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PROVISIONAL COMPLIANCE WITH THE JUDGMENT HANDED DOWN IN ACTION OF REMOVAL OF FAMILY POWER

O CUMPRIMENTO PROVISÓRIO DA SENTENÇA OU DECISÃO PROFERIDA EM AÇÃO DE DESTITUIÇÃO DO PODER FAMILIAR

EL CUMPLIMIENTO PROVISIONAL DE LA SENTENCIA O RESOLUCIÓN DADA EN LA ACCIÓN DE DESPIDO DEL PODER FAMILIAR

Edson Jacobucci Rueda Junior[1]
https://orcid.org/0000-0003-1159-2278

José Sebastião de Oliveira[2]
https://orcid.org/0000-0001-9429-3841

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ABSTRACT

Objectives: The research aims to analyze the possibility of placing the child or adolescent welcomed in a surrogate family, in the case of an injunction that suspends the family power or a sentence not yet finalized that extinguishes that power. In order to reach this objective, the evolution through which the family institution has passed, the institution of provisional compliance with a decision or sentence, the suspension and extinction of family power, from the point of view of personality rights, especially familiar coexistence will be analyzed.

Methodology: Through the hypothetical-deductive method, with research in the doctrine and jurisprudence, it will be verified that the placement of the child or adolescent in a new familiar nucleus, when its legal situation has not yet been defined, effectively meets the right to family life and above all the principle of human dignity.

Results: It will be concluded that, in addition to not finding an obstacle in the technical procedural aspect, the measure is appropriate to combat the negative effects of institutional fostering, in addition to meeting the best interests of the child and adolescent, thus effecting the right to family life.

[1] Mestrando em Ciência Jurídicas pelo Centro Universitário de Maringá – UNICESUMAR; Especialista em Direito das Famílias e Sucessões pela Universidade Anhanguera-SP; bacharel em Direito pela Faculdade de Direito de Curitiba; Juiz de Direito do Tribunal de Justiça do Estado do Paraná. Email: edsonruedajr@gmail.com.

[2] Doutor em Direito pela Pontifícia Universidade Católica de São Paulo PUC-SP; Mestre em Direito pelaUniversidade Estadual de Londrina - UEL; Consultor científico ad hoc das Universidades Estaduais de Londrina - UEL e Universidades Estaduais de Maringá – UEM; Docente aposentado de Direito Civil da Universidade Estadual de Maringá – UEM; Docente de Direito Civil do Centro Universitário de Maringá – CESUMAR; Docente dos Cursos de Mestrado e Doutorado em Ciências Jurídicas do Centro Universitário de Maringá – UNCESUMAR; Advogado na Comarca de Maringá. E-mail: drjso1945@gmail.com.

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Keywords: personality rights; familiar coexistence; human dignity; provisional compliance of sentence; extinction of family power; suspension of family power.

RESUMO

Objetivos: A pesquisa tem por objetivo analisar a possibilidade de colocação da criança ou adolescente acolhida em família substituta, no caso de liminar que suspende o poder familiar ou sentença ainda não transitada em julgada que extingue o referido poder. Para chegar ao referido objetivo, serão objetos de análise a evolução pela qual perpassou o instituto família, o instituto do cumprimento provisório de decisão ou sentença, a suspensão e extinção do poder familiar, sob o ponto de vista dos direitos da personalidade, mormente a convivência familiar.

Metodologia: Através do método hipotético-dedutivo, com pesquisa na doutrina e na jurisprudência, verificar-se-á que a colocação da criança e adolescente em novo núcleo familiar, quando ainda não definida a sua situação jurídica, efetivamente atende o direito à convivência familiar e sobretudo o princípio da dignidade da pessoa humana.

Resultados: Ao final, concluir-se-á que, além de não encontrar óbice no aspecto técnico processual, a medida é adequada para combater os efeitos negativos do acolhimento institucional, além de atender ao melhor interesse da criança e do adolescente, efetivando, assim, o direito à convivência familiar.

Palavras-chave: direitos da personalidade; convivência familiar; dignidade da pessoa humana, cumprimento provisório de sentença ou decisão; extinção e suspensão do poder familiar.

RESUMEN

Objetivos: La investigación tiene como objetivo analizar la posibilidad de colocar al niño, niña o adolescente acogido en una familia de sustitución, en el caso de una medida cautelar que suspende la potestad familiar o de una sentencia aún no finalizada que extingue esa potestad. Para alcanzar este objetivo, se analizará la evolución por la que ha pasado el instituto de familia, el instituto del cumplimiento provisional de una decisión o sentencia, la suspensión y extinción de la potestad familiar, desde el punto de vista de los derechos de la personalidad, en especial la convivencia familiar.

Metodología: Através del método hipotético-deductivo, con investigación en la doctrina y la jurisprudencia, se comprobará que la colocación del niño, niña y adolescente en un nuevo núcleo familiar, cuando aún no se ha definido su situación jurídica, cumple efectivamente con el derecho a la vida familiar. y sobre todo el principio de la dignidad humana.

Resultados: Al final, se concluirá que, además de no encontrar un obstáculo en el aspecto técnico procesal, la medida es adecuada para combatir los efectos

negativos de la acogida institucional, además de atender el interés superior del niño, niña y adolescente, por lo que en efecto el derecho a la vida familiar.

Palabras clave: derechos de la personalidad; vida familiar; dignidad humana, cumplimiento provisional de una sentencia o decisión; extinción y suspensión del poder familiar.

INTRODUCTION

The purpose of this work is to study the possibility of inserting the child or adolescent institutionally placed into a surrogate family, in the case of suspension of family power or sentence not yet finalized which indicates for the removal of family power and its correlation with the right to coexistence with the family, from the perspective of the constitutional principle of human dignity, among others.

It is noticed that, due to the delay in the processing of removal of family power, children and adolescents replaced - in an unequivocal situation of risk, therefore - remain for a reasonable period away from any family coexistence, a circumstance that directly violates the rights of the personality of children and adolescents, as well as the principle of absolute priority enjoyed by children and adolescents. In addition, with each day of replacement, the possibility of insertion in a substitute family is considerably reduced, since, as will be seen below, more than 90% (ninety percent) of the prospective adopters seek children under 6 years of age, meaning that beyond this age group, the search for interested individuals is even more complex and time-consuming.

