
OUTLINES OF JUDICIALIZATION: REFLECTIONS ON REMARRIED FAMILIES AND EMOTIONAL ABANDONMENT¹

Laura Cristina Eiras Coelho Soares²
Lisandra Espíndula Moreira
Universidade Federal de Minas Gerais, Brazil.

ABSTRACT. This paper aims to articulate two studies in the overview of Legal Psychology and taking as objects of study issues relating to the family in the sphere of justice. The main purpose of this paper is to analyze the outlines that characterize the movement of judicialization on the demands of remarried families and emotional abandonment. In general, judicialization can be understood as the movement of expansion of judicial powers to matters that used to be resolved in other spaces. With respect to remarried families, this study identified how jurisprudence can provide a way to resolve demands that are not covered by the legislation. However, respondents' reports indicated that they look for solutions without resorting to court, which differs from the proposal found on the theoretical reference to formulate specific legislation to address this family configuration. In regards to emotional abandonment, the analysis of aspects related to the production and validation of this demand by the legal system highlights the difficulty to measure damage and its relationship with absence of affection, in addition to the important gender approach, that assigns different positions and specific roles for each parental figure. Therefore, we conclude that the judicialization trend reflects and at the same time forges demands, denoting a social change in the way society deals with family impasses.

Keywords: Family; children rights; legal processes.

CONTORNOS DA JUDICIALIZAÇÃO: REFLEXÕES SOBRE FAMÍLIAS RECASADAS E ABANDONO AFETIVO

RESUMO. Este artigo buscou articular duas pesquisas que se situam na perspectiva da psicologia jurídica e que tomam como objetos de estudo questões referentes à família na esfera da justiça. O objetivo principal desta escrita é analisar os contornos que caracterizam o movimento de judicialização nas demandas de famílias recasadas e de abandono afetivo. De maneira geral, a judicialização pode ser compreendida como o movimento de expansão dos poderes judiciários em questões que antes eram resolvidas em outros espaços. Quanto às famílias recasadas, identificou-se o caminho das jurisprudências para a resolução de solicitações que não estão contempladas na legislação. Contudo, nos relatos dos entrevistados, verificou-se a busca por soluções sem recorrer ao Judiciário, o que difere da proposta encontrada no referencial teórico de criação de legislação específica para atender a essa configuração familiar. Quanto ao abandono afetivo, a análise dos aspectos vinculados à produção e comprovação dessa demanda no sistema jurídico aponta para a dificuldade da medição dos danos e da relação com a ausência de afeto, além do importante recorte de gênero, que posiciona diferentemente as figuras parentais e define funções específicas para cada um. Dessa forma, conclui-se que o movimento de judicialização reflete e ao mesmo tempo forja as demandas, denotando uma mudança social na maneira como a sociedade lida com seus impasses familiares.

Palavras-chave: Família; direitos da criança; processos legais.

¹ *Support and funding:* Coordenação de Aperfeiçoamento de Pessoal de Nível Superior (CAPES - Coordination for the Improvement of Higher Education Personnel), Sandwich PhD Scholarship, Proc. no. BEX 8742 / 11-1; CAPES/DS PhD scholarship; Pró-Reitoria de Pesquisa da UFMG

² *E-mail:* laurasoarespsi@yahoo.com.br

CONTORNOS DE LA JUDICIALIZACIÓN: REFLEXIONES SOBRE FAMILIAS RECONSTITUIDAS Y ABANDONO AFECTIVO

RESUMEN. Este artículo tiene por objeto articular dos estudios que se encuentran en la perspectiva de la Psicología Forense, teniendo como objeto de estudio las cuestiones relacionadas con la familia en el ámbito de la justicia. El objetivo principal es analizar los contornos que caracterizan el movimiento de la judicialización de las demandas de las familias reconstituidas y abandono afectivo. En términos generales, puede entenderse la judicialización como el movimiento de expansión de los poderes judiciales en los asuntos que se resolvieron en otros espacios. En cuanto a las familias reconstituidas se identificó el camino de la jurisprudencia para solucionar las solicitudes que no están cubiertas por la legislación. Sin embargo, en los reportes de los encuestados se encontró la búsqueda de soluciones sin recurrir a los tribunales, lo que difiere de la propuesta que se encuentra en el marco teórico de creación de una legislación específica para satisfacer esta configuración familiar. En cuanto al abandono afectivo, el análisis de los aspectos relacionados con la producción y prueba de esta demanda en el sistema legal denota la dificultad de medir el daño y la relación con la ausencia de afecto, más allá del importante enfoque de género, que diferencia la colocación de las figuras parentales y define las funciones específicas de cada uno. Por lo tanto, se concluye que el movimiento de judicialización refleja y, al mismo tiempo forja las demandas, lo que denota un cambio social en la forma en que la sociedad aborda los estancamientos de la familia.

Palabras-clave: Familia; derechos del niño; procesos legales.

Introduction

The review proposed here is situated within the scope of Legal Psychology. Legal Psychology has been consolidating as a specialty in recent decades, but it cannot be considered as "a new area for psychologists" (Brito, 2012, p. 204), since articulation with the Law has contributed to consolidate Psychology itself as a science.

