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Shared custody in Brazilian Family Law: foundations, application, and challenges

A guarda compartilhada no Direito de Família brasileiro: fundamentos, aplicação e desafios

La custodia compartida en el Derecho de Familia brasileño: fundamentos, aplicación y desafíos

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Abstract:
Shared custody has become one of the central institutions of contemporary Brazilian Family Law, especially after the changes introduced by Law No. 13,058/2014, which reinforced its preferential application in cases of dissolution of the marital relationship or cessation of cohabitation between parents. This article analyzes the constitutional, legal, doctrinal, and jurisprudential foundations of shared custody, focusing on the principle of the best interests of children and adolescents, parental equality, and family co-responsibility. The research adopts a bibliographic and documentary method, based on the Federal Constitution, the Civil Code, the Statute of the Child and Adolescent, specific legislation, and the doctrine of Maria Berenice Dias, Flávio Tartuce, Carlos Roberto Gonçalves, Cristiano Chaves de Farias, Nelson Rosenvald, Paulo Lôbo, and Rolf Madaleno. It concludes that shared custody represents an important advance in the comprehensive protection of children, although its effectiveness depends on parental cooperation, concrete case analysis, and the interdisciplinary action of the Judiciary.

Keywords:
shared custody; family law; parental authority; best interests of the child; co-parenting.

Resumo:
A guarda compartilhada consolidou-se como um dos institutos centrais do Direito de Família brasileiro contemporâneo, especialmente após as alterações promovidas pela Lei nº 13.058/2014, que reforçaram sua aplicação preferencial nos casos de dissolução da sociedade conjugal ou de cessação da convivência entre os genitores. O presente artigo analisa os fundamentos constitucionais, legais, doutrinários e jurisprudenciais da guarda compartilhada, com enfoque no princípio do melhor interesse da criança e do adolescente, na igualdade parental e na corresponsabilidade familiar. A pesquisa adota método bibliográfico e documental, com base na Constituição Federal, no Código Civil, no Estatuto da Criança e do Adolescente, na legislação específica e na doutrina de Maria Berenice Dias, Flávio Tartuce, Carlos Roberto Gonçalves, Cristiano Chaves de Farias, Nelson Rosenvald, Paulo Lôbo e Rolf Madaleno. Conclui-se que a guarda compartilhada representa importante avanço na proteção integral da criança, embora sua efetividade dependa da cooperação dos genitores, da análise concreta do caso e da atuação interdisciplinar do Poder Judiciário.

Palavras-chave:
guarda compartilhada; direito de família; poder familiar; melhor interesse da criança; coparentalidade.

Resumen:
La custodia compartida se ha consolidado como una de las instituciones centrales del Derecho de Familia brasileño contemporáneo, especialmente después de las modificaciones promovidas por la Ley n.º 13.058/2014, que reforzaron su aplicación preferente en los casos de disolución de la sociedad conyugal o de cese de la convivencia entre los progenitores. El presente artículo analiza los fundamentos constitucionales, legales, doctrinales y jurisprudenciales de la custodia

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compartida, con enfoque en el principio del interés superior del niño y del adolescente, en la igualdad parental y en la corresponsabilidad familiar. La investigación adopta un método bibliográfico y documental, con base en la Constitución Federal, el Código Civil, el Estatuto del Niño y del Adolescente, la legislación específica y la doctrina de Maria Berenice Dias, Flávio Tartuce, Carlos Roberto Gonçalves, Cristiano Chaves de Farias, Nelson Rosenvald, Paulo Lôbo y Rolf Madaleno. Se concluye que la custodia compartida representa un avance importante en la protección integral del niño, aunque su efectividad depende de la cooperación de los progenitores, del análisis concreto del caso y de la actuación interdisciplinaria del Poder Judicial.

Palabras clave:
custodia compartida; derecho de familia; responsabilidad parental; interés superior del niño; coparentalidad.

Introduction

Family Law has undergone profound transformations since the 1988 Federal Constitution, especially due to the increased value placed on human dignity, affection, and the comprehensive protection of children and adolescents. As Maria Berenice Dias (2024) teaches, the contemporary family has ceased to be understood merely as a formal and hierarchical institution, assuming instead the role of a space for care, solidarity, and the development of the personality of its members.

In this new scenario, the dissolution of the marital partnership cannot produce the rupture of parental ties. Paulo Lôbo (2024) argues that parenthood stems from permanent legal responsibility, so that the end of the affective relationship between adults does not eliminate the duties of care, education, assistance, and cohabitation related to children.

Joint custody therefore emerges as a legal response to the need to preserve family life and the shared responsibility of parents. For Flávio Tartuce (2024), the institution is not limited to establishing residence or dividing time spent together, but involves the joint exercise of rights and duties inherent to parental authority.

