

## EQUAL PLACEMENT BETWEEN CHOICE AND IMPOSITION

## IGUALDAD ENTRE ELECCIÓN E IMPOSICIÓN DE LA CUSTODIA

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### ABSTRACT

Parental separation can profoundly impact children, emphasizing the necessity to prioritize their holistic well-being. Physical joint custody, promoting equal or similar time with both parents, has gained traction based on international research. However, it's debated whether dual residence always meets children's best interests. Our systematic review from 2000 onwards, drawing from PubMed, Scopus, and various legal and psychological associations, explores this issue.

Research suggests that predominantly placing children with one parent, with tailored visitation schedules aligned with their psychological, physiological, and situational needs, may better serve their welfare. Advocates argue that equal time arrangements can disrupt the stability crucial for healthy child development, despite increasing court and international support.

This study seeks to inform custody decisions that prioritize children's needs over adult preferences, advocating for nuanced custody and visitation

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redefinitions in legal frameworks. The goal is to safeguard children during separations by focusing on their well-being above all else.

**Keywords:**

co-parenting; divorce; psychophysical well-being of children

**RESUMEN**

La separación de los padres puede afectar profundamente a los niños, lo que enfatiza la necesidad de priorizar su bienestar integral. La custodia física compartida, que promueve un tiempo igual o similar con ambos padres, ha ganado fuerza según investigaciones internacionales. Sin embargo, se debate si la doble residencia siempre satisface el interés superior de los niños. Nuestra revisión sistemática desde 2000 en adelante, a partir de PubMed, Scopus y varias asociaciones jurídicas y psicológicas, explora esta cuestión. Las investigaciones sugieren que colocar predominantemente a los niños con uno de los padres, con horarios de visitas adaptados a sus necesidades psicológicas, fisiológicas y situacionales, puede contribuir mejor a su bienestar. Los defensores argumentan que los acuerdos de igualdad de tiempo pueden perturbar la estabilidad crucial para el desarrollo infantil saludable, a pesar del creciente apoyo judicial e internacional.

Este estudio busca informar las decisiones de custodia que priorizan las necesidades de los niños sobre las preferencias de los adultos, abogando por redefiniciones matizadas de custodia y visitas en los marcos legales. El objetivo es proteger a los niños durante las separaciones centrándose en su bienestar por encima de todo.

**Palabras clave:**

bienestar psicofísico de los niños; copaternidad; divorcio

**Introduction**

As of today, Family Law regarding separations is governed by Law 54 of 2006 “*Provisions on the separation of parents and shared custody of children*”. Over the years, based on various international studies and research, the concept of “*physical joint custody*” has been introduced, which ensures more clearly defined equal or equivalent visitation times for children and includes dual residency.

On October 2, 2015, the Council of Europe, with Resolution 2079, invited all States to promote “*shared residence*”, a form of

custody where children, after their parents' separation, spend equal time with both mother and father. In Italy, the Pillon bill, regarding the balance between both parental figures and equal times, promoted the application of a strict “*shared residence*”, without considering the real needs of minors and not differentiating by age the necessity for stable equivalent agreements.

Numerous documents have been produced by Entities and Institutions of Psychologists and Jurists on the specific topic; among others, the Italian Association of Legal Psychology underlines how these innovations move away from the need for children to rely on a reassuring and stable environment, a characteristic so fundamental for healthy and harmonious development. The regulation does not duly consider the child's difficulties due to a sort of commuting between homes, and the fact of not being able to rely on a predictable life organization. A rigid application of “shared custody” appears like the division of a family asset, losing sight of the minor themselves and their best interest.

Parental separation represents a disturbing event for the minor, and the necessity to preserve their psychophysical integrity becomes predominant (Goldstein, J.; Freud, A.; Solnit, A., 1973; Goldstein, J.; Freud, A.; Solnit, A. J.; Goldstein, S.; Robson, K. S. 1986). It is crucial to evaluate each case individually, examining the specifics of the situation (Amato, P. R.; Afifi, T. D., 2006).

Although the Pillon Bill was not approved, courts are increasingly encountering requests for materially shared custody of children, considering more the needs of adults to the detriment of the real and specific needs of minors. It is believed that a predominant placement of the child with one parent, with visitation times adequate to the child's psychological, physiological, and situational needs, truly places the minor at the center of interest.

