the moment of the request (without prejudice of the request not being accepted) as the same may, in the future, ask for it to be conceded with the parental responsibility of its child.

The Dutch legal system also predicts that in case of divorce or separations, the exercise of parental responsibilities may be attributed to an ex-spouse or ex-partner of the parent if the child's interest so imposes. It is also the case by the death of the parent that holds the parental responsibilities, the spouse or partner is automatically named the guardian of the child.

[19] To ascertain the existence of a close relationship, the court may take a hold on the child's hearing (mandatory in light of the international tools that Holland follows). The Dutch legal order, to this regard, predicts that the hearing of the child is mandatory since 12 years of age and that it must take place in the office of the judicial magistrate, which is to be accompanied by a court clerk.

5 – Conclusion

Due to social developments in family realities, socio-affective parenthood will come to assume an increasingly significant role. The ECtHR recognized the importance of affections and of the effectiveness of family relations were recognized, having been acknowledged that the mere biological bond might not be sufficient to identify "family life", there being the necessity of sometimes maintaining the affective bond. It is exactly in that direction that the European legal systems, have adapted, building judicial institutes that regulate these new family realities, even if with different scopes.

This is exactly the conclusion we can take from the analysis previously done to the different European legal systems, that predict different ways of recognizing the rights of affective parents, as well as rights, in relation to the children's whose lives they are a part of and with whom they have established personal relations that are gratifying and beneficial to the children. It is also worth noting, that the Portuguese legal system has, nowadays, the most restrictive regime when it comes to the recognition of such family realities, noticeable by the extension of the exercise of parental responsibilities only being verifiable in situations in which the filiation is established with only one of the parents.

Lastly, in this paper we have tried to present the judicial recognition, the importance and role of the affective parent, which will always be based on the respect for the superior interest of the child, as it is the basic principle of Family Law.

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