

## The removal of family power in the context of parental alienation by false memories: Risks and challenges



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### ABSTRACT

From the creation of Law n° 12.318/2010, parental alienation was brought under Brazilian jurisdictional protection. In context, parental alienation is the demerit campaign generally carried out by those who hold custody of the minor, in relation to the other parent, with the aim of weakening the child's or adolescent's affective bond with him/her, removing him/her from their

coexistence. This practice may even involve the implantation of false memories in the minor, causing him/her to mistakenly remember traumatic moments that occurred because of the alienated parent, capable of cause various psychological damages to the infants involved, in addition to harming their biopsychosocial development and violating the right to healthy family coexistence, guaranteed in the Magna Carta. From this perspective, it was necessary to assess whether the removal of family power is the best alternative to be applied, under the aegis of the principle of the best interests of the child that governs this order. To this end, we analyzed qualitatively, descriptively and bibliographically, scientific research by scholars in the field of psychology, psychiatry and law, obtaining a multidisciplinary result, about the Parental Alienation Law and its possibilities and applicability.

**Keywords:** Parental alienation, False memories, Removal of parental power.

## 1 INTRODUCTION

In the current Brazilian scenario, the number of lawsuits based on allegations of parental alienation has grown exponentially, according to data from the Court of Justice of the State of São Paulo (TJSP, 2021, online).

This is because Law No. 12,318/2010 legally typified the practice of parental alienation, which until then was found only in psychiatry studies, such as those of Elizabeth Loftus, an American psychologist specializing in human memory, who published the article "The malleability of memory" (own translation) in 1979, in the science, engineering and technology magazine *American Scientist*, and the article "Creating false memories" (own translation), in 1997, in the scientific journal *Scientific American*, both analyzing the alterations of memory, which sometimes includes the insertion of untrue details about some event.

This legal typification has made it possible for a considerable portion of couples in the process of separation to identify with the problem portrayed, being, according to Leandro Gomes, one of the



demands that gains greater focus both in the legal environment and in the media (GOMES, 2019, online).

Article 2 of the Parental Alienation Law (No. 12,318/2010) brought an illustrative list of measures that are considered parental alienation, and that can negatively interfere in the psychological formation of the child or adolescent victims of such practices. They are:

- I - carry out a campaign to disqualify the conduct of the parent in the exercise of paternity or maternity;
- II - hinder the exercise of parental authority;
- III - hinder contact of child or adolescent with parent;
- IV - hinder the exercise of the regulated right of family coexistence;
- V - deliberately omit from the parent relevant personal information about the child or adolescent, including school, medical and address changes;
- VI - present a false complaint against the parent, his/her relatives or grandparents, in order to hinder or hinder their coexistence with the child or adolescent;
- VII - to change the domicile to a distant place, without justification, aiming to hinder the coexistence of the child or adolescent with the other parent, with his/her relatives or with grandparents. (BRAZIL, 2010).

In addition to the behaviors already listed, it is possible to indicate other behaviors equally considered parental alienations, such as the inculcation of false memories in the child or adolescent, which are described by the researcher Márcia K. Johnson as experiences that never actually occurred, but are considered as real representations of a past and personal event in the life of those who hold them. (JOHNSON, 2001, online)

Such acts are capable of generating serious consequences to the biopsychosocial development of the infant victim of alienation (GOMES, 2019, online), and may cause emotional sequelae and instigate various types of behavior and feelings (CORREIA, 2011, p. 5), such as withdrawal from other children, excessive fears, "low esteem, insecurity, guilt, depression", compromising the healthy development of the infant's personality and may generate "severe conduct disorders in adulthood" (BUOSI, 2012, p. 87)

In this sphere, we seek to analyze, in the light of the principle of the best interest of the child and adolescent, which places it as a central subject of rights and protection in the eyes of justice, which excels in the interests of the minor involved, removing the focus from the interests and wills only of the parents or others responsible for the infant, and even of the rule of law itself, whether the removal of family power is, in fact, the best measure to punish the alienating parent while protecting the alienated victim.

For this study, it is fundamental to consider and apply the basic right to maintain ties and live with both parents, guaranteed in the Constitution of the Federative Republic of Brazil, in addition to the International Convention on the Rights of the Child, ratified by Brazil in 1990, the Statute of the Child and Adolescent (Law No. 8,069/1990), the Civil Code (Law No. 10,406/2002), and Laws 11,698/2008 and 13,058/2014, which deal with shared custody.



It is important to highlight article 227, caput, of the Constitution, which placed children, adolescents and young people as absolute priorities when it comes to the defense of rights, and among them, family coexistence:

Art. 227. It is the duty of the family, society and the State to ensure that children, adolescents and young people, with absolute priority, have the right to life, health, food, education, leisure, professionalization, culture, dignity, respect, freedom and family and community coexistence, in addition to keeping them safe from all forms of neglect, discrimination, exploitation, violence, cruelty and oppression. (BRAZIL, 1988).

