



Forum delle associazioni familiari – Lungotevere dei Vallati 10 - 00186 Roma

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## **INTERNATIONAL COUNCIL ON SHARED PARENTING BONN – JULY 2014 –**

### **Policies and proposals of the Forum of Family Associations in the field of marriage crisis, separation, shared custody and rights of the child**

In this historical moment in which the crisis of the family seems to expand and in which the traditional role it played in the centuries is going to fail apart more and more progressively, it is necessary that each operator (and not just lawyers) start asking themselves with great attention to remedies that the law offers to cope with this kind of emergency.

And it happens that - ignoring the socio-cultural investigation of the genesis and development of family breakdown – this, even if it still represents the basis of the European social fabric, it shows more and more his sad and dramatic decline.

However, we may usefully interrogate about the means which the law and the social sciences, with all their limitations, put at the disposal of specialized operators.

When a crisis occurs within a married couple (especially with children) we are witnessing a phenomenon that involves various effects from many points of views.

**The primary aim is to find solutions that are as appropriate as possible to safeguard the best interests of children, especially if minor.**

Separation and divorce in Western countries are the leading cause of loss of a parent by the children. The consequences of this loss is not unique to the admittedly important psycho-affective (Cfr. Ferlinga, Conference of Genova 2013), but – as it is showed by recent studies – they concern the health of the child, causing damages at cells (Cfr. V.

Vezzetti – Strasbourg Conference 2013 <http://www.colibri-italia.it/2013/10/23-ottobre-strasburgo-reports-european.html>).

Being able to grow up with both parents is a definite right of the child, a right which concerns not only the civic-legal sphere, but even more than the protection of health.

The first and obvious solution is the care of the marriage itself.

For so long times, in opposition with the public nature the institution of marriage, married couples have been left alone to face the crisis (Cfr. S. Pillon – Strasbourg Conference 2013 [http://www.rc-](http://www.rc-comunicazione.it/images/gs/Pillon%20Strasburgo%2024%20ottobre%202013ok.docx)

[comunicazione.it/images/gs/Pillon%20Strasburgo%2024%20ottobre%202013ok.docx](http://www.rc-comunicazione.it/images/gs/Pillon%20Strasburgo%2024%20ottobre%202013ok.docx)).

A renewed treatment of stable relationships, and the provision of social mechanisms of conciliation and "maintenance" of the conjugal relationship is therefore certainly not to be considered a "rearguard action" but rather an innovative challenge to ensure better social cohesion, better support for the young generations and a more serene quality of life and relationships throughout the social fabric.

The proposals which Forum of Family Associations want to show in European Headquarters, after years of study about Associations' pilot projects, will be briefly examined.

They are:

RECONCILIATION

FAMILY MEDIATION

PARENTAL PLAN

EXPENSES PLAN

TRAINING FOR FAMILY CAREGIVER

FAMILY COURTS

TRAINING FOR SOCIAL OPERATORS

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## **1. Reconciliation of the parental couple**

The unity of the family is a precious asset to be protected, primarily, in spite of everything. The first idea is to deal with the crisis by focusing on strengthening the family, through support from outside and through the invaluable assistance coming from Associations. Lot of experiences, both locally (see [www.casadellatenerezza.it](http://www.casadellatenerezza.it)) and in the international context (see [www.retrouvaille.org](http://www.retrouvaille.org)) can prove that the possibility of giving a new chance at a destroyed wedding works in more than 60% of cases. This brings to a decrease of the rate of family breakdown and produces great benefit to the younger

generation. Obviously, to obtain meaningful results it is necessary to provide adequate services through trained and prepared for a multidisciplinary approach in terms of ethical, psychological, legal, emotional and economic. The pilot projects - born on the basis of Association agreement with the public service - have obtained excellent results in Italy, such as to justify further investment. Europe has invested too little and for purely ideological reasons in reconciling family. A road could be the implementation of the so-called "mandatory attempt at conciliation."