For this purpose, relevant legal material on the subject were consulted, with emphasis on the themes of personality rights, as well as the positioning of the National Courts, including the Superior Court of Justice and the Federal Supreme Court (STF), and the treatment given to them by the constitutional and ordinary legislator. Therefore, the hypothetical-deductive approach method was used.

At first, the themes analyzed will be (I) family, highlighting the evolution that the theme has undergone over the last few years, especially with the advent of the Federal Constitution of 1988, (II) family power (its concept and legal contours), and (III) cases of suspension or removal of family power.

Afterwards, the article will focus on the right to family life, especially in the case of a child or adolescent institutionally replaced, as well as on the principles of human dignity, affection, among others relevant to the matter.

Then, the study will be directed to the study of provisional compliance with a decision or sentence, with analysis of legal provisions, especially the adjective law (Civil Procedure Code), as well as jurisprudence related to the proposed.

Subsequently, the possibility of provisional compliance with a decision or sentence handed down in an lawsuit to remove family power will be analyzed, with the placement of the child or adolescent in a surrogate family and its correlation with the right to family life and the dignity of the human person.

In this context, the article seeks to demonstrate that the placement of a child or adolescent institutionally placed in a surrogate family, in the case of suspension of family power or a sentence not yet finalized for the removal of family power, is one of the solutions to materialize the right to family coexistence and the principle of human dignity, mitigating the deleterious effects of institutional care.

2 FIRST CONSIDERATIONS

2.1 FAMILY

At first, it is necessary to make brief considerations about the family and the evolution that this institution has undergone over the last few centuries.

Despite the impossibility of specifying a date or period for its beggining, it is certain that the idea of family goes back to the raising of man himself.

In fact, as José Sebastião de Oliveira[3] asserts,

> There is no doubt that, in terms of a social organism, the family is the oldest. Therefore, it has always existed, from the moment the first man began to exist in his most rudimentary example that is known on the face of the Earth and it was in its midst that the wonder of reproduction of one of the most important speciestht

[3] OLIVEIRA, José Sebastião de. **Fundamentos Constitucionais do Direito de Família**. São Paulo: Revista dos Tribunais, 2002. Page 20.

> occupy this planet occurred and will continue to occur, that is, the human species, the only one endowed with intelligence.

Therefore, even before the beggining of Society, Religion or State, the family already occupied its place as a true social organism, even under other forms of constitution and different objectives. Professor Washington de Barros Monteiro[4] points out that "among all institutions, public or private, the family has the greatest significance. It represents, without question, the fundamental nucleus, the most solid foundation on which the entire social organization rests*".*

Giselda Maria Fernandes Novaes Hironaka[5] reinforces that "the family is, so to speak, history, and the history of the family is confused with the history of humanity itself*"*

In the classic book *The City of God*, Saint Augustine[6] already pointed out that

> The human family constitutes the beginning and essential element of society. Any beginning tends towards an end of the same nature, and any element tends towards the perfection of the whole that the element it is a part of. It is evident, therefore, that peace in society must depend on peace in family, and that the order and harmony of the rulers and the ruled spring directly from the order and harmony that arises from creative direction and response provided within the family.

As already mentioned, the family, especially in the last century, has undergone several changes, which, in general terms, have modified its function, composition and conception. To the patriarchal family, which once represented the only form of family organization and whose main objectives were the reproduction and protection of the heritage, new modalities were incorporated, with new contours and objectives, especially affectivity, which becomes the driving force of contemporary intra-family relationships.

[4] MONTEIRO, Washington de Barros; SILVA, Regina Tavares da. **Curso de Direito Civil 2.** 42ª edição, São Paulo: Saraiva, 2012. Page 1.
[5] HIRONAKA, Giselda Maria Fernandes Novaes. **Família e casamento em Evolução**, in Revista Brasileirade Direito de Família, ano 1 – n. 1, april/may/june/1999. Page 7.
[6] SAINT AUGUSTINE. **A Cidade de Deus**. São Paulo: Editora das Américas S/A, 1964. Page 15.

In this new context, the family becomes the space or *locus* that man finds for his personal and material development, protection and externalization of his feelings - especially affection and love. Furthermore, the constitution of a heritage or reproduction are no longer the only objectives of the family; the woman, formerly submissive to the man, gains a new role in the family nucleus, sharing rights and duties with the man.

It is also worth mentioning the evolution that the theme "affiliation" has permeated: (I) the article 227, paragraph 6 of the Federal Constitution, by enshrining the principle of isonomy among children, finally removed from our legal system the discrimination that existed between the most diverse forms of affiliation; (II) the child, until recently seen as an object, is now recognized as a subject of rights; (III) the child or adolescent begins to receive full protection from the State.

As for this last item, Munir Cury emphasizes that "it is in this sense that the Federal Constitution of 1988, for the first time in Brazilian history, addresses the issue of children as an absolute priority, and their protection is a duty of the family, of the society and of the State" (2008, p. 17).

In the field of Law, the *Family* subject, in the same way, underwent a profound change, especially with the depatrimonialization and constitutionalization of the matter, which, from then on, began to be analyzed and studied from the constitutional point of view.

In Brazil, this evolution found its apex in the Federal Constitution of 1988, because, for the first time, new family arrangements are recognized, such as the stable union and the single-parent family, and new principles are adopted, such as human dignity, family solidarity, affection, equality among children, absolute priority for children and adolescents, best interests, among others.

Maria Amélia Belomo Castanho[7], following this line, points out that "*Over the centuries, the Brazilian family has changed and adapted to the demands of modern*

[7] CASTANHO, Maria Amélia Belomo. **A Família nas Constituições brasileiras**. Argumenta Journal Law, Jacarezinho - PR, n. 17, p. 181 - 204, april 2013. ISSN 2317-3882. Available at:

life. This phenomenon is reflected in the field of law, as it strives to adapt to the demands of the society of its time".