Based on the aforementioned premises and the necessary care when a process involves minors, the main questions are: does the social and legal reproach of the act of alienating the children against another parent, implanting false memories in the offspring of the former couple, justify the suspension/dismissal of the parental authority of the alienating parent? Considering as the main pillar the best interest of the minor, what are the impacts suffered by the infant when he or she is deprived of family power in relation to the alienating father?

To answer such questions, it will be necessary to deal with the occurrence of the phenomenon of false memories and the way they are formed, with a main focus on childhood. Subsequently, parental alienation will be addressed in the face of Brazilian law, analyzing the legislation corresponding to the theme from the constitutional perspective and the principles that govern this order.

Based on this study, hypotheses of applicability (or not) of the removal of family power will be portrayed, presenting different positions on this point. With this, it will be possible to carry out an in-depth analysis of the legal and social situation on the subject.

## 2 THE PHENOMENON OF FALSE MEMORIES

Memory is something quite flexible, as shown by studies conducted around the world, which will be covered in this topic. According to Trindade, it works based on three processes: "coding, storage and retrieval." During such processes, there may be some "failures" in memory, causing the individual to be unable to retrieve important details, for having encoded and stored erroneously information that never occurred (TRINDADE, 2017, p. 217 and 218). This is because when there is a lack of record of a certain moment or event, the person seeks to fill the "memory gaps with plausible assumptions", and therefore, they believe that they actually lived that memory (FIORELLI, MANGINI, 2010, p. 23).

Several false memories do not present any risk to the psychic health of those who hold them, and can occur with anyone and at any age, however, children are more subject to them **PUT REFERENCE**. Some basic and harmless examples are: clearly remembering that a friend was wearing a red blouse at a dinner party a few days ago, when in fact the color of the blouse was orange, or even



remembering having left the key to a drawer in the bag, but in reality the key was left on some furniture in the house.

The documentary series "Explaining the Mind", produced by NETFLIX in the year 2019, has the first episode called "Memory", which cites how humans are able to "reconstruct" episodes, even if they never occurred that way. In this same episode, a study was portrayed with the objective of implanting false memories of facts that supposedly occurred during the childhood of the participants, and with active actions of these (NETFLIX, 2019, ep. 1).

Among the falsely imputed facts related to the childhood of the participants were: being forgotten alone in a mall, having taken a balloon ride, spending an afternoon having tea with Prince Charles and even some crimes that the participants would have committed in the period of childhood / adolescence. The result of the research, demonstrated in the article "Constructing Rich False Memories of Committing Crime" (2015), presents a very high number: 70% of the participants developed false memories of what happened, and many of them referred to the episodes with vivid details, but that never existed.

It is important to emphasize that, for Gomes, "false memories are not lies", but "erratic foundations" (GOMES, 2019, online), which can be developed after the repetition of an argument or story with details that were not real, or even over time, when the subject believes he has experienced something in one way, when in fact it was another. In addition, those who portray the facts are not able to differentiate a real memory from a false memory, because they believe that they really went through it at some point in their life, because for him/her, the false memory has the "same credibility as a true one" (TRINDADE, 2017, p. 221).

## 2.1 FALSE MEMORIES IN CHILDHOOD

The occurrence of false memories in childhood is recognized by much of the scientific community. Jorge Trindade assures that "younger children tend to have more malleable memory" (TRINDADE, 2017, p. 217), and therefore, they commonly change their memories when an adult inserts new information. However, this community is divided when it comes to allegations of sexual abuse.

The psychoanalyst and member of the Brazilian Institute of Family Law, Ana Maria Iencarelli, states that it is not possible for a child who has never had any form of contact with sexual experiences to report such abuse, since "at the age of 4, for example, the child reasons under the aegis of the concrete, that is, only becomes an acquisition of knowledge what he experiences, that arrives through its senses" (IENCARELLI, 2016, p. 3).



In contrast, other scholars such as Luciana Ávila and Lilian Stein defend the possibility of false memories in sexual abuse in cases of Parental Alienation Syndrome (PAS), and even establish criteria to be analyzed to evaluate the veracity of the accusations:

Analysis of the context in which the complaint was made. What happened before and after the complaint that might be relevant to the case? What could be the intention of the complainant? What would be the defendant's intent in assuming a theory of harassment, libel, false memory, and PAS as well? What evidence was considered in the investigation of the facts that culminated in the complaint? What other reasons could have motivated the litigation? Are there facts that prove this theory? What is the level of knowledge of the victim in relation to the complaints made?

Discourse analysis. Real cases lead the victim to a state of shame and flight from the topic. In case of acquired memories, the alleged victim becomes more eloquent and presents incongruities, gaps and contradictions in his discourse.

