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Parental Responsibilities in Portugal

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PARENTAL RESPONSIBILITIES IN PORTUGAL

The present memo addresses:

1. What is parental responsibility?
2. Rights of the children living in Portugal, born from parents or one parent living outside Portugal.
3. Rights of other persons to have contact with the child.

1. What is parental responsibility?

Under Portuguese law, parental responsibility represents a collection of rights and duties that the legal system confers to or imposes upon both parents.

Parents should, in the interests of their child, look after all aspects of the child, particularly the child's maintenance, health, safety, education, legal representation and administration of property (Art. 1878, No. 1, of the Portuguese Civil Code, hereinafter "CC").

Parental responsibility may not be renounced (Art. 1882 of the CC), is non-transferable (inter vivos and mortis causa), and the exercise of it can be objectively controlled.

The first general dimension is that of care and protection, which encompasses the parents' right and duty to keep their children close to them, and also the maintenance of a close personal relationship with their child.

Both parents are obliged to ensure that their children receive an education proper to their superior interest.

According to Art. 1878, No. 1, of the CC, “it is the responsibility of the parents, in the interests of their children, to look after their health and safety, provide for them, oversee their education, legally represent them, even while still unborn, and administer their property”.

The main powers and duties include: the power and duty of custody of children, the power and duty to protect the child’s health, the power and duty to provide for them, the power and duty to oversee their education, the power and duty to represent them legally and the power and duty to administer their property.

2. What happens in a divorce or separation, nullity or annulment of marriage?

In situations of divorce, legal separation or the declaration of nullity or annulment of marriage, the exercise of parental responsibility may result from a system established by the parents through an agreement, subject to ratification by the judge (Art. 1905, No. 1, of the CC and Art. 174 of the Portuguese Child Protection Law), or from court intervention in those cases where there is no agreement between the parents, or when the agreement presented by them is not in the interests of the children.

The exercise of parental responsibility is always subordinate to the interests of the child (Art. 1878, No. 1, of the CC).

Law does not define what should be considered the superior interest of the child, nor does it offer criteria for defining it.

The child’s interests is a cultural concept, related to the person of the child, his or her material and emotional needs, and the conditions necessary for his or her healthy development.

With regards to any child with both parents, parental responsibility belongs equally to the father and mother and is exercised by both (Art. 1901, No. 1 and 2, of the CC). The principle of equality between spouses imposes this solution (Art. 1671 of the CC). Art. 36, No. 3, of the Portuguese Constitution establishes that parents have equal rights and duties regarding to the maintenance and education of their children.

If the parents cannot agree on issues of particular importance, the court will settle the matter (Art. 1901, No. 2, of the CC). The court will first try to persuade the parents to resolve their differences by an agreement between them. If this proves impossible, the court will decide. Before doing so, however, the judge shall hear any child – normally if it is more than 12 years old –, unless there are circumstances that militate against this (Art. 1901, No. 2, in fine, of the CC).

The parent that does not exercise parental responsibility – namely because it lives abroad – has the right to oversee the education and living conditions of the child (Art. 1906, No. 7, of the CC). The custodial parent does not have full freedom of action. Parental responsibility is subject to the control of the non-custodial parent.

3. Rights of contact with the non- custodian parent and his family

Today, the right of contact in the context of a divorce or legal separation is understood very broadly. It consists of the right of the non-custodial parent to relate to and spend time with the child, not only through occasional contacts but also by providing accommodation for the child for short periods of time (such as weekends, holidays) and by corresponding with the child (by letter, e-mail, telephone, videoconference, or through an intermediary).

The institution of visiting rights is not only a right, but it also contains an element of duty that corresponds to the rights of the child.

Thus, in a situation in which parental responsibility is exercised jointly but the child resides with only one parent, the other parent and correspondingly, the child, enjoy free right of contact with each other.

Portuguese courts have established strong rights of visitations, of spending holidays and of a close relationship between the non-custodian parent and the child, in an attempt of equality between parents.

Therefore, in a situation of sole custody, the law refers to the child's interest in maintaining a close relationship with the non-custodial parent (Art. 1905, No. 1, of the CC).

In these cases, the non-custodial parent's right of contact is restricted to the terms of a system established by agreement, ratified by the judge, appreciated by the Public Prosecutor's Office and deemed to be in the interests of the child, or else it is decreed by the court.

In the event of failure to comply with the system of contacts established through the creation of obstacles by the custodial parent, the other may apply to the court, invoking non-compliance with the system of exercise of parental responsibility, for coercive measures to be taken and for the punishment of the parent that is at fault, by means of a fine and compensation to the child.

If it is the non-custodial parent who has failed to comply, then the custodial parent may raise the matter of non-compliance.

Further, Art. 1887-A of the CC establishes that parents may not unreasonably deprive their children of contact with their siblings or ascendants. This rule appears to give rise to a right of contact with siblings, grandparents, and other ascendants and consequently, a right of the child to relate to those relatives.

4. Alimony to the child

The law defines the general criterion for awarding maintenance in Article 2004. of the Civil Code when it refers that it depends on the possibilities of the parents and the needs of the person being fed.

As regards the parent's means, it will have to the income of work and capital that he has, his savings and the value of his goods, without reaching the so-called subsistence reserve.

At the other extreme, we have the needs of the person receiving maintenance, social situation, his age, his health, or the possibility of the minor provide for his subsistence.

Therefore, according to Portuguese law, there is no table for calculating maintenance. The criterion should be the proportion between each of the parents' patrimony and the needs of the child, taking into account his/her level of life, age and special conditions.

As alimony is of public order, it is not possible for one of the parents to renounce the alimony owed by the other, since the child is the creditor.

As for extraordinary educational and health expenses, such as private schools, surgical operations, etc., the respective costs are usually excluded from the fixed amount of maintenance, and they should be borne either in equal shares, or according to another criterion agreed by the parents or, in the absence of agreement, set by the court according to the income of each parent.