The Italian civil law recognizes the possibility of a reconciliation between the spouses. Many believe that this attempt is the legacy of a concept of marriage outdated and want it to be deleted.

Of course, as it stands today is not very useful: civil reconciliation is formally entrusted only the obligatory conciliation provided for under Article 708 cpc. More concretely, the conciliation is to achieve spontaneously, thanks to the initiative of the spouses or the mediation of the lawyers, given that the state of separation should not hypothetically evolve inevitably to the dissolution of the marriage and the subsequent disintegration of the family.

It is believed, however, that **such an institution can find a second life if properly implemented and filled with content.** The attempt at conciliation already disciplined by the Code of Civil Procedure as the assumption of the separation procedure, can and should be made effective and fruitful by its fulfillment with schedules and methods that are reasonable success within a path of conciliation proposal.

It is hoped, for this reason, the introduction of a **path prior to conciliation** in accordance with an established protocol, to be made in a facility such as "counselings" public or private, or through the support of specialized and affiliated associations. All this could be a necessary condition for the submission of the application for separation.

This would allow couples in crisis to sift to the bottom of the reasons for the crisis, and their possible removal, and however, it would allow the settling of mind essential to reach, whatever the outcome of the route to a brightening of the reports.

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## **2. Family mediation at the end of the drafting of the PARENTAL PLAN and EXPENSES PLAN "**

The Forum of Family Associations has been fighting for years in Italy and not only to see recognized a shared custody that is "shared" in all respects and that transcends therefore, by algorithmic assessments give birth in a courtroom. Not to dwell on the technical aspects and which typically have been - in turn - of bills and specific conventions, this document aims to provide a new interpretation of the pathological stage of the relationship, focusing specifically in the implementation of a so-called "**parental plan**" to be submitted to the families and cd. "**Co - parenting capabilities**. With specific reference to the latter, these are innovative tools that give answers to the need to "curb the psychological, educational, economic, and ultimately, social emergency", which occurs as a result of the failure family. The multiplicity of needs of a couple at time of the dissolution of the marriage, and the various issues entailed in this event, lead people to seek new solutions, both alternative experience to that in which the Judiciary or therapeutic area, as well suited to respond to the dynamics of the conflict, even in a context like Italian one, deeply attached to the traditional. In support of initiatives to support the family in crisis to find a shared location, **family mediation** is certainly the most suitable channel to handle the situation by avoiding open conflict. Founded as a tool for conflict resolution in family context of separation and divorce, it is a relatively new institution, the result of the innovations of the twentieth century, that identify it as a precious opportunity to independently manage the most significant events of family life and staff. Family mediation is the application of ADR methods that has had more success in Europe, and has spread to Italy as an indispensable tool for conflict resolution. The specific humus where the same is to operate is represented by the complex ecosystem of the "**paths of separation.**"

## **The mediation**

→ **Aims:**

- a)** Definition of problems
- b)** Work on the emotional aspects - emotional to support restructuring of family relationships.
- c)** Defining Options
- d)** Select the opinion on which to negotiate in case of failed reunion.

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## **The parental plan**

The proposed innovation is to use the tool of mediation for parents to co-opt the building of a " **EDUCATIONAL PROJECT** " cd . "**PARENTAL PLAN** " .

It is essential to equip families with children of a well-defined program of meetings between parents and children , such as to make the system of foster truly shared , protecting primarily the interests of the child to benefit from the support and care of both parenting figures, extremely important from the point of view strictly clinical , even before the legal aspect. The main pourpouse is a full realization of the co- parenting - even without going to the extreme of foster alternate hypothesis - allowing time equivalent attendance of children with both parents. The care plan must also contain the rules of time to spend with the ascending branch of each parental and relatives in general , as well as the prediction of a specific educational plan through the regulation of content . Specifically , they will build the basic educational foundation through the shared choice of school to attend , sports to practice , etc. .

In the education plan must also have proper emphasis the Right of the child to continue living in his social and cultural habit.