Some tensions arise from the proximity between Law and Psychology. Initially, such impasses are related to the utilitarian purpose of psychological knowledge, which places Psychology Professionals only as a tool to conduct evaluations regarding different demands. Secondly, tensions expand to the very configuration of the fields of knowledge, establishing a collage between objects of knowledge and forms of psychological and legal intervention, making the concepts of law and rule indistinguishable (Arantes, 2008).

The second tension is related to the trend some authors refer to as the judicialization of life (Lobo, 2012; Oliveira & Brito, 2013; Arantes, 2008; Rifiotis, 2015). Overall, it can be said that judicialization of life refers to an increase in the number of situations brought to the legal system. It is noticed that a greater number of conflicts have found in courts the privileged space for their resolution. Situations that previously were not even problematized in the legal environment, or were not treated so specifically, such as: bullying, parental alienation, psychological harassment, violence against women, among others.

The procedure we have chosen is to discuss judicialization in two scenarios: remarried families formed after divorce and emotional abandonment. In order to do that, we will begin by expanding the review on the very concept of judicialization and presenting the legislative context in which families are inserted, and then the specific questions regarding each topic.

Problematizing judicialization is thinking about the Legal System and beyond, that is, the possibility conditions and the effects of such expansion of justiciable objects. In this sense, judicialization could be understood as "the trend of normative and legal regulation of living, which subjects rely on for the resolution of everyday conflicts" (Oliveira & Brito, 2013, p.80).

In addition, it is interesting to think how much judicialization is connected to other forms of social regulation, since "the control of behaviors and populations continues to operate in a surveillance and correction network, in institutions such as schools, the police and psychiatry" (Lobo, 2012, p.29). In this scenario, the expansion or enforcement of laws are often believed to be the most effective way to correct deviations.

Both themes in question: remarriage after marital separation and emotional abandonment are inserted within the family context, more specifically in the post-divorce scenario due to the adopted

scope, even if the family in question was formed in a love affair without formalization of a relationship. However, due to the birth of a child of that couple, it will be possible to observe the presence of intersections that compose the post separation context and may be noticed in those requests that enter the courts, such as the existence of stepfathers or stepmothers and the birth of half-brothers. Under the guise of lawsuits for emotional abandonment or matters of rights to be granted to stepfathers or stepmothers, the (dis)affections that cross the family history of the parties may be noticed.

Judicial developments - such as the definition of child custody, visitation agreements and enforcement, food payment, among others - may justify a lawsuit for emotional abandonment or a request for recognition of the stepfather and / or stepmother replacing or in addition to the father / mother³, in the stepchild's civil record. In legislative terms, the expansion of the notion of family - e.g., in post-divorce situations, stable union, equality among children conceived outside marriage - was considered in relatively recent changes (Lei nº 6.515, 1977; Lei nº. 8.069, 1990; Lei nº 10.406, 2002; Lei nº 13.058, 2014).

Therefore, it is within this legal-juridical field that the procedural demands that will be discussed in this text arise. In regards to remarriage, we have decided to analyze questions involving the legal and judicial demands of remarried families. To this end, we have sought to present the debate on the creation of specific laws to attend to that family configuration, based on what is provided in Brazilian legislation and the stance adopted by the interviewees regarding the construction of the position of stepfather and stepmother.

As for emotional abandonment, jurisprudential material was analyzed in order to identify arguments used in the construction of demands. Through this analysis, it was possible to understand the relationship between the existing legislation, the rights claimed due to the damage suffered, and the parameters built to think about affection and parental relationships.

The existing tensions in the field of Legal Psychology require permanent reflective exercise, since they need to be articulated with another field of knowledge and practice. In addition, the legal system has increasingly been required to resolve conflicts that are situated on the boundary between legal and subjective, fostering the articulation between these fields. In this sense, this paper analyzes in detail the trend of judicialization of life through two themes - remarried families and emotional abandonment - that call the notions of family, affection and responsibility into question.

Method

The research that served as the basis for this review of these two themes was carried out separately and has different methodological choices. This diversity also shows the multiplicity of possible approaches in the field of legal psychology. In the investigation performed on remarried families (Soares, 2013) individual semi-structured interviews were conducted with six stepmothers and six stepfathers who were in heterosexual relationships, members of different post-divorce families, living in the state of Rio de Janeiro, belonging to the middle class and without age restriction. Access to interviewees was obtained through recommendation. The survey aimed to obtain reports about the relationship stepfather / stepmother and stepchildren regarding the duties of the former, which was authorized by the Ethics Committee. One of the aspects we sought to observe is how interviewees think of their responsibilities in relation to their stepchildren and their accordance with the current legal-juridical provisions. Data obtained from the interviews were analyzed through content analysis utilizing

³ Recognition in replacement of the father / mother refers to the unilateral adoption or adoption by a spouse referred to in paragraph 1 of Article 41 of the Statute of the Child and Adolescent (Lei nº. 8.069, 1990): Art. 41. Adoption attributes the condition of son/daughter to the adopted child, with the same rights and duties, including inheritance, and therefore disconnecting him/her from any bond with parents and relatives, except matrimonial impediments. Paragraph 1, if one of the spouses or concubines adopts the child of the other, the bonds of filiation between the adoptee and the spouse or concubine of the adopter and his / her relatives are kept. On the other hand, "recognition in addition" to the civil registry refers to the recent multi-parenting cases, which allow the inclusion of a third party in the civil registry by modifying the filiation. In this family configuration it would mean to make the stepfather / stepmother equal to the father / mother.

categories as defined by Gomes (1994). The names used are fictitious in order to protect interviewee's anonymity.