These are new times, demanding a new look from the interpreter, having as a paradigm the Federal Constitution and its defining principles, especially those linked to personality rights.

At this point, the principle of human dignity stands out, foreseen as one of the foundations of the Democratic State of Law and which represents a quality or attribute that is inherent to all citizens.

In a relevant work on the Civil Code, Gustavo Tepedino[8] stipulates that

> The choice of human dignity as the foundation of the Republic, associated with the fundamental objective of eradicating poverty and marginalization, and reducing social inequalities, together with the provision of paragraph 2 of article 5, in the sense of non-exclusion of any rights and guarantees, even if not expressed, as long as they arise from the principles adopted by the Constitution, constitute a true general clause for the protection and promotion of human, taken as the maximum value by the legal system

Ingo Wolfgang Sarlet[9] defines the human dignity as

> the intrinsic and distinctive quality of each human being that makes him worthy of the same respect and consideration by the State and the community, implying, in this sense, a complex of fundamental rights and duties that guarantee the person both against any and all acts of a degrading and inhuman nature, as they will guarantee the minimum existential conditions for a healthy life, in addition to providing and promoting their active and co-responsible participation in the destinies of their own existence and life in communion with other human beings.

2.2 FAMILY COEXISTENCE

<http://seer.uenp.edu.br/index.php/argumenta/article/view/239/236>. Access in: 28 october 2021. Page 18.

[8] TEPEDINO, Gustavo. **A parte geral do novo código civil**: estudos na perspectiva civil-constitucional. 2.ed. Rio de Janeiro: Renovar, 2003. Page 25.

[9] SARLET, Ingo Wolfgang. **Dignidade da Pessoa Humana e Direitos Fundamentais na Constituição Federal de 1988**. Porto Alegre: Livraria do advogado, 2001. Page 60.

Among the various principles and institutes related to the Family, the right to family life stands out, especially for this article.

It is a fundamental right, inherent to the personality, expressly provided for in article 227 of the Federal Constitution and in articles 4 and 19 of Law 8069/90 (Child and Adolescent Statute), among other normative documents.

In summary, it concerns the right of parents and children to live with each other, in an environment permeated by affection and suitable for the physical and psychological development of children.

As Beatriz Leiva Rodriguez[10] states, family life is "el derecho del niño a no ser separado de sus padres excepto en el supuesto de que fuese lo más conveniente atendiendo a su interés superior, en cuyo caso el menor gozará del derecho a mantener el contacto con ellos*".*

Rolf Madaleno[11], with proper wisdom, states

> It is established as a fundamental right of children and adolescents and now also of young people (EC 65/2010), guaranteed by article 227 of the Federal Constitution, to guarantee family and community coexistence to the infant, as already ordered by the Convention on the Rights of the Child, of the United Nations, by establishing that the child should grow up within his family, in an environment of happiness, love and understanding, for the full and harmonious development of his personality.

In the same vein, Professor Paulo Luiz Netto Lôbo teaches that *"family coexistence is the daily and lasting affective relationship interwoven by the people who make up the family group, by virtue of kinship or not, in the common environment"* (2008, p. 52).

[10] RODRIGUEZ, Beatriz Leiva and García Garnica, M.C. and García Garnica, M.C., **Análisis de las instituciones del sistema de protección de menores: Y su reforma por la Ley Orgánica 8/2015 y la Ley 26/2015 (I)** (Analysis of the Institutions of the Child Protection System: And Its Reform by Organic Law 8/2015 and Law 26/2015 (I)) (March 25, 2016). EL GENIO MALIGNO. Revista Semestral Septiembre 2016. Num. 19, Available at SSRN: https://ssrn.com/abstract=3359802 or <http://dx.doi.org/10.2139/ssrn.3359802>. Access in: 30 nov. 2021.

[11] MADALENO, Rolf. **Direito de família.** 8. ed., Rio de Janeiro: Forense, 2018. Page 209.

As can be inferred, much more than a right of the parent, family life is a right of the child or adolescent, since its main function is to guarantee the physical, intellectual and emotional development of the child.

In fact, in the case of the father, in addition to a right, coexistence is seen as a duty, arising from family power and responsible parenting, subject even, in the case of non-compliance, to compensation for affective abandonment[12]. In fact, in addition to the moral obligation, the parent has a legal obligation to live with their children, to ensure the physical and emotional integrity of their offspring. As asserted by Clayton Reis and Simone Xander Pinto, *"this "breach of evaluative conduct" causes immense fissures in the personality of its members, subjecting its authors to civil liability arising from these facts"* (2012, p. 517).

In the same direction, Rolf Madaleno[13] warns

> The unjustified omission of any of the parents in providing for the physical and emotional needs of the children under parental power or their malicious behavior, relegating descendants or abandoning them, has propitiated the jurisprudential and doctrinal feeling of protection and reparation for the psychic damage caused by the deprivation of affection in the formation of the person's personality.

This is because, as advocated by Wilson Donizeti Liberati[14], "the family is the first socializing agent of the human being. The lack of affection and love from the family will forever mark her future."

There is no doubt that the absence of a family - regardless of its configuration - will affect the child's growth and leave wounds that, even with the passage of time, will never heal. Numerous studies indicate that the absence of a father figure alone causes irreparable damage, such as a propensity to use alcohol, narcotics, depression, low self-esteem, among others.

However, the mere presence of the family is not enough: it is necessary for the child to find within the family the appropriate environment for his/her development. And that presupposes affection, respect, love, dedication, dialogue, etc. Only in this

[12] In the same direction, stands out the following sentence by STJ: REsp 1887697/RJ, Rel. Ministra NANCY ANDRIGHI, TERCEIRA TURMA, sentenced in 21/09/2021, DJe 23/09/2021.
[13] MADALENO, Rolf. **Direito de família.** 8. ed., Rio de Janeiro: Forense, 2018. Page 113.
[14] LIBERATI, Wilson Donizeti. **Comentários ao estatuto da criança e do adolescente.** 10. ed. São Paulo: Malheiros, 2008. Page 22.

environment, it is repeated, permeated by the feelings outlined above, will the healthy development of the infant be possible.