Is the focus of the complaint on the child, or is it one of the parents? In this sense, what is the intention of the judicial process, to clarify facts or to distance the child from one of the parents. Parental behavior. In case of real abuse there is some difficulty of the reporting parent in accepting or understanding how everything happened. In false cases, there is an attempt to find new evidence and to recognize the alleged evidence. (Ávila, STEIN, 2006, p. 340)

It is also possible to find documented famous cases in which accused persons were acquitted of the alleged sexual abuse on the grounds of the existence of false memories in the children. In the United States of America, the case involving teacher Margaret Kelly Michaels and the state of New Jersey became known when children claimed to suffer terrible sexual abuse during classes. In 1988 the teacher was convicted by the jury of committing 115 crimes against 19 children, however, during the review of the case by the State Supreme Court of Appeals in 1994, she was found not guilty, because the Court recognized that the interrogation was carried out in an absolutely inappropriate manner and, therefore, the evidence derived from it was not reliable (THE NATIONAL REGISTRY OF EXONERATIONS, 2012, online).

Another well-known example in Brazil is the 1994 Case of the Base School, which occurred in the city of São Paulo/SP, when the owners of a children's school, the driver of the school transport and even a couple of parents of one of the students were accused of sexually abusing four-year-old children. At the time, the mother of one of the students, Lúcia Eiko Tanoue, alleged that her son had described sexual abuse practices practiced by the accused against him and three other classmates from the school (TV BRASIL, 2014, online).

With this, a huge media spread about the alleged event began, with sensationalist titles such as "Kombi era motel na escolinha do sexo", causing the accused to be socially condemned, suffering attacks in their homes, at school and in public places. Icushiro Shimada, one of the accused, suffered a heart attack and developed other heart problems, while Paula Alvarenga, a teacher and partner at the school, developed phobias and panic syndrome after the attacks (TV BRASIL, 2014, online).

The report of the Forensic Medical Institute was inconclusive, and one of the mothers admitted that her son suffered from constipation, which could have caused minor injuries to the child's anal



region. Even though they were not indicted for lack of evidence, the accused did not recover from the chaos they experienced. This is another case in which the investigation was conducted in order to suggest and convince the children of what had occurred, with the help of the police and the parents of the infants (TV BRASIL, 2014, online).

## 2.2 CHILDISH TESTIMONY AND THE RISKS OF SUGGESTIBILITY

Some forms of insertion of false memories are described by Trindade in his work *Legal Psychology*. Among them, exogenous factors and suggestibility, which can be found during the interviews of the infant or adolescent, carried out by the team taking the testimony (TRINDADE, 2017, p. 225).

The child's testimony, whether of a child or adolescent, must respect various precautions in order to avoid exposing the infant to another form of violence, revictimizing him. Fiorelli and Mangini highlight important techniques to be observed in such a delicate moment: to use a language understandable to the minor, to understand the language used by him or her to describe the events and, finally, to be careful with the psychic integrity, avoiding using methods or situations that may harm it (FIORELLI, MANGINI, 2010, p. 352).

Gomes also reinforces that sensitivity during the interview is fundamental, and includes "key questions" and the "appropriate vocabulary" of the health professional as essential to obtain a good result (GOMES, 2019, online), after all, it is a difficult time for the child, because at the same time that he wants the violence to be stopped (either that of parental alienation or, in fact, physical or sexual violence), she does not want one of her parents to be arrested (FIORELLI, MANGINI, 2010, p. 253).

Because they are more susceptible to suggestibility (especially the younger ones), very long testimonies or with assumptions made repeatedly tend to cause failures in the child's memory, and may even generate false memories (TRINDADE, 2017, p. 229).

In his dissertation, Osnilda Pisa reports the study conducted by Alfred Binet, in which he concludes that younger children are more suggestible by two factors: "(a) cognitive or autosuggestion, because the child develops a response according to his expectation of what should happen; (b) and another social, which is the desire to adjust to the expectations or pressures of an interviewer" (PISA, 2006, p. 17 and 18).

The study went further, and Binet found that when children wrote about the events, they gave accurate information, but in small amounts, however, when they were led by questions focused on details, they were less accurate. Finally, when they answered a suggestive question, they accepted the suggestion and answered based on it, even if it was false/wrong in relation to what happened (PISA, 2006, p. 17 and 18).



The Code of Civil Procedure provides for the taking of testimony in situations of parental alienation in its article 699, in Title III, which deals with special procedures:

Art. 699. When the process involves discussion about a fact related to parental abuse or alienation, the judge, when taking the testimony of the incapable, must be accompanied by a specialist. (BRAZIL, 2015)

Iencarerelli states that the absence of technical training of the health professionals who conduct the interview with the infants is what ends up causing the discredit of the testimony (IENCARELLI, 2016, p. 5). Moreover, in sensitive cases such as these, the interviewer usually has preconceived theses and assumptions, and therefore, even if unintentionally, may end up formulating suggestive or inducing questions in order to prove his initial point of view (TRINDADE, 2017, p. 229).