The research on indemnity claims due to emotional abandonment is part of a larger study that archaeologically analyzed enunciations about fatherhood and criminality in the decisions of second and third instance courts in the southern states of Brazil, seeking to describe possible enunciation games. It should be pointed out that the enunciation that was the starting point of this research - father absence as cause of criminality, led to enunciation movements that articulated these two matters (criminality and fatherhood) in different ways and, therefore, evidenced struggles of forces, knowledge / power games that merged, so that enunciations that may or may not support the sentences that were read, could arise. The courts of the three states of the southern region were analyzed (TJRS, TJSC and TJPR, acronyms in Portuguese for the Courts of Law of Rio Grande do Sul, Santa Catarina and Paraná respectively), the Federal Regional Court (4th region) and the Superior Court of Law (STJ, acronym in Portuguese) and Federal Supreme Court (STF, acronym in Portuguese). The research was conducted in the virtual collection of the legal instances mentioned above, crossing descriptors related to the terms fatherhood and criminality. Altogether, 208 court rulings were selected, which are documents that record the decisions taken by the group of judges. In order to present the aspects regarding emotional abandonment, a document concerning "Emotional Abandonment" was reanalyzed, a case in which a father was charged with having emotionally abandoned his child.

It should be noted that we did not intend to legally discuss the legislative and procedural possibilities of the emotional abandonment or remarriage claims, but to highlight the arguments that support these discussions, i.e., observing family models and idealizations that are at stake in this debate and the possible effects of judicialization on families.

Naturalness vs. Regulation: on the exercise of stepfatherhood / stepmotherhood

The search for the Judiciary can be used as a means to understand the way remarried families deal with their impasses. Martin and Le Gall (1992) chose the discussion on whether or not some of these families seek the judiciary and the circumstances justifying such a search as the guiding element of their research. This methodological choice reaffirms the idea that there is not a single remarriage configuration, but rather multiple formations. Even if in appearance the structure of certain remarried families can be the same, the internal processes of marital / family construction may differ.

Based on this understanding, different recomposition logics are observed according to two factors. The first aspect refers to how open or closed the family network is. When the family space is organized keeping parental dialogue, the rules are collectively negotiated and supersede the Law. In other words, self-regulation is a priority compared to hetero-regulation. In contrast, in cases where there is no healthy dialogue between ex-spouses, legal demands become stronger when it comes to resolution of conflict situations and assignment of responsibility. The second factor is the marriage project. If couples believe their remarried families are as important as their first union families, they tend to seek the judiciary more often, because they will try to erase any previous marital history. Conversely, if remarried couples stand for spouse autonomy, problems will be addressed aimed at negotiation and including all family members.

Given the above, the question is whether remarried families would require specific legal-juridical regulation and which legislative proposals have been thought to address this family configuration. In Brazil, the proposed Estatuto das Famílias (Statute of Families)⁴ (PL 2285/2007), formulated by the Instituto Brasileiro de Direito de Família (Brazilian Family Law Institute - IBDFAM), addresses the remarried family in some articles. Article 91 suggests the participation of the new spouses in caring for

⁴ The original Statute refers to Bill No. 2285/2007, but it was altered when approved by the Comissão de Seguridade Social e Família (Social Security and Family Commission). A comparative chart between the original and the substitute text is available on the IBDFAM (s.d.) website at: http://www.ibdfam.org.br/_img/artigos/Estatuto%20da%20Fam%C3%ADlia%20x%20substitutivo.pdf

It should be noted that the mentioned bill, known as Statute of Families, differs from PL 6.583 / 2013 called Statute of the Family. In 2014 there was a request to append the Statute of Families bill to Bill 6,583 / 2013, but the request was denied "since Bill no. 2,285 / 2007, which is being processed appended to Bill no. 674/2007, is under conclusive resolution procedure, and has already received reports from the committees responsible to examine its merit", as informed by the website of the Câmara dos Deputados (Chamber of Deputies, s.d.).

stepchildren since they share parental authority with the genitor: "When parents constitute a new family entity, the rights and duties arising from family power shall be exercised with the collaboration of the new spouse or cohabitant or partner".

This measure would modify what is provided by article 1,636 of the Brazilian Civil Code (Lei nº 10.406, 2002), which refers to non-interference of the stepfather / stepmother in the stepson's education. As stated in the article, the father or mother shall exercise parental authority "without any interference from the new spouse or partner". Another article in the Statute of Families that affects remarried families is the continuation of interaction: "Art. 100. The right to interaction can be extended to any person with whom the child or adolescent maintains an affectional bond". As it is written it is possible to learn that, in the event of marital separation, the stepfather / stepmother could request the right to visitation or custody of the stepchild in order to maintain interaction, claiming to have established an affectional tie. Thus, if the text of the Statute of Families is approved, new legal demands from remarried families may enter the courts, exposing the need for a thorough debate on parenting and filiation.

When stepfathers and stepmothers interviewed in the survey presented here were asked about the establishment of a division of labor with the spouse, i.e., if the couple had talked and set such duties, the word "naturally" or the phrase "it was natural" stood out in their answers. This data shows that there was not a conversation in which the duties of both stepfathers and stepmothers were pre-determined. When asked if the division of responsibilities in the care of the stepchildren was established with her husband, Rose said: "No, it was not stipulated who would take care of what, it happened normally. It was really a natural thing...".