Echoing the assertion, Gabriel Chalita[15] states that "[...] the family has the responsibility to form character, to educate for the challenges of life, to perpetuate ethical and moral values".

Likewise, psychoanalyst Augusto Cury (2014, p. 84) warns that *"We know if a family is healthy, determined and happy not by the complete absence of friction, something impossible, but by the presence of gratitude, respect, consideration and dialogue".*

Therefore, there is a clear interest on the part of the State and society as a whole that children and adolescents maintain a healthy coexistence with their family, since it is in this environment that their development and first socio-affective relationships will occur.

That said, it is observed, especially in article 19 of the Child and Adolescent Statute, the preference of the legislator for the natural family as a *locus* for the realization of the right to family life.

Indeed, the permanence of children and adolescents within their natural family, preserving family ties, is a primary targert to be pursued by the entire Society and State, with the utmost priority.

This is because the role of parents is fundamental for the intellectual, moral and psychological development of their children, who, if they do not obtain the proper guidance and follow-up, will certainly have their social relationships and personal growth compromised, which will be reflected in the way they interact in society.

In an important contribution to the theme, Joelson Junior Bollotti, Mariana Gomes Ribeiro Bollotti and Rodrigo Valente Giublin Teixeira state that (2020, p. 878),

> The family is the first living space of human beings, it is fundamental for the healthy development of the individual that, regardless of its configuration, it is the natural environment in which the child recognizes himself as a subject, receives the first references, learns and incorporates ethical and religious values, lives affective experiences, representations and expectations that influence the formation of his personality.

[15] CHALITA, Gabriel. **Educação: a solução está no afeto**. São Paulo: Gente, 2004. Page 20.

However, when it is not possible to remain within the natural family, article 19 of the ECA provides for the possibility of placing the child or adolescent in a substitute family, in order to guarantee the right to family life.

It should be noted that placement in a surrogate family is an exceptional measure, only viable after all attempts to keep the child or adolescent in their natural family have been frustrated.

It is, therefore, *ultima ratio*, so that it is up to the State and Society to make every effort to ensure that the child or adolescent remains in their natural family, providing care services and, if necessary, financial assistance, for the promotion and autonomy of the family nucleus.

Placement in a surrogate family will take place through custody, guardianship or adoption, as provided for in article 28 of the ECA[16]. It should be noted that guardianship presupposes the dismissal or suspension of family power, while adoption requires the removal of family power and breaks all ties with the natural and registered family. Custody, in turn, does not require removal or suspension of family power, and can even coexist with family power.

3. FAMILY POWER

The expression "family power" is relatively new in our legal system, as it was only included in 2002, with the entry into force of the current Civil Code, at the suggestion of professor Miguel Reale.

Until then, the expression "vernacular power" was used, a term that dates back to Roman Law – pater potestas –, and which meant, as Maria Berenice Dias[17] asserts,

[16] Article 28. Placement in a surrogate family will be done through custody, guardianship or adoption, regardless of the legal situation of the child or adolescent, under the terms of this law.
[17] DIAS, Maria Berenice. **Manual de Direito das famílias**. 3.ed. São Paulo: Revista dos Tribunais, 2017. Page 376.

"[...] absolute and unlimited right conferred on the head of the family organization over the persons of the children".

It should be noted that, in its initial conception, vernacular power, as can be inferred from the portuguese expression itself, was exercised exclusively by the husband and father, excluding the mother. Only in the absence of the father, the management of the family society and, therefore, the parental power, was transferred to the woman, as provided for in article 380 of the Civil Code of 1916[18].

The Married Woman Statute (Law 4.121/62) changed the wording of the aforementioned article 380 of CC/1916 and ensured parental power to both parents, however, with primary exercise by the husband, with the collaboration of the wife, so that, in practice, the father's will prevailed, permitted for the mother to resort to justice.

Although the term was abandoned only in 2002, as of 1988, with the validity of the current Federal Constitution, women began to hold family power on equal terms with men, due to the equal treatment given by the constituent, in articles 5, I and 226, paragraph 5 of the Constitution.

Reflecting this new perspective, the Statute of Children and Adolescents, in its article 21, innovated by establishing that the "vernacular power" must be exercised in equal conditions by the mother and father, abandoning and derogating, therefore, the odious discrimination of the Code of 1916.

That is to say, from 1990 onwards - the year of the advent of the ECA -, family power, even under the name of "vernacular power", began to be exercised by both parents, without any prevalence of the paternal position, and, in the event of divergence between them, it will be up to the Judiciary, through the Childhood and Youth Judge, or whoever takes his place, to settle the controversy.

Despite the evident evolution that the theme has undergone in recent years, part of the doctrine - especially Silvio Rodrigues, Paulo Luiz Netto Lobo, Maria Berenice

[18] The original wording of article 380 Civil Code of 1916 stipulated that, "During marriage, the husband exercises parental authority, as head of the family (art. 233), and, in his absence or impediment, the wife".

Dias, among others - shares the understanding that the expression "family power" still does not perfectly represent the institution.

In an important subsidy, Maria Berenice Dias[19] points out that

> Although the expression family power has sought to address equality between men and women, it has not been liked. It maintains an emphasis on power, only shifting it from the father to the family. Criticizes Silvio Rodrigues: he sinned gravely by worrying more about removing the word "vernacular" from the expression than including its real content, which, before a power, represents an obligation of the parents, and not of the family, as the name suggests. Family power, being less of a power and more of a incumbency, has become a duty, and perhaps one should speak of a family function or family duty.

In fact, analyzing the subject in detail, it is clear that, more than a power, the institution represents a duty or incumbency imposed on parents by law, to protect - principle of full protection of children and adolescents - and to meet the child's interest. – best interest principle.