## **Method**

### *1. Psychological Processes and Temporal Dimensions*

Separation and divorce are phenomena that are constantly increasing in our society, and as highlighted by national statistics,

separations between common-law couples and those between partners of different nationalities are also on the rise.

Legal principles and concepts of separation, divorce, and child custody have also evolved over time. The separation of a couple is no longer seen as a “*pathology*” or “*fault*,” but as a typical event in the family life cycle. In this sense, separation is not necessarily considered traumatic and dysfunctional for children. Family psychology even holds that separation may be less harmful to children than maintaining a formal bond with severe and persistent tensions or conflicts within it (Johnston, J. R., 2005).

If the separation is highly conflictual, the child may be involved in processes of triangulation, emotional infection due to symbiotic relationships, dysfunctional dynamics in the parent-child relationship that jeopardize their psychological health and psychophysical and social development. The judge faces a complex assessment of risk factors and protective factors related to parenting skills to decide the best custody arrangements for the children. For this reason, it is becoming increasingly important, as an area of research in the legal-psychological field, to analyze the psychosocial characteristics of parenting, identify scientific criteria for evaluating parenting skills, and thoroughly examine the needs of the children involved to determine the best custody and visitation arrangements in their exclusive interest (Baker, A. J. L.; Verrocchio, M. C., 2013; Verrocchio, M. C.; Baker, A. 2015).

It is now widely accepted in the literature that separation and divorce represent processes that entail an evolution of family relationships on the marital, parental, and external environmental levels.

Each individual has temporal dimensions within which experience can be mentalized, dreamed, and thought. These are defined as psychic times that are never proportional to chronological times, extending over different planes of reality and being circumscribed and defined (Bernet, W.; Baker, A. J. L.; Verrocchio, M. C., 2015). During the separation phase, the time of “*pain*” and “*mourning*” can vary based on the reasons that led the couple to end the relationship, unlike for the child, for whom the time of suffering is

closely linked to their age, along with other variables that interfere with their reaction to the parents' separation, such as temperament, the ability to tolerate frustration, and the quality of the attachment relationship organized by the primary figures before the separation process. Besides changing the family system, the child will undergo a change in their positioning, always playing the role of "victim" unlike the parents, who in the dyadic conflict can alternate between victim and persecutor roles. The child, instead, directly suffers the parental or individual choices, leading to an internal split that represents the image of the parents who, from a father/mother couple, become individual father, individual mother (Schick, A., 2002). In the child's mind, the parental couple is present as a wounded couple, no longer having a stable and defined place, representing a loss of integrity, strength, and guidance, all elements that carry a strong negative impact on their development (Verrocchio, M. C.; Marchetti, D., 2017). Among the negative aspects is also the possible presence of a new partner for the parent or the presence of other children, seen by the child as a theft, a subtraction of their place within that unit. The external split of the father/mother couple coincides with an internal split of the child, making parental separation a disturbing event, harmful to their development, with the severity level varying in relation to certain variables such as (Lanotte, 2015):

- Age; within developmental age, we can distinguish various phases:
  - early childhood 0-3 years
  - middle childhood 4-7 years
  - preadolescence 8-13 years
  - adolescence 14-18 years;
- The child's personal characteristics;
- The parents' personal characteristics;
- The reasons for the separation;
- The separation history in relation to the previous history of separation.

Therefore, various aspects must be explored to investigate the psychological processes and the clinical dimension of the child within the parental separation event. Separation thus inevitably represents a

psychologically complex experience for the child, although socially necessary for the adult-parent. The parental couple should therefore find solutions aimed at providing the child with basic psychological organizers that will serve as stable and secure support in their existential journey, giving the children the opportunity to experience the couple united and with shared agreements.

Unfortunately, it is common during custody evaluations in separation cases for children to be instrumentalized in the conflictual couple's game of alliances (Neale, B.; Wade, A.; Smart, C., 1998), being called upon to assume different roles and forced to take sides with one parent or the other, to mediate the parental conflict, or to represent the unconscious weapon of one party against the other (Baker, A. J. L.; Darnall, D. 2006).

## *2. The parental role: legal aspects "Equal or equivalent times" of visitation for the minor child with parents*

The legal system always assigns the function of deciding on the custody of minor children to the judge, not only in cases where there is a conflict between the parents, but also when the parents have independently reached an agreement regarding the custody of the children and the consequent regulation of obligations and rights.