This naturalness sometimes allows the attribution of authority to arise from a situation of impasse or confrontation. However, this aspect is not restricted to remarriage, since even in first union marriages solutions are built when difficulties arise. It is impossible to predict all the circumstances a family will face. The specificity of remarried families refers to the topics and guidelines that should be established. Patricia's statement stands out because despite not having previously discussed it with her partner, she believed she could take some responsibilities, but she was reproached by her husband: "I scolded his son as if he were mine. And he said, 'do not talk to my son like that', then I said: 'either you want me to be fully present, or we will have a dating life without the children present'".

From that episode on, her possibilities of intervention as a stepmother and his as a stepfather were stipulated. A broad authority in the guidance of the children involved was decided. A similar approach can be noticed in Vitor's report on authority reciprocity with children and stepchildren. He also experiences a double remarriage in which both spouses had children from marital unions prior to the current relationship. He says: "No, this was not discussed, since we already knew each other, we already knew the way the other dealt with their children. Since the ways looked alike, I think one considered the other could treat the children equally".

While Patricia and Victor defined this broad authority, in Neusa's interview we may notice the concern to differentiate herself from a maternal position: "It happened naturally, we talk about everything, including about that. I do recognize some boundaries, I cannot participate in everything, I am not the mother". Throughout the story told by Patricia, she mentioned that after a conflict situation, she was authorized by her partner to collaborate in the education of her stepchildren. She then realized that there were differences between her children and stepchildren, and that her behavior could not be the same.

The finding that the majority of interviewees lacked a specific dialogue to establish responsibilities, and the fact that its construction is seen as a natural process, returns to the question about the need to legislate on remarried families (Martin & Le Gall, 1992). In other words, given what was presented, the question is to what extent the members of this family structure demand regulation of their relations. Based on the collected interviews it can be said that in regards to responsibility assignments, they have occurred without the need for legal-juridical support.

As regards legal regulation, one of the questions in the guide asked if the interviewee had resorted to the judiciary to meet any family demand. Except for the ones who answered they had resorted to the justice system for separation or divorce from previous marital relationship, there were no other positive answers on this item. However, although none of the interviewees had sought the justice system to

demand something regarding family reconfiguration, some have mentioned legal demands. Some of them were in the past, i.e., decisions that had already been made, while others mentioned concerns about the future, especially regarding passing away. But these needs did not come from stepmothers, only stepfathers expressed such wishes.

Regarding past events, health plans were mentioned by two stepfathers, but in opposite ways. Guilherme managed to include his step daughter, while Vítor gave up including his stepchildren as a result of legal obstacles that arose. These legal requests from members of remarried families are met by the jurisprudence on such demands. Some companies already include stepchildren in their internal regulations, showing concern with the changes undergone by families in contemporaneity. However, the execution of those requests still occurs often through the courts, based on previous decisions favorable to the claim.

Regarding the right to visitation, despite not having made an agreement in court, stepfather Lorenzo kept in touch with his stepson even when he spent some time separated from his current wife. This scenario would be devoid of legal and juridical safeguards, and would be based on the permission granted by the parent for the step-parent to have access to the stepson. Stepmother Neusa also mentioned that she would like to keep the bond with her stepchildren in case of separation: "If one day I decide to separate, I would keep the bond, it would not be the same, but there is no way around it, they are already part of the family" (Neusa).

The fear about the consequences of passing away, i.e., the helplessness of the stepchild in terms of rights after the death of his stepfather, or the possibility of a distance between stepfather and stepson after the mother's death, are a source of distress for some interviewees. Stepfather João is concerned about keeping the stepson under his care in the event of the mother's death: "He could say "I am the father, I want to be with him", but I think it would not be the best for him. I think if I asked [my stepson] I think he would want to remain in his home, where his room is" (João).

Another legal aspect mentioned was the Clodovil Law (Lei nº 11.924, 2009), which allows the step-parent's family name to be added to the stepson's name. Although not very well known, interviewee Lorenzo mentioned his interest in this law, since he believes this way his position will be further recognized. The alternatives considered by these stepfathers point towards the exclusivity of their place in substitution for the father, or at least a guarantee of their permanence in the stepson's life.

Social institutions can act as means of exclusion or reaffirmation of parenting (Brito, 2006). The research by Cardoso (2009) identified the lack of knowledge of the surveyed schools about the need to adapt their routines to new family models. Lorenzo illustrates how the family and the school indicated what should be his space as a stepfather: "At that moment I did not think about taking a father's place, I thought about assisting a friend, but the family started treating it this way, so did the school".

This is an important finding for reflection about the legal-judicial system and the way lawsuits are conducted, generating expectations of stepfatherhood / stepmotherhood recognition, i.e., the exercise of being a stepfather or stepmother within the replacement model. The construction of affection, as stated by some interviewees, is facilitated by interaction. But currently, since parents have not yet seen the joint custody law effective for most cases, interaction actually happens with the stepfather who has access to the child more often. Thus, on the grounds of affection established with the stepfather, and because of a certain distance kept from the father due to a court decision, certain rights are granted to the stepfather and the father is pushed away from his child.