Various studies that have occurred since the beginning of the 70's have shown that children of separated couples live detachment from one of the two parental figures in a traumatic way and how often these problems automatically become clinically relevant. The discussion about the benefits or harmfulness of shared began in the United States (where divorce has existed since 1906), France (since 1789) and Sweden (since 1913). The positions for and against the "equitable sharing of the parental role" can be compared by analyzing the benefits arising from ongoing relationships with both parents, against damage due to greater exposure to parental conflict and home instability too.

The struggle within the scientific community has been, and is pretty intense. After more than 40 years, since the debate began, we can now replace the theoretical and ideological debate, with a more concrete and practical approach based on search results.

In Europe, the only country that has accepted the challenge of "Parental Plan", thus providing a valuable support for parents starting with the basic points of the resolution of the conflict, are the Netherlands. For years the Dutch government has asked municipalities to establish the cd. "Youth and Family Centers" and this initiative has significantly reduced the impact of divorce.

Specifically, in the Netherlands, municipalities are responsible for five areas of parenting support and growth, which are mentioned in the law of social support. In the Netherlands, the parents of minor children who divorce have a legal obligation to submit a parenting plan to the court, provided of agreements concerning the minor children. This plan outlines the organization of the parents about the division of labor and care of "parenting". When parents, by themselves, are not able to set a "Parental Plan", the judge will make a decision on the matter. He may also require the cd. "Child Care" in order to investigate the situation in practice and to identify the most appropriate path to follow, in the exclusive interest of the child.

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### **The plan of apportionment of expenses (Expenses plan)**

Across Europe, most of the conflicts arises as regards the economic aspect of the management of maintenance for their children. This is because each of the parents - who are clearly at odds with each other - turns the child support for the child in a tool to "hit" the other side. In essence, each chooses to provide for the maintenance, education and recreational and training of children, without the need to meet - clash with each other. It is precisely for this reason that the introduction of an innovative system for managing expenses for the offspring is necessary.

Bearing in mind the European regulatory framework regarding child support in a pair separated and divorced - specifically Italian context - bearing in mind the post-debate about Italian law n. 54/2006 on the rules of contribution to the development and growth of the child in a of family crisis - we can see that contrast essentially two visions:

- On the one hand there is conservation: the parent which lives with the child must receive the check and manage the full contribution for the child (this is a method contrary, in our opinion, to every principle of co-responsibility). The text of the italian law n. 54/2006 differs from previous legislation which governs the maintenance of children in separation and divorce. While in the past, according to art. 155 co. 2 and art. 6 co. 3 italian law n. 898/70, the judge had to determine the extent and the manner in which the non-custodial parent must contribute to the maintenance of the child, in the legislative text, which focuses on shared custody, the judge must determine the extent and mode of the contribution of each parent, with different logic operation.
- Recalling the principle of shared parental responsibility and the principle of proportionality, already envisaged by art. 148 of the Italian Civil Code, the fourth paragraph of Art. 155 Italian Civil Code states that "unless otherwise agreed by the parties

freely entered into, each parent provides for the maintenance of the children in proportion to their income .."

- On the other hand, there is the proposal of direct maintaining. This is a central issue that has sparked a lively debate in doctrine and jurisprudence. It refers to the direct contribution on the part of both parents to the maintenance of the minor child. Despite the innovation of an idea that would lead to banish the check to a mere instrument of "equalization", which is used in order to restore balance in relation to the contribution made by each party, the majority jurisprudence seems reluctant to abandon the practice of 'periodic check on the basis that the parent with whom the child is placed or who keeps it to himself with the character of stability, must be able to cater directly to the needs of the offspring.

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The proposed solution is to maintain a substantial direct computed previously by the distribution plan expenses. In this way, the parents, in advance and with the help of the mediator, may be attributed to spending whole chapters dividing eg. expenses for the sport, or for school, or even travel.