Indeed, since parents' agreements may involve motivations and purposes that differ significantly from the real interests of the minor, a thorough review of the custody decision is required to protect the minor, who is considered the vulnerable party in the family crisis, even during the approval of consensual separation.

The intervention of the law of February 8, 2006, No. 54, containing "*Provisions on the matter of parental separation and joint custody of children*", has brought about a real cultural revolution in the regulation of child custody, introducing joint custody as the standard regime applicable in cases of parental separation. This regime ensures the minor child's right to maintain an equitable and continuous relationship with both parents, to receive care, education, and instruction from both, and to preserve significant relationships with grandparents and relatives from both parental branches (Art. 155 c.c., 1st paragraph).

Joint custody, as regulated by the aforementioned law and Art. 155 c.c., requires both parents to directly exercise parental responsibility and allows the children to maintain direct relationships with both reference figures and their respective families of origin.

Children must, in any case, be placed with one parent (residence), even though the non-resident parent typically has broader and more significant visitation rights compared to the exclusive custody regime (Kelly, J. B., 2004). Placement can also be alternated, depending on the age of the minors and the geographical area. In such cases, the children spend equal time with each parent (McIntosh, J., 2009; McIntosh, J.; Chisholm, R., 2008).

In recent years, the importance of shared parenting has increasingly been recognized, involving variable amounts of time children spend with each parent (Blomqvist, P.; Heimer, M. (2016). This includes the 50-50 shared parenting model, commonly known as "*equal parenting time*", a practice adopted in some countries (particularly Sweden, France, Belgium, the Netherlands, and Australia), though still in the minority. Specific scientific literature on mandatory equal parenting time is very limited. In countries where this practice has been introduced, it is not imposed but chosen by the parents. The decision on time division between the two parents, to achieve a good probability of success, depends on specific factors: the age and gender of the children, the logistical and temporal availability of the parents, the possibility of support in childcare, etc (Nielsen, L., 2013; Viry, G. 2014).

In specific cases, a better distribution of time can allow children to have a parent more available in terms of time and attention dedicated to them, resulting in positive outcomes for both parents (Zartler, U.; Grillenberger, K., 2017). A better division of time reduces the stress level due to lack of time, especially among mothers, and alleviating stress can improve parenting quality (Bartfeld, 2011).

However, a legal imposition uniformly applied to all separation situations does not meet, psychologically or legally, the prerequisites for effective shared parenting: the indication that equal time placement should be provided "*regardless of the relationship between the two parents*" (Art. 11 of the proposed Pillon bill) is not supported by

psychological literature, which, when evaluating outcomes, refers to case-by-case decisions. Equal time placement can be a child-centered solution, but it must be evaluated based on whether it meets the interests and needs of the specific case and should not be imposed by law, especially when the criteria refer to parental conditions rather than the children's needs.

In Italy, the judge must make every decision according to the best interests of the minor. In addition to their own case evaluation, the judge must also consider the views of children and adolescents, a mandatory practice required by national and European regulations for children over 12 years old—or younger if capable of discernment: the New York Convention on the Rights of the Child of November 20, 1989, ratified in Italy with law 27 May 1991 No. 176 (Art. 12); the Strasbourg Convention of January 25, 1996, ratified in Italy with law of March 20, 2003 No. 77 (Art. 6).

The literature agrees that it is not possible to define abstractly whether it is better for minors to spend exactly the same amount of time with each parent. It is necessary to remember the numerous documents produced by bodies and institutions of psychologists and jurists on the specific subject.

- Document from academic psychologists, AIP (Italian Association of Psychology) and CPA (Conference of Academic Psychology), which in a joint statement criticize the proposal contained in DDL 735 (Pillon Bill) regarding shared custody, direct maintenance, and guarantee of bi-parenting. In the document, the academic psychologists' community clarifies that "*The imposition of such a shared time model between parents, or a minimum of 12 days per month or substantial equivalence of time throughout the year, does not consider the real and specific needs of minors, different developmental phases, which lead to different needs, also in reference to emotions and attachment and identification processes, the quality of parent-child relationships, the logistical problems of children's lives (school, peer relationships)*". The importance of "*the rights and specific needs of children at different age stages*" is highlighted by Resolution 2079 in line with the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (Art. 5.10).