The relevance of the topic is justified by the significant number of family conflicts brought to court and the need for solutions that prioritize the child as a subject of rights. Cristiano Chaves de Farias and Nelson Rosenvald (2024) emphasize that the child cannot be treated as an object of dispute between parents, and should occupy the center of family legal protection.

The objective of this article is to examine the legal foundations of shared custody, its normative evolution, its practical application, its benefits, and its limitations. To this end,

bibliographic and documentary research is used, with an analysis of Brazilian legislation, specialized doctrine, and the jurisprudential guidance consolidated by the Superior Court of Justice.

2. Constitutional foundations of shared custody

Joint custody finds its direct basis in the principle of the dignity of the human person, provided for in Article 1, III, of the Federal Constitution. According to Maria Berenice Dias (2024), human dignity acts as an interpretative axis for family relations, requiring that judicial decisions preserve the autonomy, emotional integrity, and development of vulnerable individuals.

The principle of integral protection, enshrined in Article 227 of the Federal Constitution and reproduced by the Statute of Children and Adolescents, determines that children and adolescents be treated as holders of fundamental rights. Paulo Lôbo (2024) explains that integral protection shifts the focus of conflict between adults to the concrete needs of the child, requiring a solution that preserves their physical, psychological, emotional, and social development.

Equality between men and women also underpins shared custody. According to Carlos Roberto Gonçalves (2024), the traditional model of almost automatic custody assignment to the mother reflected an outdated family structure, incompatible with parental equality and active paternal participation in raising children.

The principle of the best interests of the child guides all decisions regarding custody. For Cristiano Chaves de Farias and Nelson Rosenvald (2024), this principle does not correspond to the subjective will of either parent, but to the solution that best promotes the stability, security, affection, and healthy development of the minor.

Rolf Madaleno (2024) observes that shared custody should be understood as an instrument for preserving the maternal and paternal reference points, whenever such co-existence is healthy and compatible with the protection of the child. Thus, the institution cannot be applied mechanically, but neither should it be dismissed due to mere disagreements between the parents.

3 Legal framework and regulatory evolution

In the Civil Code, custody is specifically regulated in articles 1,583 and 1,584. Article 1,583 defines shared custody as the joint responsibility and exercise of rights and duties of the

father and mother who do not live under the same roof, concerning the parental authority over their common children. Flávio Tartuce (2024) emphasizes that this legal definition highlights that the core of the institution is co-responsibility, and not the mandatory physical alternation of the child between residences.

Law No. 11,698/2008 was responsible for significantly introducing shared custody into the Brazilian legal system. Carlos Roberto Gonçalves (2024) observes that this legislation represented a first attempt to overcome the culture of sole custody, valuing the joint participation of parents in relevant decisions in their children's lives.

Subsequently, Law No. 13.058/2014 amended the provisions of the Civil Code to reinforce the preferential application of shared custody. As explained by Rolf Madaleno (2024), the legislative amendment sought to prevent sole custody from continuing to be adopted as an informal rule, especially in situations where both parents demonstrate aptitude to exercise parental authority.

The legislation also engages with the Statute of Children and Adolescents, whose article 19 ensures the right of every child and adolescent to be raised and educated within their family, guaranteeing family and community life. Paulo Lôbo (2024) understands that family life should be interpreted as a right of the child, and not as a privilege of the parents.

Law No. 12,318/2010, which deals with parental alienation, reinforces the importance of preserving the child's relationship with both parents. According to Maria Berenice Dias (2024), shared custody can function as a mechanism for preventing parental alienation, although it is not, in itself, an automatic solution to serious family conflicts.

4. Shared custody and parental authority

Parental authority is the set of rights and duties attributed to parents in relation to their minor children, encompassing support, custody, education, upbringing, representation, and assistance. For Flávio Tartuce (2024), it is a legal function exercised for the benefit of the children, and not a selfish prerogative of the parents.

Cristiano Chaves de Farias and Nelson Rosenvald (2024) explain that parental authority must be interpreted in light of the functionalization of Civil Law, which is why the powers conferred on parents are only legitimate when exercised in favor of the child. In this way, shared custody embodies the idea that parenthood is a joint responsibility.

Joint custody does not eliminate the possibility of establishing primary residence with one of the parents. Maria Berenice Dias (2024) clarifies that the reference residence serves the

child's daily organization, but does not transform the other parent into a visitor or a mere monitor of the child's life.

Carlos Roberto Gonçalves (2024) differentiates between shared custody and alternating custody. In alternating custody, there would be an alternation of the exclusive exercise of custody for determined periods; in shared custody, in turn, there is a joint and simultaneous exercise of parental responsibilities, even if physical cohabitation is distributed unequally.

Paulo Lôbo (2024) reinforces that shared decision-making should involve essential aspects of a child's life, such as school, health, medical treatments, religious guidance, extracurricular activities, and extended family interaction. Joint participation reduces the risk of exclusion of one of the parents and strengthens co-responsibility.