In this sense, reinforcing the seriousness of the practice of incest and the high rates of acquittal related to this accusation, and considering that a large part of the defenses to the referred complaint is the allegation of the occurrence of parental alienation as an "exclusionary of criminality", Maria Berenice reiterates that the Justice needs to be prepared to be able to differentiate one situation from another, protecting the minor in both (DIAS, 2017, p. 10).

After "several sessions, the professional needs to be able to identify false memories and separate them from the effective memories", and adds that in this process, it is essential that spaces that allow the child to release their emotions and feelings are created (GOMES, 2019, online). Maria Iencarelli also suggests the implementation of special listening that includes audiovisual records and even unifaceal mirror walls in the interview rooms, avoiding the repetition of the hearing and the revictimization of the infant (IENCARELLI, 2016, p. 5).

In this sense, a special form of taking testimony was implemented in 2003 in the Court of Childhood and Youth of Porto Alegre. The project, which was called "Testimony without Harm", was created with the purpose of validating the infant's report, enabling him to feel more comfortable in a more welcoming room, in the presence of toys and drawing materials, to express his feelings and his version of the facts (CEZAR, 2021, p. 184).

During the interview, the questions that were asked in the courtroom were passed on, with the authorization of the magistrate, to a professional trained to "translate" the question into appropriate language for the child or adolescent, who answered freely. Such statements given by the minors were recorded and added to the process, allowing the parties to have full-time access to evaluate the testimony (CEZAR, 2021, p. 185).

The project received, in 2006, the "Integral Promotion" award, conferred by the Brazilian Association of Magistrates and Prosecutors of Children and Youth – ABMP, and is currently implemented in forty-two counties of the state of Rio Grande do Sul (CEZAR, 2021, p. 185).



### 3 PARENTAL ALIENATION: A NEW INSTITUTE OF LAW?

The family is an institution of extreme social importance and, according to the Minister of the Federal Supreme Court, Luiz Edson Fachin, constitutes one of the three pillars of Brazilian Law (FACHIN, 2003. p. 7.) A moment of separation and disintegration of this family nucleus is, according to researcher Cláudia Galiberne Ferreira, one of the most stressful episodes for the members, coming in second place, behind only the death event (FERREIRA, 2013, p. 40).

For Gomes, it is in this scenario of tension, discord and emotional imbalance that parental alienation is born when "the dispute for the children, or even the dispute for the assets of the other, the desire for revenge" can provoke such a practice (GOMES, 2019, online).

Maria Berenice Dias also cites the desire for revenge as one of the main factors of parental alienation, leading to "a process of destruction, demoralization, discrediting of the former partner", a kind of "brainwashing" in order to tarnish the image of the other parent, and causing the infant to gradually become convinced and take it as real (DIAS, 2011, p. 463).

Parental Alienation can be defined, in a simplified way, as a conglomerate of actions used by the alienating parent (who performs the action) in order to transform and distort the consciousness of the children, in order to damage the affective bonds with the alienated parent (who suffers the alienation), without any real reason or justification for such acts, so that the infant begins to cultivate feelings of hatred for him (TRINDADE, MOLINARI, 2017, p. 297).

Although this practice is common in Brazilian families, only in 2010 the matter was legislated through Law No. 12,318/2010, which conceptualized Parental Alienation as a psychological interference caused by one of the parents or other guardians, with the objective of removing the bonds of this infant with the other parent.

According to Edna Maria Galvão de Oliveira, "parental alienation deconstructs the parental figure of one of the parents in the child" (OLIVEIRA, 2021, p. 33) when carrying out the demeritorious campaign on this / a, causing the child or adolescent to acquire a new negative view about the person for whom he has always felt so much affection, believing that such a relationship was built on lies, and feeling abandoned by the alienated parent.

For Buosi, when one of those responsible for the child or adolescent uses the infant to attack the other in order to remove and cause suffering, there are "very serious consequences in the development of this and the former partner removed" (BUOSI, 2012, p. 58), who sees himself unjustly removed from his offspring.

The documentary "The invented death", produced in 2009 by the director Alan Minas, left parental alienation in greater evidence in the country, bringing testimonies of some men and a woman who were alienated from living with their children. These children, already adults at the time of the recording, also gave interviews talking about how this practice had affected their lives (MINAS, 2009).





Rafaela is one of those interviewed in the documentary for having suffered parental alienation during her childhood and adolescence, and remembers hearing repeatedly that her father no longer cared about her and her brother, Diogo. According to her, they would have grown up "kind of angry with my father, for abandonment" (MINAS, 2009). She also reports that she felt the need to act as her mother's accomplice in her father's demeritorious campaign, and that this would make her mother proud: "I thought it was cool that my mother knew that, you know? I thought she would be proud of me, because my mother was everything to me," she says during her statement (MINAS, 2009).

The participant believes that if the separation process had been conducted differently by the father and mother, she and her brother would have had healthier relationships with both, without feelings of guilt, abandonment and betrayal. In his words:

(...) It would have been so much healthier all my life. I wouldn't feel that hole. I think even I miss it a lot, you know. Looking back like this, I had a great mother and over time, when I started to be aware and to understand, I started therapy. I saw that in order for me to be able to walk, I had to take a cut, but cutting my mother out of my life was too complicated. I tried to explain it a thousand times to her. (MINAS, 2009).