That is why Paulo Luiz Netto Lôbo, supported by Maria Berenice Dias, uses the expression "parental authority", stating that

> [...] authority, in private relations, better translates the exercise of a function or incumbency, in a delimited space, based on the legitimacy and interest of the other, in addition to expressing a simple hierarchical superiority, similar to that exercised in any organization , public or private. 'Parental' better highlights the kinship relationship par excellence that exists between parents and children, the family group, from which the legitimacy that grounds authority must be derived, in addition to doing justice to the mother. [...]. (2008, p. 269)

This expression is better in line with the new view on the matter, focused on the child's interest and its real protection by the holders of family power, Society and the State.

That said, one can conceptualize family power - or parental authority - as a complex of rights and duties granted to parents, with regard to the child and their assets. It is also an incumbency or a charge assigned to parents by the State,

[19] DIAS, Maria Berenice. **Manual de Direito das famílias**. 3.ed. São Paulo: Revista dos Tribunais, 2017. Page 377.

which, due to the vulnerability of children and adolescents, exercises permanent supervision.

It encompasses, in addition to protection, the duty to create, educate, respect, teach, promote leisure, family life, among other duties, provided for in article 1634 of the current Civil Code.

In an excellent study on the subject, Claudete Carvalho Canezin[20] advocates that "Family power, therefore, encompasses all the rights and duties of parents in relation to the person and property of their minor children, which implies the care of the parents, the duty of raising them and of feeding and educating them correctly" (2005, p. 181).

In the same vein, Joyceane Bezerra Menezes and Luís Paulo dos Santos Pontes[21] assert that the public role of family power "implies a bundle of legal positions (burden, right, duty, ought, interest, etc.) set for the care and emancipation of the child and of the adolescent).

In a thesis on the subject, Gonzalo Hernandéz Cervantes[22] states that

> El contenido de la patria potestade compreende un conjunto de faculdades y deberes, de ámbito personal y patrimonial, enunciados lealmente em abstracto pero cuya adecuada aplicación exige su ejercicio siempre de acuerdo com la personalidade de los hijos, lo que implica la adecuación de la potestad paterna a las concretas circunstancias y necessidades del menor, a fim de que éset pueda cumplir com el preno desarrllo de sua personalidade, para lo cual requiere – salvo em situaciones de carácter excepcional – tanto de la figura del padre como de la madre.

[20] CANEZIN, Claudete Carvalho. **A noção de poder familiar e a desconsideração do novo modelo de família nuclear**. Available at: <https://periodicos.unicesumar.edu.br/index.php/revjuridica/article/view/342/198> Access in: 26 of october, 2021. Page 181.

[21] MENEZES, Joyceane Bezerra; PONTES, Luís Paulo dos Santos. **A liberdade religiosa da criança e do adolescente e a tensão com a função educativa do poder familiar**. Revista Brasileira de Direito, Passo Fundo, v. 11, n. 1, p. 113-123, ago. 2015. ISSN 2238-0604. Available at: <https://seer.imed.edu.br/index.php/revistadedireito/article/view/861/642>. Access in: 28 october 2021. Page 113.

[22] CERVANTES, Gonzalo Hernández. **La perdida de la patria potestade y el interés del menor.** 2010. Tese (Doutorado) – Curso de Direito. Universidad Autónoma de Barcelona, Barcelona, Espanha. Available at: <https://www.tdx.cat/bitstream/handle/10803/48647/ghc1de1.pdf?sequence=1&isAllowed=y>. Access in: 30 november 2021. Page 7.

It is noteworthy that the new conception of family power, in which the infant is seen as a subject of law, is closely linked to the principle of the best interests of the child and adolescent[23], so that the focus of the institution shifts from the father to the son.

Analyzing this scenario, Carlos Roberto Gonçalves (2017, p. 597) rightly states that

> [...] family power constitutes a set of duties, transforming itself into an eminently protective institution, which transcends the grounds of private law to enter the scope of public law. Indeed, it is in the interest of the State to ensure the protection of new generations, who represent the future of society and the nation. In this way, family power is nothing more than a public duty, imposed by the State on parents, so that they can watch over the future of their children. In other words, family power is instituted in the interests of the children and the family, not for the benefit of the parents, in view of the principle of responsible paternity in article 226, paragraph 7, of the Federal Constitution.

3.1 SUSPENSION AND DESTITUTION OF FAMILY POWER

As stated elsewhere, family power, understood here as a duty (or outh), is always exercised in the best interest of the child, as long as he is a minor. Due to the evident vulnerability of the child, the State, when the best interests are not observed, can – and must – interfere in the paternal-filial relationship, in order to protect the child or adolescent, even if temporary or definitive removal is necessary.

The State has the duty to supervise and control the family power, so that, in fact, there is the fulfillment of the duties arising from this power, without considering, in this case, undue State intervention in the family relationship.

As a consequence of the assertion, in the case of non-compliance with duties, the State has the possibility of depriving parents of the exercise of family power, through the suspension or removal of it.

[23] For the sake of argument, it should be noted that the principle of best interest also prevails in other legal systems, such as, for example, in Spain, as Beatriz Verdera Izquierdo points out: "configura como un principio general que debe informar la aplicación del Derecho siempre que se adopte una decisión que afecte a un menor" (IZQUIERDO, 2016, p. 5)

As it is a drastic measure, whose effects radiate mainly in the child, its application must be restricted to exceptional cases - *ultima ratio* -, always taken in favor of the infant, to preserve his physical and psychological integrity.

Indeed, as stated, the permanence of children and adolescents within their natural family must be the primary and priorital objective to be pursued by the State and, consequently, by the Judiciary.

In fact, article 19 of Law 8.069/90 prescribes that the preference for the creation and exercise of custody belongs to the parents, with the exception of placing the minor in a surrogate family.

However, when the parents' conduct reveals the total inability to exercise a responsible maternity/paternity, it becomes the obligation of the State-Judge to take this drastic measure (destitution or suspension) aiming, above all, to protect the children's interest.

In this scenario, the destitution or suspension of family power, as the last measure to be applied, is not aimed at sanctioning the parents who do not take care of their offspring, but at the preservation of the physical, moral and psychological integrity of the child, when the incapacity of the parents is evident.