Hence, instead of ensuring and supporting the exercise of fatherhood post-divorce, social institutions exacerbate the concept of socio-affection. In this regard, it is necessary to reflect - before considering legislating - on the place of the stepfather, since the exercise of paternity should be guaranteed effectively after divorce⁵. It is not intended here to discuss this dualism, since we understand these places are different, we want to overcome the binary idea of father / stepfather and mother / stepmother, and to think about them as truly complementary and not mutually exclusive or equivalent. To this end, social change is necessary, including institutions, so that step-parents may reflect on their position in the family without having only the nuclear model of first union as a reference.

⁵ This argument was presented by the SOS Papa association against the approval of the Statute of the stepfather / stepmother in France.

Judicializing affection: measure the damage to punish abandonment

The second situation to be analyzed in more detail in this paper is emotional abandonment, i.e., the possibility to request indemnity for moral damage in case of emotional abandonment. We have prioritized the demands made by children who prosecuted their parents as defendants. Based on the analysis of some case law documents, our objective is to review aspects of the assimilation of the emotional abandonment demand by Brazilian courts of law.

It is important to go back to the main points of this demand, some of which have already been mentioned in previous studies (Moreira & Toneli, 2015), deepening the discussion and the legal and theoretical review of the subject. Given the articulation of legal procedure with the psychological issues involved in emotional abandonment, the analysis of this situation is promising for the debate on the attempt to resolve conflict in court. It is not our intention to defend or invalidate the substance of these cases. Our focus is to analyze the declarations surrounding these requests, either to sustain or deny the possibility of indemnity. A debate restricted to the analysis of whether it is legitimate or not of the judiciary to assume this demand, is likely to be fruitless. We are interested in the assertions that build the different positions of the subjects in the exercise of family relationships (fathers, mothers, children).

In order to present some aspects regarding emotional abandonment, a document concerning "Emotional Abandonment" was re-analyzed - a case in which a father was charged with having emotionally abandoned his child. Jurisprudence⁶ - a set of concrete decisions of the Courts of Law - is not synonymous with law, as Perucchi and Toneli (2008) have pointed out, therefore it "does not have the power to generate legal rules, but it can lead to their future formulation" (p.144). The power of case law analysis is the possibility of understanding "how some statements and their enunciations have been used as a precedent to legitimize similar future decisions" (Moreira & Toneli, 2015, p.1260).

The document re-analyzed in this article is a court ruling by the TJSC, according to the summary information related to the March 2007 decision.

TJSC 2006.015053-0. CIVIL LAW - OBLIGATIONS - CIVIL LIABILITY - INDEMNITY FOR MORAL AND MATERIAL DAMAGE... - MATERIAL DAMAGE - CAUSAL LINK BETWEEN OFFENSE AND CLAIMANT'S FINANCIAL LOSS - ABSENCE - KNOWN RESOURCES - PARTIAL ACCEPTANCE OF DEFENDANT'S CLAIM AND REJECTION OF CLAIMANT'S

The father who neglects his child, abandoning him/her, offends their psychosomatic integrity, resulting in an offense liable for moral compensation. The suffering of the child abandoned by their father inflicts moral damage to their mother figure, especially when the consequence of such suffering is decisive in shaping personality as a whole (TJSC, 2007, s.p.).

It is a Civil Appeal⁷, due to an action for moral and material damages filed by the mother of a son who was "abandoned" by his father. The son obtained paternity recognition and compensation for emotional abandonment in another lawsuit. That is, the mother accuses the father of emotional abandonment and seeks compensation for moral damage, since she has emotionally taken care of the son on her own. The decision analyzes several points involved in this case, but it is important remember some aspects that are relevant for the claim and that have been found in other cases, including a court decision.

6 From the Latin *jurisprudencia*, from *jus* (Law, science of Law) and *prudencia* (wisdom), which literally means the science of Law observed wisely. The Romans used to define it, according to Ulpian, as the knowledge of divine and human things and the science of fair and unfair: *divinarum atque humanarum rerum notia, justi atque injusti scientia*.... The literal meaning is clear: the Law applied with wisdom (Silva, 2014, p.812).

7 From Latin *appellatio*, used in the same original meaning: an appeal filed from a lower to a superior judge. Designates one of the appeals a person aggrieved by a decision is entitled to file, so that when the case moves up to a higher court, and its merit is known, a new decision can be reached, confirming or modifying that one reached in the lower instance jurisdiction (Silva, 2014, p. 118).

Overall, a demand linked to emotional abandonment triggers some legal arguments and dilemmas. As regards the legal argument, at least three questions have to be answered in order to consolidate the demand: what is the right violated? What is the damage caused? What is the responsibility of the parties? What was possible to analyze is that the right claimed as violated in these cases is family interaction. The damage caused by the violation of this right are moral and / or psychological. While the parties' liability is based on the differentiation of parental roles, assigning specific roles to the mother or father.

One of the dilemmas this demand brings about is the difficulty to measure and verify the causal link between emotional abandonment and the damage presented. Moreover, if this relationship is proven, another dilemma is to find alternatives to resolve the conflict, which sometimes falls into capitalization of affection, treatment, or pedagogy of family relationships.

The reasoning of the decision sustains the importance of family interaction as a right of children and adolescents, established by the Statute of the Child and Adolescent - ECA (According to its acronym in Portuguese - Lei nº. 8.069, 1990), stressing the need for the parental couple. Family interaction, understood as a right, is a relatively new construction. Prior to ECA, separation represented the loss of the child's custody by one of the parents, "a practice that represents true 'commodification' of the child, being considered more as an object than a subject of rights" (Dias, 2011, p. 441). In addition, interaction has been scrutinized by rules on how to educate children, and cohabitation alone is not enough.