A woman who chose not to identify herself for fear of her ex-spouse also reported her experience of being alienated from the coexistence of her child. Even though she had custody of her son, when he spent school holidays and weekends with his father, he returned aggressive and, according to her, avoided even looking her in the face. She also exposes a situation she suffered on a Mother's Day, which because it was on a Sunday, she spent away from her son:

Mother's Day wasn't with my son. Then I called and said, today is Mother's Day. He, on the phone, said to me, 'hey, Mother's Day? You're a fucking mother' and my son was listening. When he came home he didn't even look at me, he was stuck and aggressive. (MINAS, 2009).

It is important to emphasize that other people who have affective links with the child or adolescent and who live in this family environment (such as uncles, grandparents and etc.), can be drivers or even victims of parental alienation, which goes beyond the parents of the infant (FREITAS, 2015, p. 41)

The practices considered parental alienation, such as the induction of false memories, are visible and traumatic, and can cause various damages to the biopsychosocial development of this child or adolescent (GOMES, 2019, online), and causing this victim to develop anxiety, depression, double personality and even suicidal tendencies (NASCIMENTO, 2018, p. 19), therefore, need a lot of attention from the judiciary.

Michel Foucault, in several of his works and especially in the book *Microphysics of Power*, deals with the power relations that govern society, and more accurately on the less visible relations of



power, removing the focus on the power of the State or the economy, and analyzing the microphysics that involves various types of relations (FOUCAULT, 1978, online).

In this sense, analyzing in an analogous way to Foucault's microphysics, there is also a relationship of subjective power between the infant and those who hold his custody, which is able to influence, interfere in the other relations of the minor and distance him or her from people or environments, although in a very subtle way, which does not allow the child or adolescent to perceive that they are being, in a way, manipulated.

It is necessary to consider the feelings that the child has for the alienating parent, placing him or her at the center of his or her life and believing that he or she owes loyalty to the feelings of the father or mother who have been "abandoned" by the alienated parent, and should, because of this, repudiate and completely remove from his or her life that person whom the child believes has also abandoned him/her, because it does not understand that separation or divorce belong to the couple, but should not involve the offspring (OLIVEIRA, 2021, p. 29).

Another very delicate point that raises concerns in the scientific community is the possibility of the misuse of the institute of false memories and parental alienation. Maria Berenice Dias, in her book "Incest and Parental Alienation", warns about the existence of a "self-inflicted" alienation, as a form of maneuver to place oneself as a victim in the custody process, increasing the possibility of being able to remove the child or adolescent from the former partner, or using it as the main thesis of defense against incest charges (DIAS, 2017, p. 10).

In addition, other people raise this topic stating that the Parental Alienation Law ends up defending a probable aggressor, removing the child from the parent who holds custody, which in about 70% of cases is the mother (IBGE, 2017), and superimposing the right of visits to the safety and best interest of the child and adolescent (IENCARELLI, 2016, p. 4). Ana Maria further states that:

The so alluded Parental Alienation of the mother, this is curious because today this concept belongs to the female gender only, has sentenced the totality of the processes of intrafamily sexual abuse. And it has committed the aberration of the estrangement of the child's coexistence with his mother. The loss of custody is trivialized, at a time when the importance of shared coexistence with father and mother is founded. (IENCARELLI, 2016, p. 4)

### 3.1 PARENTAL ALIENATION SYNDROME

Parental Alienation Syndrome (PAS) was proposed by Professor of Clinical Psychiatry Richard Allan Gardner in 1985. For part of the medical community, such a proposal is still seen as a theory (GOMES, 2019, online), due to the uncertainty that it would in fact be characterized as a Syndrome in the sense of a psychiatric disease. In the year 2019, Parental Alienation was included in the International Classification of Diseases (ICD-11). In Brazil, in 2016, the National Council of the Public Prosecutor's Office (CNMP) published guidelines on the fight against PAS:



CNMP - RECOMMENDATION NO. 32, OF APRIL 5, 2016. It provides for the standardization and performance of the Brazilian Public Prosecutor's Office, through policies and administrative guidelines that foster the fight against the Parental Alienation syndrome that compromises the right to family coexistence of children, adolescents, people with disabilities and unable to express their will. (BRAZIL, 2016).

The word syndrome can be read and considered in two senses: the doctor, which is a "set of signs and symptoms observable in several different pathological processes and without a specific cause", or even, in the figurative sense, as being a "set of signs or characteristics that, in association with a critical condition, are liable to arouse insecurity and fear", therefore, PAS can be considered more as a figurative term and less as a medical term (MONTEZUMA, 2017, p. 38).