Having said that, it must be asserted that, in the case of distitution the law requires proof of a serious fact or even a repeated failure of the parents regarding their duties of attention and care of the children, or even, when it is verified that the parents do not boast conditions to protect their children, in order to guarantee them a healthy and harmonious development, in conditions worthy of existence (CC, art. 1638).

Suspension of family power, in turn, occurs in cases where parents act with abuse of authority, fail to fulfill inherent duties or ruin their children's assets (CC, art. 1637). In addition to these cases, the sole paragraph of the same article 1637 of the Civil Code states that family power will be suspended if the father or mother is convicted of a crime whose penalty exceeds two years in prison.

Following this argument, the ECA, in its article 22, adds that "parents are responsible for the maintenance, custody and education of minor children", and it is possible to affirm that failure to comply with such duties also gives cause to suspension or distitution of family power, depending on the gravity and other circumstances of the specific case.

Although the hypotheses of distitution and suspension are declined by the Civil Code and the Statute of Children and Adolescents, from reading both normative devices, it is clear that the causes mentioned by the legislator are presented in a generic way, so the State-Judge, as Maria Berenice Dias[24] asserts, has *"wide freedom in identifying the facts that may lead to the temporary or definitive removal of parental functions"*.

That is to say, the list brought by the legislator should not be considered exhaustive and cannot even receive a restrictive interpretation, so that, in the specific case, the Judge, when evaluating all the circumstances and especially the absolute priority of the child and adolescent and their best interest, may apply the drastic measure of suspension or distitution of family power, even if the measure, in theory, does not fit one of the legal hypotheses.

The difference between the institution, in short, is the gravity of the measure: while the distitution definitively breaks family power, the suspension is subject to review, so that, once the reasons that gave rise to it cease, it is possible to reestablish familiar power.

It should be noted, as appropriate, that both suspension and distitution require a judicial decision, to be taken by the Childhood and Youth Court, safeguarding the right to contradictory and full defense. The procedure is provided for in articles 155 et seq. of the Child and Adolescent Statute.

Suspension of family power, moreover, may be decreed in the context of the action to remove family power, as an anticipatory measure of guardianship, as provided for in article 157, caput, of the Child and Adolescent Statute.

[24] DIAS, Maria Berenice. **Manual de Direito das famílias**. 3.ed. São Paulo: Revista dos Tribunais, 2017. Page 386.

4. PROVISIONAL COMPLIANCE WITH THE JUDGMENT HANDED DOWN IN ACTION OF REMOVAL OF FAMILY POWER

As can be inferred from a brief reading of the legal system in force until the mid-1990s, the execution, in the case of a judicial enforcement order, as a rule, presupposed a final judgment.

Commenting on the original wording of article 587 of the Civil Procedure Code of 1973, Professor Moacyr Amaral Santos pointed out that, "for the sentence to have force of execution, as a rule, it must have become final, that is, that res judicata must have occurred. Executive title par excellence, therefore: is the final conviction" (2003, p. 226).

This understanding was based on legal certainty, a principle long foreseen in the Legal System and raised to a fundamental right, as extracted from article 5, item XXXVI. It was argued that, admitting the enforcement, while the judgment is subject to modification, would compromise the legal order and, therefore, give rise to legal instability.

It so happens, however, that the final decision, in most cases, was postponed beyond what was reasonable, attracting, at this point, real social disturbance by challenging the State and society itself.

In this context, the delay in providing judicial protection has always been the subject of numerous debates and criticisms to the Judiciary, especially because the delay affronts the existence of the Democratic State of Law itself and several constitutional principles, such as the right of access to jurisdiction, the due process, legal security, reasonable duration of the process[25], among others.

[25] The right to a reasonable duration of the process was included among the fundamental rights provided for in art. 5 of the Constitution of the Republic of 1988, through Constitutional Amendment 45/2004.

In a famous speech, known as "Oração dos Moços" (Youth Prayer), delivered over a hundred years ago, jurist Rui Barbosa[26] stated, with extreme perspicacity, that "delayed justice is not justice, but qualified and manifest injustice".

Citing Nicolo Trocker, Luiz Guilherme Marinoni (2005, p. 481) asserts that

> Delayed justice is above all a serious social evil; it causes economic damage (immobilizing assets and capital), favors speculation and insolvency, and accentuates discrimination between those who can wait and those who, by waiting, can lose everything. A process that goes on for a long time – in Trocker's words – becomes a comfortable instrument of threat and pressure, a formidable weapon in the hands of the strongest to dictate to the adversary the conditions of his surrender.

Likewise, Carnelutti[27] pointed out that "time is an enemy of law, against which the judge must wage an unremitting war".

In order to minimize the deleterious effects of slowness and combat this enemy, sometimes invisible, the legislator starts to make use of several techniques, especially to allow an isonomic distribution of the time of the process between the parts.

This new vision also finds constitutional support, above all, as mentioned above, in the principles of effectiveness, reasonable duration of the process, celerity and right of access to jurisdiction.

Thus, if, on the one hand, legal certainty justifies the reinforcement only with a res judicata, on the other hand, the new constitutional principles begin to demand new techniques from the legislator, for an effective and efficient judicial protection, without forgetting the social peace and legal stability.

In this scenario, the possibility of provisional compliance with an interlocutory decision or sentence that has not yet become res judicata stands out – either

[26] BARBOSA, Rui. **Oração aos Moços**. Popular edition noted by Adriano da Gama Kury. 5 ed. Rio da Janeiro: Fundação Casa de Rui Barbosa, 1977. Page 40.
[27] CARNELUTTI, Francesco. Apud CARREIRA ALVIM, J.E. **Tutela Antecipada na Reforma Processual**. Rio de Janeiro: Destaque, 1995, page 6.

because the deadline for an eventual appeal has not elapsed, or because the respective appeal has not been judged.

This is, in brief, the faculty granted to one of the disputing parties to, before the res judicata, seek the postulated good (intended guardianship), backing the request for reinforcement/compliance in an interlocutory decision or appealable sentence.

It should be noted that, initially, the legal system only provided for the possibility of provisional reinforcement of a sentence and, even so, in exceptional cases - when the sentence was challenged by appeal received only in the devolution effect (587, CPC/1973).