Resolution 2079 of 2015 of the Parliamentary Assembly of the Council of Europe goes in the opposite direction to that of the DDL, as it indicates a personalization of time with each parent based on the needs of each child. It indeed recommends that Member States: *"introduce in their laws the principle of shared residence following separation, limiting any exceptions to cases of abuse or neglect of minors, or domestic violence, with a period of time that the child spends with each parent adapted according to the child's needs and interests"* (Art. 5.5):

- ANM National Association of Magistrates. This type of visitation (referring to DDL 735) seems to disregard the real needs of minors, their difficulties with various moves, and above all, the lack of attention to the need for a stable, predominant space. Moreover, not differentiating by age and stipulating at least 12 overnight stays with one parent, rigidly applying shared custody, appears to be a division of family property, far from the real interest of the minor. It does not consider that different developmental phases call for different needs and requirements, also in reference to emotions, attachment, and identification processes, often linked to the quality and type of relationships established. The importance of *"the rights and specific needs of children at different age stages"* is highlighted by Resolution 2079 in line with the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (Art. 5.10)";

- UCM National Union of Minor Chambers *"The minor, indeed, is described (referring to DDL 735) as a "good" that must be exactly divided in half like a family household item. The legislative provision of double residence, aimed at not producing inequalities between the two parents, with specific identification of the minimum number of days to be spent with each, inevitably affects the identity and stability of the minor, forcing the child to take into account the adult's need for affirmation before their own"*;

- AIAF Italian Association of Family and Minor Lawyers *"The proposed reform (referring to DDL 735) prevents the concrete evaluation of the best interest of each child, who must be Solomonically divided in half, without the possibility of considering their needs, habits, and desires"*. Finally, it does not seem that the CTU considered

the recommendations of the Guarantor for Childhood and Adolescence in the document The Charter of Children's Rights in parental separation, where in Art. 1 it clarifies that "*Love is not measured by time but by care and attention*". Moreover, in Art. 4 it states that "*Children have the right to be heard and to express their feelings. Children have the right to be heard first by their parents, together, in the family. Children have the right to speak, feeling welcomed and respected, without being judged. Children have the right to be angry, sad, to feel bad, to be afraid, and to have uncertainties, without being told that "everything is fine". Even in the most serene separations, children can experience these feelings and have the right to express them. Art. 6: Children have the right for decisions that concern them to be shared by both parents. Children have the right for the most important decisions about residence, education, schooling, and health to continue to be made by both parents in agreement, respecting the continuity of their habits. Children have the right for any changes to consider their emotional and relational needs*".

## Results

In conclusion, it is hoped that the visitation time with both parents will increase, defined in a personalized way and adapted to the needs of the children and not exclusively to the needs of the adults.

In this direction of promotion and personalization, which has been underway in many Italian courts for some time, the collaboration of judges and lawyers with psychologists, psychiatrists, and child neuropsychiatrists can be a useful resource, especially in complex cases, as consultants to the judge or social service operators.

This element should be carefully considered to protect the overall interest of the minor.

## Discussion

In cases of separation and divorce, finding the best custody solution for the child is not always straightforward. Sometimes, one

must settle for what represents the lesser evil for the child, considering that if it had been possible for that parental couple to reach a peaceful agreement, they would have already avoided disputes and conflicts that harm the children and are difficult to resolve in front of judges and consultants. These professionals often deal with couples characterized by high levels of conflict who, engaged in a game of mutual accusations, may lose awareness of the impact of their conflicts on the well-being of their children and thus lack the ability to identify alternative and reparative strategies to mitigate the conflict. The assessment of custody must therefore prioritize the well-being of the children. Indeed, the children are the real victims of separation and high parental conflict; they suffer as passive protagonists from the couple's decisions, leading to an inevitable internal division of the parental image representation, and thus they must be protected and safeguarded.

To preserve and protect the minor within legal proceedings, we believe it is not sufficient to conduct purely technical consultancy aimed solely at answering the judge's questions. It is also necessary to lay the groundwork for supporting and guiding the family towards a positively evolving change that centers exclusively on the child's best interests. Supporting the family in this sense requires the intervention of various experienced professionals who can provide guidance to those involved throughout this difficult journey. Additionally, it requires the equally important support of the relevant social network, so that parents can overcome the limits and difficulties that a contentious separation may entail and can create a "new space" for cooperation, always anchored to the ultimate goal of the child's well-being.

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