It is also relevant to emphasize that Parental Alienation and Parental Alienation Syndrome differ: while the first is the demeritorious campaign in search of the removal of one of the parents of the infant carried out by those who have custody of the child (CORREIA, 2011, p.5), the second deals with the negative effects of this on minors that may or may not occur, as per specific cases, and is portrayed by Gardner as being

a childhood disorder that appears almost exclusively in the context of child custody disputes. Its preliminary manifestation is the denigratory campaign against one of the parents, a campaign made by the child himself and that has no justification. It results from the combination of a parent's instructions (which does the "brainwashing, programming, indoctrination") and the child's own contributions to slander the target parent. When true parental abuse and/or neglect is present, the child's animosity may be justified, and so the Parental Alienation Syndrome explanation for the child's hostility is not applicable. (GARDNER, 2002, online).

Among the possible consequences of PAS, it is possible to list "depression, inability to adapt to social environments, identity and image disorders (...) and, at times, drug, alcohol and suicide abuse." As adults, victims may continue to carry negative feelings because they believe they are guilty of an injustice carried out in the face of the alienated parent (FIORELLI, MANGINI, 2010, p. 309).

In addition, for Gomes, PAS "is considered a form of psychological torture because of the process of mental manipulation carried out by the alienating parent", in which the victim are the children of that relationship (GOMES, 2019, online), and contradicts articles 3, 4 and 130 of the Child and Adolescent Statute, which, in turn, stipulates that children and adolescents enjoy all the fundamental rights guaranteed in the legal system (BRASIL, 1990).

#### **4 CONSTITUTIONAL ANALYSIS OF LAW NO. 12,318/2010**

The Constitution of the Republic, promulgated on October 5, 1988, represents a great advance in the area of the rights of children and adolescents, recognizing them as subjects of law. In this Charter, in addition to generic articles dealing with equality, dignity and other basic rights, Article 227 brought in its wording the absolute priority of the rights of infants.



Two years later, Law No. 8,069/1990, known as the Child and Adolescent Statute, was sanctioned, which further solidified the rights guaranteed to citizens and underage citizens, and reaffirmed that the Principle of the Best Interest of Children and Adolescents must be protected by society, the family and the Government in its article 4, caput, which reads as follows:

Art. 4 It is the duty of the family, the community, society in general and the public power to ensure, with absolute priority, the realization of the rights related to life, health, food, education, sports, leisure, professionalization, culture, dignity, respect, freedom and family and community coexistence. (BRAZIL, 1990).

From this perspective, it was proposed by Deputy Regis Fernandes de Oliveira in 2008 the Bill No. 4.053/08, bringing proposals that sought to inhibit and punish the practice of parental alienation in article 5 of its wording originally presented to the plenary:

Art. 5 Characterized typical acts of parental alienation or any conduct that hinders the coexistence of child with parent, the judge may, immediately, without prejudice to subsequent civil and criminal liability:

I - declare the occurrence of parental alienation and warn the alienator;

II - stipulate a fine to the alienator;

III - expand the visitation regime in favor of the alienated parent;

IV - determine monitored psychological intervention;

V - to amend the provisions relating to custody;

VI - declare the suspension or loss of family power. (PL No. 4,053, 2008, p. 2).

The Bill brought in its justification that parental alienation disrespects the rights of the personality of the minor and demanded reprimands to such conduct, emphasizing the importance of the practice of responsible motherhood and fatherhood as safeguards of the biopsychosocial development of infants (PL No. 4,053, 2008, p. 3 and 4), was approved and promulgated by President Luiz Inácio Lula da Silva in 2010, becoming Law No. 12,318, of August 26, 2010.

For Buosi, this law can be seen as an attempt to give greater effectiveness to the fundamental right of those involved, restraining "family members to restrict the adequate coexistence between the child and a loved one, through the personal interests of this adult", and limiting parental authority that escapes the principles of "Responsible Paternity/Maternity", in addition to "combating judicial delay", since the processes with such themes should be processed with priority (BUOSI, 2012, p. 116 and 118).

However, the same author recognizes that there are criticisms regarding excessive state intervention in private relationships, and cites the psychologist Cynthia Rejanne Cirallo, appointed by the Federal Council of Psychology to report on such a device, who stated that the positivization of Law No. 12,318/10 "subtracts from the family the possibility and responsibility of resolving conflicts (BUOSI, 2012, pp. 118 and 119).



Part of the legal doctrine and psychology also criticizes the lack of scientific studies on the subject of PAS, and even states that such protection to children and adolescents could be done in other ways, with no need to create specific legislation on the subject (BUOSI, 2012, p. 153).

Bill No. 498 of 2018, coming from the Parliamentary Commission of Inquiry – CPI of Maltreatment of 2017 of the Federal Senate, proposes the repeal of Law No. 12,318/2010, under the argument that the law of parental alienation provided the distortion of the protective purpose of the child or adolescent, subjecting them to abusers.