In a 2012 decision, the STJ sustains that emotional abandonment "is a sufficient basis to characterize compensable moral damage" (STJ 1159242). The delimitation of care will use psy knowledge to construct the relationship between absence of care and damage, as can be observed in the use of Winnicott's theory in the report text: "a baby who is deprived of some ordinary but necessary things such as affective contact, is susceptible, to some extent, to disturbances in their emotional development, which will be revealed through personal difficulties, as they grow "(STJ 1159242).

In this sense, the argument seeks to resolve one of the dilemmas: how to measure the lack of, the absence of, the emotional abandonment: "There is no question over the measurement of the intangible - love - but rather the verification of compliance, breach, or partial fulfillment of a legal obligation: caring" (STJ 1159242, p. 10). This verification will have to rely on the definition of a rule regarding care, affection and family interaction, as a comparative model to define if not efficient enough. In the same decision, some points are highlighted as concrete possibilities to measure family relationships: "presence; contact, even if not in person; voluntary actions in favor of the offspring; comparisons with the treatment given to the other children, among other possible formulations that will be brought before the judge by the parties "(STJ 1159242, p. 11).

Parental figures and roles must also be defined as a way to assess the responsibilities of each. On this point, there is an important crossing of gender questions. In the case we have analyzed, the father's responsibilities are defined. The exercise of parenting and its relationship with moral damage is indistinguishably constructed, but later on, responsibilities must be differentiated and therefore fatherhood is constructed as necessary but different from motherhood. The father's role is considered to be responsible for authority and his absence would represent "the decline of paternal virility" (TJSC 2006.015053.0). Such decline which spreads to other social spheres "is probably what has been causing the terrible consequences known to all of us, as the increase in juvenile delinquency, homeless children and children on the streets" (TJSC 2006.015053.0).

In this argumentation, paternal responsibility is highlighted and fulfills simultaneous roles of construction, legitimization and regulation of what it is to be a father, emphasizing its importance in the child's life and in the construction of society itself, but, also blaming him for the problems in these two areas. The risk of judicialization stepping into the family and determining the features of each role exists when one "excludes or minimizes the effects of other power relations on the phenomena in question (increased juvenile delinquency, homeless children and children on the streets, among others) "(Moreira & Toneli, 2015, p.1263).

The questions of gender associated with these arguments are based on the binary difference between men and women, fathers and mothers and hold fatherhood responsible for authority matters. This argument considers paternal role as a synonym for authority, attached to the male parent, who

"will always be in the position of representative of the law, because this is crucial to the structure of subjects after all"(Pereira, 2003, p. 144). The call to construct a "virile *father*", confines the exercise of fatherhood to a particular sex and assigns this sex a supposedly natural and anatomically different body.

Moreover, once damage and its relationship with lack of attention, care, or affection have been identified, what are the ways to resolve conflicts? While understanding indemnity does not repair the damage caused, it has been the most common way to conduct and resolve cases. It includes the guarantee of treatment costs reimbursement, which is necessary to deal with psychological damage, but also the notion that indemnity could be educational as guidance to all families. However, there is a risk of trying to capitalize on affection, as if, when one is unable to give affection, they could literally pay for their absence. In addition, this demand can be understood as having strictly economic or revenge motivations, as identified in a survey of separated men (Padilha, 2008).

However, the STJ ruling expresses the dilemmas and tensions present in the acceptance of this demand as an object of legal attention. These questions arise particularly from subdued vote "There is not a perfect model to be followed in the education and upbringing of children, because it is not possible to measure the degree of attention, affection and care provided by parents to their offspring "(STJ 1159242, p. 42).

In this sense, given the legitimacy of this demand, the door to the justice system is opened to some family matters, responsibilities and affections. In the dissenting vote, the argumentation warns about the effects of this kind of decision, which could instigate the filing of indemnity claims: "Well, that would lead us to quantify or aggravate pain... So, opening this door here, is to recognize this as a right, and we cannot do that "(STJ 1,159,242, pp. 16-17). Despite this argumentation, the demand remains legitimized by the Supreme Court, which represents an important outline of judicialization of life.

Declarations linked to emotional abandonment express social, historical and cultural constructs that must be analyzed very carefully, because they create subjects, especially the father subject. While it provides legitimacy, legal recognition also regulates the terms of what will be considered fatherhood or not. This makes us question: why is it attractive to seek such legitimacy? What is the cost of this recognition (considering that there is always a series of exclusions in these definitions)? In regards to the jurisprudence analyzed concerning emotional abandonment, the balance between legitimacy and regulation is quite complex. State legitimacy had already been granted, since paternity had been recognized, but the exercise of fatherhood was somehow not effectively guaranteed. Legitimacy would only come into effect through the regulation of legitimacy itself. If the law defines someone as the father, it is necessary to establish the assessment criteria of who can be considered father, a position sometimes claimed by stepfathers on the grounds of the socio-affective bond argument. In this case, the emotional abandonment by the father would be substituted by the presence of the care offered by the stepfather, disregarding the social and legal context in which these relationships have been built.