5. Practical application of shared custody

In forensic practice, shared custody requires the definition of clear rules for co-existence, communication, and decision-making. Flávio Tartuce (2024) highlights that the absence of objective criteria can generate new conflicts, which is why the judgment or the ratified agreement must regulate the child's routine in a way that is compatible with their age and needs.

The division of time spent with the child does not need to be mathematically equal. Maria Berenice Dias (2024) states that the relevant equality is in responsibilities, and not necessarily in hours or days. What is sought is to ensure that both parents effectively participate in their child's life.

Rolf Madaleno (2024) observes that balanced co-parenting must consider the distance between residences, school schedules, the child's activities, parental availability, and the child's emotional stability. Therefore, the application of this principle requires a concrete and sensitive analysis of the family reality.

Communication between parents is an important element for the success of shared custody. However, Carlos Roberto Gonçalves (2024) argues that normal disagreements arising from separation do not, in themselves, preclude the possibility of shared custody, especially when both demonstrate minimum conditions to exercise parenthood.

Cristiano Chaves de Farias and Nelson Rosenvald (2024) argue that judges should avoid standardized decisions, as each family has its own structure, dynamics, and needs. The legal solution should be constructed in a proportional and appropriate manner, focused on the child's best interests.

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6 Benefits of shared custody

Among the main benefits of shared custody is the preservation of the emotional bond with both parents. For Paulo Lôbo (2024), the child needs stable family references, and the continuity of maternal and paternal participation contributes to their emotional security.

Maria Berenice Dias (2024) argues that shared custody reduces the logic of possession over children, as it removes the idea that only one parent holds the central role in the child's life. With this, the child ceases to be an instrument of dispute and begins to be recognized as a subject of rights.

Another relevant benefit is the more balanced distribution of parental responsibilities. Carlos Roberto Gonçalves (2024) highlights that concentrating responsibilities on only one parent can lead to overload and alienation of the other, while sharing encourages greater involvement of both in the child's routine.

Joint custody can also reduce parental alienation practices. Rolf Madaleno (2024) states that regular contact and active participation of both parents decrease the possibility of emotional monopolization and unjustified discrediting of one parent in the eyes of the child.

Flávio Tartuce (2024) emphasizes, however, that shared custody should not be conceived as an automatic solution for all conflicts. Its success depends on the maturity, responsibility, and commitment of the parents to the child's development.

7 Limitations, conflicts and exceptional situations

Despite its benefits, joint custody has significant limitations. Cristiano Chaves de Farias and Nelson Rosenvald (2024) observe that the principle of the best interests of the child may require the adoption of a different solution when joint custody puts the child's emotional stability or safety at risk.

Cases of domestic violence, abuse, gross neglect, or parental incapacity must be analyzed with special caution. Maria Berenice Dias (2024) argues that the comprehensive protection of the child should prevail over any abstract presumption of equality, since family life is only legally protected when it is healthy and safe.

Law No. 14,713/2023 reinforced the legislator's concern with situations of domestic and family violence in custody proceedings. In these cases, Rolf Madaleno (2024) argues that judicial action should be preventive, avoiding the use of the custody arrangement as an instrument for the continuation of violence or control over the other parent.

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Intense conflicts and completely unfeasible communication can also hinder the practical application of the institute. Carlos Roberto Gonçalves (2024) emphasizes, however, that simple disagreement between parents is not sufficient to preclude shared custody, otherwise the parent who artificially resists contact would be rewarded.

Flávio Tartuce (2024) states that the judge must distinguish between the common conflict of separation, which can be managed by objective rules, and the destructive conflict, capable of compromising the psychological health of the child. This distinction is essential to avoid decisions that are formally correct but materially harmful.

8 Case law on shared custody

The jurisprudence of the Superior Court of Justice has consolidated the understanding that shared custody should be sought as the preferred model, even when there is not full harmony between the parents. This understanding stems from the premise that amicable co-parenting is not an absolute requirement, as long as the measure serves the best interests of the child.

In Special Appeal No. 1,417,868/MG, the Superior Court of Justice (STJ) affirmed that shared custody should be sought in the exercise of parental authority between separated parents, even if it requires restructuring, concessions, and various adjustments. This jurisprudential orientation aligns with the doctrine of Paulo Lôbo (2024), for whom responsible parenthood demands cooperation and adaptation after marital breakdown.

In a 2017 institutional news report, the Superior Court of Justice (STJ) noted that its jurisprudence already prioritized shared custody even before its legislative consolidation, based on the premise that amicable cohabitation between parents is not indispensable for shared custody. This position aligns with Flávio Tartuce (2024), who identifies shared custody as a legal rule stemming from parental equality.