The opinion of the CPI recognizes that the law was approved with the best of intentions, in order to protect minors from the conflicts arising from the separation, however, this purpose suffered distortions on the part of abusers who use it in order to intimidate former partners not to report abuses (CPI-MT, 2018, p. 31). That opinion further states that:

It is unacceptable that people who can muster the courage to report abuse and face tough legal battles are treated as alienators simply for using legal means to defend their children's rights, such as police reports and lawsuits. There are indications that tenacious abusers use this legal loophole to obtain custody of the very children against whom they are accused of committing crimes, completely reversing the priority that should be given to the safety of the child. This distortion in the parental alienation law must be extirpated (CPI-MT, 2018, p. 31).

In addition to Bill No. 498/2018, which is currently awaiting designation as rapporteur, there is also a Direct Action of Unconstitutionality – ADI No. 6723, proposed by the Association of Lawyers for Gender Equality, filed on 11/29/2019, which argues that the Parental Alienation Law contravenes both the principle of proportionality, as well as articles 3, IV, 5, 226, §8° and 227 of the Constitution of the Republic, which have the following wordings:

Art. 3 The following are fundamental objectives of the Federative Republic of Brazil:

(...)

IV - to promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination.

(...)

Art. 5 All are equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, in the following terms:

(...)

Art. 226. The family, the basis of society, has special protection from the state.

(...)

§ 8 The State shall ensure assistance to the family in the person of each of its members, creating mechanisms to curb violence in the context of their relations.

Art. 227. It is the duty of the family, society and the State to ensure to children, adolescents and young people, with absolute priority, the right to life, health, food, education, leisure, professionalization, culture, dignity, respect, freedom and family and community coexistence, in addition to keeping them safe from all forms of neglect, discrimination, exploitation, violence, cruelty and oppression. (BRAZIL, 1988).

Another important argument brought up in ADI 6723 deals with the mistaken view about parental alienation being practiced almost exclusively by women, "associating the image of mothers with alienators" who are unable to overcome the end of a relationship or see the ex-spouse happy



without feeling abandoned and with a desire for revenge against them, quoting, including an excerpt from the message justifying the project that gave rise to the law (ADI 6723, 2019, p. 19):

However, often the rupture of married life generates in the mother a feeling of abandonment, rejection, betrayal, giving rise to a very great vindictive tendency. When it fails to adequately elaborate the grief of the separation, it triggers a process of destruction, of demoralization, of discrediting the ex-spouse. (ADI 6723, 2019, p. 20).

The last movement of ADI 6723, whose rapporteur is Justice Rosa Weber, was on 07/15/2021, when the case files were concluded to the rapporteur, and await the trial.

The main point in common between PL No. 498/2018 and ADI 6723, is that both demonstrate the concern for the distorted use of the law of parental alienation, which was initially proposed to protect the best interest of the child and adolescent, but which in some situations has been used as a way to frighten the parent who has custody of the child, under the threat of loss of custody by the practice of alienation, or even as an exclusionary of criminality when it bases the thesis of defense of the accusation of sexual abuse.

The fact is that the law is in force, with several critics and defenders, and others who defend the maintenance of said legislation with certain amendments, seeking to prevent it from being used in a distorted way by those who care nothing about the best interest of the child and adolescent.

## **5 THE APPLICABILITY OF THE REMOVAL OF FAMILY POWER: AN ANALYSIS BASED ON THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD**

Article 4 of the Statute of the Child and Adolescent states that it is the duty of the community, society and the family "to ensure, with absolute priority", the rights inherent to childhood, including, among them, family coexistence (BRASIL, 1990), considered fundamental for a full psychosocial development of the infant. In addition, basic principles such as that which refers to the dignity of the human person, provided for in Article 1, III of the Magna Carta, govern this legal system (BRASIL, 1988).

There are several ways to punish those who practice parental alienation, ranging from milder penalties, such as warnings, to more extreme cases with the suspension of parental authority, and are listed in the seven items of Article 6 of the Parental Alienation Law:

Art. 6 Characterized typical acts of parental alienation or any conduct that hinders the coexistence of child or adolescent with parent, in autonomous or incidental action, the judge may, cumulatively or not, without prejudice to the resulting civil or criminal liability and the wide use of procedural instruments able to inhibit or mitigate their effects, according to the severity of the case:

- I - declare the occurrence of parental alienation and warn the alienator;
- II - to expand the regime of family coexistence in favor of the alienated parent;
- III - stipulate a fine to the alienator;
- IV - determine psychological and/or biopsychosocial follow-up;
- V - determine the change of custody to shared custody or its reversal;



VI - determine the precautionary fixation of the domicile of the child or adolescent;

VII - declare the suspension of parental authority.

Single paragraph. Characterized abusive change of address, impracticability or obstruction to family coexistence, the judge may also reverse the obligation to take to or remove the child or adolescent from the residence of the parent, at the time of the alternation of the periods of family coexistence (BRAZIL, 2010).

In contrast to the measures that vary in levels of severity and should be used in a way directly proportional to the specific case, magistrates have more often applied the most severe sanctions to those who practice parental alienation, jumping directly to the change of custody or even the suspension of parental power (ANDRADE, 2021, pp. 237-256).

