

Judicial decisions to protect minors

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PERSONAL SEPARATION OF COUPLES

The legislature makes a point of specifying (in sec. 158 of the civil code, hereafter referred to as c.c.) that "separation solely by consent of the couple has no effect without the authorisation of the judge." For situations that involve not only the private interests of the couple, but also the rights of minors, it is obvious that any legal relevance is denied by simply interrupting living together, in the absence of any authorisation by the court.

On the other hand, in the interest of society, particularly sensitive situations, such as the custody of children, should be subjected to the evaluation of the judge. Therefore, all cases should be channelled into the two types of separation that are admitted: judicial and consensual.

JUDICIAL SEPARATION

Judicial separation is resorted to when there is no agreement between the spouses on one or all the terms of the separation, or when one of the spouses requests a payment. Judicial separation is arrived at, then, when there are behaviours which are contrary to marital obligations, when there is a request for payment, when living together is no longer tolerable, when it is impossible to reach a solution that is in the interest of both parties, or when a consensual separation cannot be reached.

The procedure begins with the presentation of the application. This process takes place in two phases: one before the president of the court, after the attempt at conciliation, in order to make temporary and urgent decisions, and the other of the true and proper instruction of the case, in which the necessary evidence is carried out, up to the final sentence.

In the first phase the couple must appear personally before the president without the help of defenders. The parties are listened to first separately and then together.

The president for such an audience should carry out the attempt at conciliation and only if this fails move to the phase of temporary and urgent measures. On the other hand, if the attempt at conciliation succeeds, the president notes this in the minutes of the hearing and arranges for the case to be archived.

Before arranging for urgent procedures, the magistrate draws up a report of the spouses' declarations, which will then be evaluated by the judge in order to reach the final decisions. Such decisions, which are substantially the same as those established by the couple in case of a consensual separation, regard the following points:

- custody of minor children,

- contributions due to the children by the non-custodial spouse and how visiting rights will be carried out,
- allocation of the conjugal home,
- maintenance payment that one spouse might owe the other.

Once temporary and urgent decisions have been made, the president fixes a hearing for the couple before the examining judge. The preliminary investigation of the separation procedure is analogous to that of any other examination process, with the difference that the judge can arrange for evidence that has not been requested by the parties.

The decision is made by a college of three magistrates, after which all temporary measures that were established by the couple are replaced by those contained in the decision.

CUSTODY OF CHILDREN AND OTHER DECISIONS OF THE COURT

Sec. 155 c.c., concerning decisions about children, is the most specific among the provisions regarding personal separation of spouses, thus emphasizing the importance that the legislature has granted to the matter.

The intent of the law is to seek only the moral and material interests of children. Therefore, it is considered the magistrate's task to evaluate the needs of minors - emotional, scholastic, adaptive - if necessary completely apart from the requests and agreements of the spouses.

The first task of the judge is to evaluate the parent who will have custody. Child custody bears a series of consequences also in terms of property. In fact, the spouse who obtains custody is also given the right to use the conjugal home, and the right to a payment for participating in the maintenance of the children.

Under this profile, it would be useful for the law to require that children over a certain age be heard by the judge, whereas now there is only the possibility of a hearing, which in actuality rarely occurs.

Under present law, there is no provision for the judge to take advantage of various social services. As far as implementing orders relative to the children (including presidential decisions, investigative decisions, and decisions contained in the final judgement), if the other spouse does not collaborate, two distinct hypotheses can occur: on the one hand the execution of the decision can be requested while the case is under way; on the other hand, instead, the implementation will occur after the procedure is finished.

Regarding the first hypothesis, sec. 10 of law 74/1987 establishes the possibility that if difficulties arise in carrying out decisions in terms of custody and visiting rights, the concerned spouse can have recourse to the same judge who has been handling the procedure, and who arranges the necessary means for actually carrying out the decisions.

In these cases the magistrate orders the parties to appear in advance, in order to attempt a mediation of opposing interests. If the appearance is not successful, then the magistrate can order the involvement of social services, to assist the minors, in order to see that the decisions are actually carried out, by helping children and parents to meet and by eliminating possible difficulties that might arise from these meetings.

In the second case, when procedures have been finalised, parents complaining about failure to carry out some aspect of the decisions, for example visitation rights, should resort to the guardianship judge.

After filing the appeal, the guardianship judge will convoke the parties to appear. Where a solution cannot be reached, the social services will be asked to accompany the minors to their parents, or parents to the minors, and will report to the judge about the evolution of the situation.

Finally, it should be specified that the guardianship judge has the power to modify or add to the decisions of the tribunal, in the sense that he can arrange for or order the modification of the tribunal's decisions respecting periods of visits, or even suspend them whenever, during such visits, a situation arises that is prejudicial to the minor.

Analogously, the guardianship judge has an integrative power. In cases where decisions made by the tribunal, or by the couple reaching a consensual agreement, are not complete in terms of visits, hours, and similar matters, this judge can add the necessary details.