Nevertheless, case law allows for the departure from shared custody when a concrete risk to the child is demonstrated. In cases involving severe conflict, violence, or manifest parental incapacity, the courts have applied the principle of the best interests of the child to justify sole custody or other protective measures.

Cristiano Chaves de Farias and Nelson Rosenvald (2024) observe that jurisprudence should avoid automatic solutions: both the unreflective imposition of shared custody and its rejection based solely on the resistance of one of the parents can contradict the integral protection of the child.

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9 The role of the Judiciary and interdisciplinary teams

The Judiciary plays a decisive role in the implementation of shared custody. For Maria Berenice Dias (2024), the family court judge should not act merely as a mechanical applier of the law, but as an agent of social pacification and protection of vulnerable individuals.

Interdisciplinary action is especially relevant in custody disputes. Rolf Madaleno (2024) highlights that psychologists, social workers, and technical teams assist in understanding family dynamics, allowing the magistrate to identify risks, emotional bonds, specific needs, and real possibilities for cooperation.

Family mediation also presents itself as a suitable instrument for conflicts involving custody. Paulo Lôbo (2024) states that self-composition allows parents themselves to build more lasting solutions, provided that the child's inalienable rights are preserved.

Flávio Tartuce (2024) emphasizes that the ruling establishing shared custody must contain objective parameters, in order to avoid ambiguities that fuel new litigation. Thus, the Judiciary must regulate co-parenting, communication, school and medical responsibilities, vacations, holidays, and extraordinary expenses when necessary.

Carlos Roberto Gonçalves (2024) points out that shared custody does not eliminate the obligation to pay child support. Child support should continue to be determined based on the balance between need and ability to pay, since shared custody does not mean an automatic and equal division of all expenses.

10 Family mediation as instrument for strengthening security shared

The effectiveness of shared custody is directly related to the ability of parents to communicate. Although Brazilian law establishes this model as the preferred rule, its practical application depends on the existence of minimal communication between father and mother so that decisions regarding the upbringing of children are made jointly. In this context, family mediation presents itself as an important instrument for preventing and resolving conflicts, allowing those involved to build solutions that are appropriate to the family's needs. As Tartuce (2024) teaches, the use of consensual methods of conflict resolution contributes to reducing litigation and favors the construction of more cooperative parental relationships.

Family mediation is also based on the principles of cooperation, good faith, and the comprehensive protection of children and adolescents. Its objective is not to re-establish the

marital relationship, but to reorganize communication between the parents so that they can jointly and responsibly exercise parental authority. Maria Berenice Dias (2024) emphasizes that separation ends the marital bond, but does not extinguish the duties inherent in motherhood and fatherhood, which is why co-parenting should be preserved whenever possible.

Furthermore, the involvement of multidisciplinary teams composed of psychologists, social workers, and mediators assists the Judiciary in identifying the real needs of the child, allowing shared custody to be implemented in a safer and more effective manner. According to Cristiano Chaves de Farias and Nelson Rosenvald (2024), resolving family conflicts requires an interdisciplinary approach, since emotional issues often go beyond the limits of strictly legal interpretation.

From this perspective, mediation contributes to reducing parental alienation practices, minimizing the emotional impacts of separation, and strengthening parental co-responsibility. The consensual construction of agreements tends to generate greater stability in family relationships and preserve the best interests of the child, a principle that guides the entire protection system provided for in the Federal Constitution, the Statute of Children and Adolescents, and the Civil Code. Thus, mediation proves to be an important mechanism for implementing shared custody and promoting a culture of social pacification.

11 Final Considerations

Joint custody represents an important advancement in Brazilian Family Law by affirming that the end of the conjugal relationship does not extinguish parenthood. According to Maria Berenice Dias (2024), the protection of the child requires that relevant affective bonds be preserved whenever compatible with their safety and development.

The analysis carried out demonstrates that the institution has solid constitutional, legal, doctrinal and jurisprudential foundations. Paulo Lôbo (2024) and Flávio Tartuce (2024) converge in recognizing that shared custody concretizes parental equality and co-responsibility in the exercise of parental authority.

It was also found that shared custody is not to be confused with alternating custody or with a mathematical division of time. As Carlos Roberto Gonçalves (2024) and Rolf Madaleno (2024) explain, the essential element is the sharing of relevant decisions and parental responsibilities, respecting the concrete reality of the child.

Although it is the preferred rule, joint custody cannot be applied automatically. Cristiano Chaves de Farias and Nelson Rosenvald (2024) emphasize that the best interests of the child

remain the paramount criterion, capable of justifying a different solution in cases of violence, risk, neglect, or destructive conflict.

It can be concluded, therefore, that shared custody should be understood as an instrument of comprehensive protection, parental equality, and joint responsibility. Its effectiveness depends on the maturity of the parents, the careful action of the Judiciary, and interdisciplinary support, always with absolute priority given to the rights of the child and adolescent.

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