However, the removal of a parent or other relatives with a strong affective bond with the child or adolescent, hurts their dignity and their right to healthy family coexistence, defended by Article 3 of the Parental Alienation Law itself, in addition to Article 227 of the Constitution of the Republic, Articles 4 and 19 to 53 of the Statute of the Child and Adolescent, who defend as the right of the minor "to be raised and educated within his family" (BRASIL, 1990). Still, it is possible to find in article 1,634 of the Civil Code the provision on the full exercise of family power, and other provisions currently in force in the Brazilian legal system.

The coexistence with both parents, considered a fundamental right of the minor, prevents him from suffering from the estrangement of his/her relatives and inhibits practices of parental alienation, which are more likely to occur when one of the parents has a kind of monopoly over the child or adolescent, which is subject to their influence (OLIVEIRA, 2021, p. 72).

Based on this, there is a clash between principles and rights: that of the minor to have guaranteed the right to coexistence with his/her parents conflicting with the application of the suspension of parental authority as a way to inhibit the continuity of the practice of parental alienation, and it is this conflict between norms that requires a deep analysis under the aegis of the principle of the best interest and the integral protection of the child and adolescent.

The minor almost never understands that he or she is being alienated from his/her other parent, because he/she does not realize the manipulation carried out by the one who holds custody (GOMES, 2019, online). For this child or adolescent, the person with whom he/she lives daily is someone trustworthy, who loves, cares and protects him/her, and therefore, a very strong emotional bond of trust is developed in this relationship, and the child feels a need to "be the protector of the alienating parent" (GOMES, 2019, online).

It is also necessary to understand that the interest of parents does not always correspond to the best interest of the minor. According to Marraccini and Motta, psychoemotional factors can distort the view of the parents "due to personal problems and residual issues of marital separation", which can end up removing the interest and needs of the children from focus, and put interests and disagreements



between the former couple as a central factor of the separation (MARRACCINI, MOTTA, 1995, p. 346-357).

Therefore, leaving briefly aside the interest of the State to punish those who contravene the current legislation, and of the alienated parent to take revenge on the alienator who caused him or her emotional damage, it is necessary to evaluate whether the removal of this will be beneficial to the child or adolescent, or if it will only bring greater suffering to the life of the infant, seeing yourself separated from the most important person in your life at that moment.

In this sense, Eliane Marraccini and Maria Antonieta Motta reaffirm the importance of living with their families, especially in delicate situations that involve painful processes of separation, claiming that living with both parents "will have to be preserved because, whether they are the father or the mother, it is essential in the structuring and psychological balance of the child" (MARRACCINI, MOTTA, 1995, p. 346-357).

Obviously, the practice of parental alienation must be legally disapproved once the damages that it can cause have been demonstrated, however, it is necessary to consider that the greatest of punishments – the declaration of the suspension of the parental authority of the alienator in relation to his/her children, provided for in item VII of article 6 of Law No. 12,318/2010, It can cause even more damage to the psyche of children or adolescents involved and already fragile due to the separation of their family.

## 6 FINAL CONSIDERATIONS

Based on the documentary and bibliographic research carried out during this research, it was possible to reach some conclusions: the practice of parental alienation can bring serious damage to the biopsychosocial development of the child or adolescent victims of this act; it is necessary to seek to reduce the occurrence of parental alienation, being possible through shared custody among parents, visits supervised by professionals when necessary and even with the dissemination of information about the harm it generates in alienated children; Law 12.318/2010 deserves changes in order to prevent it from being used in a distorted way, since its objective is to protect the child and not abusers, however, it is interesting that it remains in force and preventing the practice of alienation.

In this sense, there are Bills No. 10562/2018 and No. 1079/2015, both from the Chamber of Deputies, which seek to institute awareness campaigns and combat parental alienation. In addition to these, PL No. 7569/2014 provides for the implementation of the psychological care program for victims of parental alienation.

Still, it was possible to demonstrate how much the minor can be in a vulnerable situation, with problems of socialization and even trust, and, therefore, the suspension of parental authority is not the





best way to combat alienation, since it removes another important person from the life of the child or adolescent, with whom he has affective bonds.

The removal of family power is, in some aspects, the best form of punishability in severe cases of parental alienation with the implantation of false memories if analyzed from the interest of the State, which seeks to repress such practice, or even of the parent who was alienated from the presence of their sons or daughters, for he wants the alienating parent to pay for the emotional damage he or she has caused. However, the application of this penalty does not observe the best interest of the infant, and it is from this perspective that the present work was developed.

For the minor, the extension of the period of coexistence through shared custody with the one who was alienated is the best way for her to strengthen again the emotional bonds affected by parental alienation, in addition to psychological monitoring to verify if alienation continues to occur in her life, seeking to guarantee the fundamental rights inherent to childhood, such as healthy family coexistence with both parents.



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