With the procedural reform of 1994, through Law 8.952, the reinforcement of anticipatory relief began to be admitted, that is, the fulfillment, through an executive process, of an interlocutory decision, therefore, provisional, based on a judgment of summary and superficial cognition given in the midst of the knowledgement process.

Subsequent changes in civil procedural legislation, with emphasis on Law 10.352/01, which substantially changed the civil procedure codex of 1973 and the new Civil Code of 2015, standed out the possibility ou provisional enforcement of the sentence, not remaining therefore, doubts about this option granted to the creditor of judicial protection.

There is, therefore, a clear concern of the legislator regarding the speed, effectiveness, efficiency and, above all, reasonable duration of the process, aiming, with this, to mitigate the effects of time in the provision of judicial protection.

In the specific case of the action to remove family power, the legislator, through Law 13.509/2017, which amended article 163 of the Child and Adolescent Statute, following the ideal of a reasonable duration of the process, provided for a maximum period for completion of the procedure: 120 days.

This period, which is relatively short, however, is not always respected, for multiple reasons: lack of equipment for the Judiciary, delays in the processing of actions, complexity of the evidence, among others.

In addition, there is the possibility for the parent to file an appeal - and perhaps a special or extraordinary appeal -, whose deadline for judgment may further prolong the conclusion of the procedure.

It should be noted, at this point, that, in the case of a child or adolescent - considered the most important phase of human life, given that it is in this period that cognitive, biological and emotional aspects are developed -, the temporal issue, already deleterious for the adult, is aggravated by its peculiar situation of development, especially in the case of a child or adolescent institutionally sheltered.

There is no doubt that, no matter how good the conditions of the shelters, institutional placement, in addition to violating the right to family life, causes serious consequences in the medium and long term in the lives of those who are sheltered.

Research carried out by Harvard University, with orphans from Romania, published by the Correio Braziliense website, proved that children sheltered for a long time have a decrease in IQ, "increased risk of psychological disorders, reduced linguistic capacity, difficulty in creating affective bonds , stunted physical growth, among countless other serious problems, some of them irreversible" (Correio Braziliense, 2020).

Added to this is the fact that, every year, the possibility of placement in a surrogate family decreases, since, it is known, there is a greater demand for children under 06 years of age. Data provided by the National Council of Justice (CNJ), based on the National Adoption System, indicate that 92,7% of applicants only accept adopting children aged 0 to 5 years old.

Aware of these circumstances, the legislator expressly provided, in article 199-A of the ECA, that "the sentence that distitutes the family power from both or any of the is subject to appeal, which must be received only in the devolution effect".

Therefore, it opens up the possibility of provisional fulfillment of the sentence handed down by the Court of first degree, which destituted the family power of the parents, since any appeal will not suspend the effects of the decision.

In the case of an anticipatory decision, rendered in the context of the dismissal action, however, there is no express normative provision, which, however, is not an obstacle to the respective compliance, and the interpreter must, in this case, use the general rule of civil procedure , which allows the provisional fulfillment of an anticipatory guardianship decision.

It can be seen, therefore, that, from a technical-procedural[28] point of view, there is no impediment to the provisional fulfillment of the appealable sentence or the interlocutory decision rendered in the context of the action to destitute family power.

The controversy in the hypothesis lies in assessing whether, in fact, placement in a surrogate family while the legal situation has not yet been defined, serves the best interests of the child and adolescent, especially in view of the possibility of reforming the decision and returning to foster care or biological family, with abruptly ruptures any new affective bond.

In order to clarify or at least clarify the issue, it is opportune to emphasize, at the outset, that there is not a standardized and general answer for all cases. It is up to the Magistrate, with the technical assistance of his multidisciplinary team, to evaluate and measure all the shades of each specific case, and then take the decision to insert the minor in a surrogate family, through judicial custody.

In this step, several circumstances must be investigated by the Childhood and Youth Judge and his team, especially the quality of the evidence produced, the

[28] See, as an example, the following judgment of the Court of Justice of the State of Paraná: Civil Appeal - Action for Removal of Family Power - Children who lived under the care of the maternal grandmother - Parent who used narcotics - Parent with alcoholism problem – Infants who had already been sheltered before – Failed attempt to reintegrate into the family nucleus – Disrespect for the rights of children and adolescents provided for in the ECA – Infants welcomed at the system – Absence of behavioral change on the part of the parent capable of assuring family power – Removal of the Family Power correctly recognized – Provisional compliance with the sentence started – Children who are in a substitute family qualified for adoption – Best interests of the children assured – Sentence maintained. Resource not provided. (TJPR - 11ª C.Cível - 0008940-87.2019.8.16.0188 - Curitiba - Rel.: Desembargador Gil Francisco de Paula Xavier Fernandes Guerra - j. 01.03.2021)

possibility of reforming the sentence or preliminary injunction, the time of fostering, age of the sheltered, among other criteria.

For this to occur with a minimum of legal certainty, Artenira da Silva and Gabriella Sousa da Silva Barbosa[29] warn that "it is of fundamental importance that magistrates acquire minimum transdisciplinary knowledge about child psychosocial development so that they avoid making use of subjectivism and personal values in the judgments of concrete cases"

Regarding the time of reception, it is recalled that family coexistence is a fundamental right of the child and adolescent and, for this reason, it is the duty of the State to shorten the institutional foster measure as much as possible, since the permanence of the infant, even in a standard host institution, directly infringes that right.

Aware of this duty, the ECA, in the same article 19, in its second paragraph, provides that the fostering must not exceed 18 (eighteen) months and, in addition, must be reassessed every 3 (three) months, and the Judge, after within that period, decide on the possibility of family reintegration or placement in a surrogate family.

Therefore, provisional compliance is a healthy measure to combat the negative consequences of a prolonged fostering, as stated by Professor Monica Cuneo[30]: "Prolonged institutionalization prevents the occurrence of favorable conditions for the good development of the child. The lack of family life makes it difficult to provide individualized care, which constitutes an obstacle to the full development of the child's biopsychosocial potential".