In emotional abandonment claims, 'winning' the cause would mean the conviction of a father who admittedly did not fulfill his role properly. The justice system recognizes the suffering caused by the father's absence and establishes a causal link between absence, suffering and moral damage. However, this recognition contributes to the standardization of parental figures and in the difference marked by gender constructions. In addition, the resolution methods point to the commodification of family relationships and / or the psychological and pedagogical treatment of what is considered a deviation from family standards.

Final considerations

Based on the analysis provided about the two themes chosen for this article - remarried families and emotional abandonment - it is worth considering how judicialization assumes specific features in regards to families. It is important to note how the identification and definition of these demands enable the creation of new laws or the interpretation of existing legislation, but they also bring about new dilemmas for Legal Psychology, in particular the contradictions between legitimacy and standardization.

In this sense, the question is: what are the effects of these legal claims for social relations? What are the possible contributions, limits or challenges that are brought into the field of Legal Psychology in this scenario?

It is undeniable that the ability to access the justice system to resolve questions concerning remarried families or emotional abandonment generates recognition of the conflicts and highlights the importance of matters that have been neglected for quite a while. Rifiotis (2008) analyzes this quest for recognition in the gender and domestic violence field, drawing attention to rights as "important symbolic elements in building legitimacy", it is necessary to "reflect on its place as part of the strategy of visibility and recognition of social struggles"(p. 229).

However, analyses should not succumb to the temptation of paying attention only to those aspects and celebrating the expansion of judiciary range without regard to its new effects: "analyze to what extent these different political aspects expand the exercise of citizenship and / or to what degree they limit it" (Perucchi & Toneli, 2008, p. 154). In this regard, it draws attention to how much these demands, which at first may broaden the concept of family, also generate the standardization of families, regardless of their diversity, and establish the parameters by which the full exercise or inefficiency of their roles will be measured and evaluated. It is understood that the family is a discursive construction which also demands legal legitimacy through these claims. The analyses of these situations show how much the legal definition of family is limited, and indicate that "less" parental figures (emotional abandonment / parenting) or "more" parental figures (remarriage / stepfatherhood / stepmotherhood) may generate conflicts and therefore must be standardized.

Overall, the situations analyzed here - emotional abandonment and remarried families - allow us to think about the legal implications of this question, but they do not have effect only in legal instances. For Perucchi e Toneli (2008): "This whole network that exerts a non-judicial power plays one of the roles that the justice system has taken upon itself", which is to "correct conducts, provide behaviors, (de)legitimize personal postures and attitudes" (P. 154). In this sense, judicializing would be the formalization of a much more dispersed and intense process constituted by small courts in various social institutions.

It is interesting to think how much family judicialization, in regards to parenting or step-parenting, seeks family accountability by describing its roles, responsibilities and risks, as if they were "naturally" the family's responsibility and of each of its members according to their specificities. The judicialization of the family also exposes the contact between psychological knowledge and the Law, since it is based on many analyses and theoretical-psychological constructions, such as the different roles of fathers and mothers to define emotional abandonment and of stepfathers and stepmothers in the context of remarriage. When we think about developing specific legislation to meet the demands of remarried families, it is necessary to understand the social context, to ensure the full exercise of fatherhood and motherhood after separation, so that the claims by the stepfathers / stepmothers are not a consequence of family difficulty in dealing with this new configuration. Thus, such claims could be considered in a way that maintains the spaces of the father and mother, establishing other positions to the stepfather / stepmother.

Therefore, it is important to understand what these judicial claims reveal - either in terms of emotional abandonment or requests involving remarried families - and also to think of other ways, within legal-judicial possibility and with the participation of psychologists. Based on the reflections discussed here, a central question must be raised: What should be the contribution of Legal Psychology when a professional is called to work in cases like these? It is our intention to think about the necessary construction and consolidation of an ethical and reflective performance, founded on a critical and broad perspective on the social field where Legal Psychology stands. The proposition here developed aimed to contribute to the formulation of psychological knowledge to be applied in legal and juridical debates on the themes discussed, as well as to assist in the stance to be adopted by psychologists who work directly with these demands.