CONSENSUAL SEPARATION

Consensual separation is regulated by sec. 158 c.c. It is a procedure that unlike judicial separation is based on agreement between the spouses. It is set up almost as an extra-judicial and private way to resolve disputes.

The appeal should contain all conditions agreed upon as necessary. These are common to both kinds of separation:

- which parent will have custody of the children,
- rights and duties of the other spouse,
- which spouse will be allocated the conjugal home,
- quantity and conditions of payment contributed to the children in favor of the spouse with no income.

The agreement can be presented personally or through a lawyer. The couple will appear personally before the president of a tribunal. Here a procedure substantially analogous to that of judicial separation will take place. In fact, the president should, as a preliminary measure, make an attempt at conciliation. If this succeeds, he can declare the closing of the proceeding. Where the attempt at conciliation is not successful, the next step will involve reading the conditions and formalising the agreement.

Having taken into consideration the opinion of the prosecutor, the president refers this to the Camera di Consiglio (Advising Chamber), so that the tribunal can decide whether or not to issue a decree of approval. The control power of the tribunal should be limited to individual agreements regarding child custody. The tribunal also examines agreements in terms of their impact on both parties, thus evaluating whether any clause is oppressive to one of the spouses.

THE TRIBUNAL FOR MINORS

The civil competence of the tribunal for minors is to protect the child in case of a distorted use of parental powers, which means any behaviours prejudicial to the child.

Civil competence in the area of protection of minors is part of the competence of the ordinary civil tribunal, in the sense of sec. 38 implementing regulation of the c.c., and to the guardianship judge (sec. 6, 2nd paragraph of law 1.12.1970 n. 898 and sec. 337 c.c.).

Therefore, there can be cases where the competencies of three different judges are interwoven: the ordinary civil tribunal, which handles marital separation and consequent child custody matters; the tribunal for minors, which has the responsibility of regulating parental authority; and finally the guardianship judge, who serves as a watchdog to see that decisions established by the two previous tribunals are actually carried out.

Interferences between the various judicial authorities just mentioned, concerning one case, illustrate the necessity of defining borderlines between the competencies of the ordinary judge and the specialised one, so as to avoid any inconvenient questioning of decisions made by the tribunal of minors.

In particular, the tribunal for minors (sec. 330 c.c.) can order termination of parental authority whenever a parent violates or ignores his or her duties, or abuses the powers inherent in this authority.

For serious motives, the tribunal can order removal of a child from a family home. Such a decision necessarily implies that the tribunal for minors must entrust custody of the minor to a third party.

When the parent's behaviour does not create serious damage to the child, and therefore cannot entail removal of parental authority, yet nonetheless appears detrimental to the minor, the tribunal for minors can make the most convenient decisions for the child, including removal from the family home. This is, however, a question of degree. The decisions that the tribunal can make, in terms of the needs of minors who are faced with parental behaviours prejudicial to their interest, are not specified. In some cases the tribunal for minors does not directly issue prescriptions, but rather it grants custody to local social services, which then have the task of following the case and issuing directives they consider useful for eliminating behaviours that are clearly prejudicial to minors.

THE GUARDIANSHIP JUDGE

The role of guardianship judge was introduced by the legislature in 1942, substituting for the old family council and establishing in each magistrate's court one or more judges to supervise custodies, guardianships, and other functions granted to them by law (sec. 344 c.c.).

The guardianship judge of the district where the minor's principal business and interests are located appoints a guardian (sec. 343 c.c.) to minors who have no parents either because these have disappeared or because they are considered incapable of exercising parental authority. This guardian takes charge of the minor, representing him legally whenever necessary and administering any personal property.

The possibility that the guardianship judge can make urgent decisions on behalf of the minor, or of the minor's property, is introduced in sec. 361 c.c. The judge can take advantage of public organisations, such as social services provided by local authorities (sec. 344 c.c.).

The guardianship judge names the guardian of the minor, who is emancipated by marriage, and authorises transactions considered as extraordinary administration.

More recently, the role and functions of the guardianship judge have notably increased. Through some special laws, new and important activities have been attributed to them. Law no. 194/1978, regarding voluntary interruption of pregnancy, allows the guardianship judge to authorise abortion for minor women, if those exercising parental authority refuse to grant assent, after an obligatory hearing with the expectant mother.

Law no. 184/1983, regarding adoption, provides that the guardianship judge may by decree give final validity to decisions concerning family custody by local social service organisations, subject to consent of those exercising parental authority. According to sec. 9 of the same law, the guardianship judge should have inspections held every six months, or as often as considered useful, of institutions of public or private assistance. These are in turn obliged to submit to the judge, every six months, a list of all minors currently in a state of neglect or abandonment.

Finally, law 898/1970, which deals with cases of marital dissolution, provides (in sec. 6) that the guardianship judge should monitor child custody situations established by the tribunal which has pronounced the dissolution or end of the civil effects of matrimony. The guardianship judge is granted an authority similar to that provided for by sec. 337 c.c., namely a power of vigilance under the terms established by the Tribunal of Minors in respect of the exercise of parental authority.