In relation to the age of the foster child, it is known that, each year, the chance of being placed in a substitute family, through adoption, decreases considerably. As

[29] SILVA, Artenira, BARBOSA, Gabriella. **O princípio do melhor interesse da criança e a aplicação equivocada da guarda compartilhada como alternada**. Argumenta Journal Law, Jacarezinho – PR, Brasil, n. 28, p. 377. < http://seer.uenp.edu.br/index.php/argumenta/issue/view/N.%2028> Access in: 28 october 2021.
[30] CUNEO, Mônica Rodrigues. **A institucionalização prolongada de crianças e as marcas que ficam**. Available in: <http://mca.mp.rj.gov.br/wp-content/uploads/2012/08/7_Abrigamento.pdf.> Access in: 20 october 2021.
DIAS, Maria Berenice. **Manual de Direito das famílias**. 3.ed. São Paulo: Revista dos Tribunais, 2017. Page 68.

previously mentioned, 92,7% of applicants registered in the National Adoption System accept to adopt only children aged 0 to 5 years old (CNJ, 2013). Also according to the same report, only 2,7% of applicants accept children over 10 years old.

Therefore, in many cases, waiting for the decision of destitution to become final will mean the loss of the chance of adoption, especially when it is not a newborn.

Analyzing these issues, Guilherme de Souza Nucci[31], in his work, clarifies that:

> Another aspect to consider, when the judge is attentive and aware of his/her relevant activity in the Childhood and Youth Court, is the provisional-definitive situation. In other words, there are cases in which the parents (or only one of them, because the other is absent) on account of very serious conduct against the child; the magistrate knows that the return to the natural home is practically impossible. The child must be placed in a surrogate family, a candidate for adoption, knowing that it is receiving someone with an undefined situation. (our emphasys)

In the same direction, Maria Berenice Dias[32] states that

> […] At the filing, the Public Prosecutor's Office must request, as an urgent preliminary injunction of a precautionary nature, that the child be handed over to the custody of whoever is qualified to adopt him (art. 300, CPC). After all, the likelihood of the right and the danger of harm if it remains institutionalized is evident. Placement in a surrogate family is an exceptional situation to guarantee family and community coexistence in an environment that guarantees their integral development (ECA 19).

On the other hand, in certain cases, especially when there is complexity in the evidence produced, the Judge may choose to maintain the reception, until there is a res judicata, observing, again, the elements outlined above.

[31] NUCCI, Guilherme Souza. **Estatuto da criança e do adolescente comentado: em busca da Constituição Federal das crianças e dos adolescentes**. Rio de Janeiro: Forense, 2014.
OLIVEIRA, José Sebastião de. **Fundamentos Constitucionais do Direito de Família**. São Paulo: Revista dos Tribunais, 2002. Page 343.
[32] DIAS, Maria Berenice. **Filhos do afeto: questões jurídicas**. São Paulo: Revista dos Tribunais, 2016. Page 117.

In any case, opting for placement in a surrogate family, the Magistrate must alert the new family of the provisional nature of the measure and the risks, even if minimal, arising from the reform of the sentence or anticipatory decision.

Technical follow-up, especially by a psychologist, is essential in this case, whether in the preparation of the child and adolescent, or in the follow-up of the new family nucleus, so that, in the case of a review of the decision, the return to the status quo is the least traumatic for everyone.

Obviously, the rupture of this new bond will cause damages and losses to the infant, however, the risk of reforming the decision cannot be an obstacle to the realization of the right to family coexistence, since the permanence in the reception, likewise, also brings irreparable damage in addition to the other aspects previously analyzed.

As stated previously, the placement of the child or adolescent in a surrogate family will take place through compliance with a judgment or anticipatory decision, proposed by the Public Ministry or by the couple intending to adopt, in the same Court in which the dismissal or family suspension is decreed.

In the latter case, as Professor Alessandra de Andrade Rinaldi points out, *"These are situations in which the process of destitution of family power occurs simultaneously with the adoption process, so that the procedure occurs quickly and avoids lengthy bureaucratic procedures"* (2020, p. 77).

Biological/registered parents should not have access to this new lawsuit, to protect the identity and security of the applicants and ensure the feasibility of the adoption process.

In this case, the applicants will receive the child or adolescent in provisional custody, which will last until the establishment of the adoption bond, after the final decision of the removal of family power has become final.

Finally, it should be noted that provisional compliance is only advisable in cases where the child or adolescent is fostered, so being the child in his or her natural

family, in the course of the action, the Magistrate must wait for the final decision to place the child in a surrogate family.

5 FINAL CONSIDERATIONS

Undoubtedly, the family and, consequently, family law, underwent profound changes in the last century, especially with the depatrimonialization of the family entity, the economic emancipation of women, the recognition of other arrangements besides marriage and, more recently, with the constitutionalization of private law and the consequent application of the principles inherent to the right of personality.

In this scenario, the new vision that the Law has on filiation, as well as on the child and adolescent - and their relationship with their parents - stands out, especially regarding their absolute priority and best interest.

As a consequence of this new paradigm, the child or adolescent is seen as a true subject of rights, whose protection is the duty of the State, Society and the Family itself.

Protection, however, is not restricted to physical integrity: the child is required to be raised in a healthy environment, permeated by affection and love, suitable for its correct development. And that space, by nature, is the family, whether natural or surrogate.

Therefore, the right to family life is an obligation of the State, Society and Family and, on the other hand, it is a right of children and adolescents, whose absence will lead to unequivocal damage to their correct development.

In the case of a child or adolescent who is fostered, therefore deprived of family life, and whose destitutional process has already been sentenced - or with an anticipatory guardianship decision -, without a final decision, the possibility of placement in a substitute family arises, as a means of to realize the right to family life.

The measure does not find an obstacle from a technical-procedural point of view and, although it cannot be used indiscriminately in all cases, it is adequate to

combat the deleterious effects of time - either with regard to the age of the fostered, or in relation to the interregnum of placement.

From there comes the need for further studies and deepening of the matter, aiming at improving the subject studied here.

In this way, the present article did not intend to exhaust all the nuances on the subject, only to contribute to the development of the theme.

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