References

- Arantes, E. M. M (2008). Mediante quais práticas a psicologia e o direito pretendem discutir a relação? Anotações sobre o mal-estar. In C. Coimbra, L. Ayres & M. L. Nascimento (Orgs.), *Pivetes: encontro entre a psicologia e o judiciário* (pp. 131-148). Curitiba: Juruá.
- Brito, L. M. T. (2006) Desdobramentos da Família Pós-Divórcio: o relato dos filhos. In R. C. Pereira (Org). *Anais do V Congresso do IBDFAM*. (pp.531-542) SP: IOB Thompson.
- Brito, L. M. T. (2012). Anotações sobre a Psicologia jurídica. *Psicologia Ciência e Profissão*, 1(32), 194-205.
- Câmara dos Deputados (s.d.). *Requerimento de Apensação*. Recuperado de http://www.camara.gov.br/proposicoesWeb/prop_imp.jsp?jsessionid=F7FFD843161BDEF663E3378A8ACD308C.proposicoesWeb2?idProposicao=786544&ord=0&tp=reduzida
- Cardoso, A. R (2009). *Escola e pais separados: uma parceria possível*. Curitiba: Juruá.
- Dias, M. B. (2011) *Manual de direito das famílias* (8a ed. rev. e atual.). São Paulo, SP: Editora Revista dos Tribunais.
- Gomes, R (1994). A análise de dados em pesquisa qualitativa. In M. C. S. Minayo (Org), *Pesquisa social: teoria, método e criatividade*. (pp. 67-80) Editora Vozes: Rio de Janeiro.
- Instituto Brasileiro de Direito de Família [IBDFAM] (s.d.). *Substitutivo (2) aprovado na Comissão de Seguridade Social e Família*. Recuperado de http://www.ibdfam.org.br/_img/artigos/Estatuto%20da%20Fam%C3%ADlia%20x%20substitutivo.pdf
- Lei nº 6.515, de 26 de dezembro de 1977. (1977, 26 de dezembro). Regula os casos de dissolução da sociedade conjugal e do casamento, seus efeitos e respectivos processos, e dá outras providências. Disponível: http://www.planalto.gov.br/ccivil_03/leis/L6515.htm
- Lei nº. 8.069, de 13 de julho de 1990. (1990, 13 de julho). Dispõe sobre o Estatuto da Criança e do Adolescente e dá outras providências. Recuperado em 25 de maio 2016, de http://www.planalto.gov.br/ccivil_03/leis/L8069Compilado.htm
- Lei nº 10.406, de 10 de janeiro de 2002. (2002, 10 de janeiro). Institui o Código Civil. Recuperado em 25 de maio, 2016, de http://www.planalto.gov.br/ccivil_03/leis/2002/L10406.htm
- Lei nº 11.924, de 17 de abril de 2009. (2009, 17 de abril). Altera o art. 57 da Lei no 6.015, de 31 de dezembro de 1973, para autorizar o enteado ou a enteada a adotar o nome da família do padrasto ou da madrasta. Recuperado em 02 de maio, 2016, de http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/Lei/L11924.htm
- Lei nº 13.058, de 22 de dezembro de 2014. (2014, 22 de dezembro). Altera os arts. 1.583, 1.584, 1.585 e 1.634 da Lei no 10.406, de 10 de janeiro de 2002 (Código Civil), para estabelecer o significado da expressão "guarda compartilhada" e dispor sobre sua aplicação. Recuperado em 25 de maio, 2016, de http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/Lei/L13058.htm
- Lobo, L. F. (2012) A expansão dos poderes judiciários. *Revista Psicologia & Sociedade*; 24 (n.spe), 25-30.
- Martin, C. & Le Gall, D. (1992) Les familles recomposées. França, Paris: *Informations Sociales*, 1 (22), 105-112.
- Moreira, L. E. & Toneli, M. J. F. (2015). Abandono Afetivo: Afeto e Paternidade em Instâncias Jurídicas. *Psicologia Ciência e Profissão*, 35 (4), 1257-1274.
- Oliveira, C. F. B. de e Brito, L. M. T. de (2013). Judicialização da vida na contemporaneidade. *Psicologia Ciência e Profissão*, 33 (n.spe), 78-89.
- Padilha, C. C.(2008) Quando o pai vira réu por alegação de abandono afetivo. In L. M. T. Brito (Org.), *Famílias e Separações: perspectivas da Psicologia Jurídica* (pp.187-217) Rio de Janeiro: EdUERJ.
- Pereira, R. (2003) *Direito de família: uma abordagem psicanalítica* (3a ed.). Belo Horizonte, MG: Del Rey.
- Perucchi, J. & Toneli, M. J. F. (2008) Aspectos políticos da normalização da paternidade pelo discurso jurídico brasileiro. *Psicologia Política*, 8 (15), 139-156.
- Rifiotis, T. (2015). Violência, Justiça e Direitos Humanos: reflexões sobre a judicialização das relações sociais no campo da "violência de gênero". *Cadernos Pagu*, 1 (45), 261-295.
- Silva, P. (2014). *Vocabulário jurídico*. Atualizadores: Nagibi Slaibi Filho e Priscila Pereira Vasques Gomes (31ª ed.). Rio de Janeiro: Forense.
- Soares, L. C. E. C. (2013). *Padrastos e madrastras: construindo seus lugares nas famílias recasadas*. Tese de doutoramento não-publicada. Doutorado em Psicologia Social, Instituto de Psicologia, Universidade do Estado do Rio de Janeiro, Rio de Janeiro.
- Superior Tribunal de Justiça - STJ 1159242. (2012). Recurso Especial, julgado em 24 de abril de 2012. Aceso em 12 de novembro de 2016, em: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1067604&num_registro=200901937019&data=20120510&formato=PDF
- Tribunal de Justiça de Santa Catarina – TJSC. (2007). 2006.015053-0 Apelação. Acesso em 13 de abril, 2014, em <http://tj-sc.jusbrasil.com.br/jurisprudencia/6521648/apelacao-civel-ac-150530-sc-2006015053-0/inteiro-teor-12625918>

Received: Jun. 12, 2016

Approved: Aug. 24, 2016

Laura Cristina Eiras Coelho Soares: Adjunct Professor, Department of Psychology, Faculty of Philosophy and Human Sciences at Federal University of Minas Gerais - UFMG and of the Graduate Program in Psychology at UFMG. Master and Doctor of Social Psychology, State University of Rio de Janeiro - UERJ. Graduate in Legal Psychology, UERJ.

Lisandra Espíndula Moreira: Psychologist, Master of Social and Institutional Psychology and PhD in Psychology. Associate Professor, Department of Psychology, Faculty of Philosophy and Human Sciences at Federal University of Minas Gerais - UFMG.