This would reduce a lot of the payment of money from one parent to another, favoring the direct management of maintenance. Any remaining needs may find forms of compensation to be paid by means of a **double-check of both parents to be paid to a bank account held jointly and aimed to the residual needs of children**, including medical expenses and school. The bill would thus be fed by both parents and from which each parent (or adult child) may be taken for the needs of the child (or in the case of their adult child). This is all to the advantage of accountability, transparency and equality of the two parenting positions.

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### **3. Specific training for "family caregiver"**

Couples must be sustained even if they decide to reach, however, the separation, in order to maintain as far as possible, the civilization of the reports and the patency of appropriate channels of dialogue, particularly in respect of a balanced and proper exercise of shared parenting.

**For this reason it is useful to promote:**

#### **a) Family Court**

The idea, proposed several times and also subject of an Italian parliamentary initiative (DDL n. Sen 3040. Alberti Casellati) is assessed in the overall context of the need for

reforming the institution of the judiciary and of the specialized sections of the Tribunal for the disputes in respect of persons and family law. The idea is to provide for the establishment by the courts already existing (ordinary courts and Courts of Appeal) of a section, which centralises the skills of all trials relating to family, children, status and legal capacity of the person and marital status, currently divided between the Juvenile Court (for underage people), the tutelary judge and the ordinary courts. The establishment of a specialized section of the Family Court also would realize the need for a specific "procedural law family", allowing the elimination of some major discrepancies in the procedural practices of the various courts and ensuring greater consistency in the decisions. The idea in fact, would be to rationalize and unify the various process models that are currently being used in family litigation, children and incapable, the result of a law which in recent decades has shown that development is not always staffed. The establishment of the Family Court would achieve a simplification and rationalization of the rites of the proceedings, through the reorganization and unification of legal disputes and those that affect the status and capacity of the person, in general, to protect a greater dignity of individuals.

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#### **b) Watch out for children's right**

Already in 1990, the Hague Conference on Private International Law had promoted a Convention regulating the guardianship of minors and numerous conventions, incorporated into our legal system through the instruments of ratification and enforceability, were taken out, since the twenties, for to adjust the disciplinary powers of the authorities and the law applicable to the protection of minors, as well as to regulate some institutions particularly sensitive to family law. In particular, the **Convention on the Rights of the Child**, adopted at the UN November 20, 1989, not only outlines in a comprehensive and sufficiently complete a "**Statute of the rights of the child**" but also allows, through the law of ratification, that the principles and the provisions of the Convention are to be an integral part of domestic law and therefore become fully active even in different countries (Italy has ratified and made enforceable by the Convention of 27 May 1991, n. 176). The Convention on the Rights of the Child, while moving from the traditional view of the child as a person who "by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth," attaches to a lesser progressive autonomy in the exercise of a comprehensive catalog of human rights.



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### **c) Procedural Representation of the child**

Various European and international Conventions such as the **European Convention on the exercise of children's rights** (Strasbourg January 25, 1996), the Hague Convention of 25 October 1980, the Luxembourg Convention of 20 May 1980, and the recent Convention of Oviedo claim the principle of the necessary procedural representation of the child.

Article 5 of the European Convention on the Rights of the Child, in particular, recognizes the minor in proceedings that directly affect it, the right to participate as an autonomous part of the judgment, through representation by a private lawyer.

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### **c) Preparation and training of operators**

To ensure an adequate level of specialized technical expertise to "operators" who play a decisive role in cases concerning underage people and family, they should be regulated in an adequate and continuous training mandatory for all persons charged with care of the family in crisis, from judges to legal services, social services workers for brokerage services, from family counselors, teachers, the police. The Convention on the Rights of the Child of 20 November 1989, at Article 3 expressly states that in all actions concerning children, whether undertaken by social welfare institutions, private and public, courts, administrative authorities, legislative bodies, the higher interest of the child should be the subject of primary importance, and this principle became a full part of our legal system, moreover it has become more and more often refer to either the ordinary law of merit and legitimacy, both the constitutional jurisprudence. For this reason, it was considered that the legal practitioners, appointed to resolve disputes in the field of family and children, should have a specific skill and, above all, a cd. "Overview".

Thank you.