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ПОРТУГАЛЬСКАЯ «ОСОБАЯ ОПЕКА»: НЕСКОЛЬКО МЫСЛЕЙ О ВЫСШИХ ИНТЕРЕСАХ РЕБЕНКА

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Непросто дать определение семьи, так как она постоянно меняется. Понятие «семья» развивается с течением времени, и соответствующее законодательство также должно развиваться. Кроме того, законодательство должно охватывать новые формы семьи, которые возникают из-за необходимости предоставить новые решения, особенно для нуждающихся детей. Одной из таких новых форм семьи является португальская «особая опека» («apadrinhamento civil»¹), которая осуществляется в высших интересах ребенка, предоставляя ему семейное воспитание с опекунами и в то же время позволяя ребенку поддерживать связь с биологической семьей. Эта правовая форма отличается от усыновления и позволяет помочь детям, которые не могут жить со своими биологическими семьями, обеспечивая благоприятную семейную среду, в которой ребенок может расти. Описываются особенности специальной опеки, соответствующие требованиям и правовые последствия этой новой формы семьи.

Ключевые слова: apadrinhamento civil («особая опека»), интересы ребенка, новые формы семьи.

i) Initial thoughts

Since family is a social construction, its perception changes over time. And therefore, it must be analysed taking into account the concrete circumstances that surround it at each moment, leading us to the conclusion that there is no standard ‘family’, but ‘families²’ that are formed and shaped in the context of the social fabric³.

It is also widely known that – when possible – a child should be raised within a family structure. The upbringing of a child can determine his/her future. Different countries are trying to find solutions that can materialize the best interest of the child.

In order to meet this interest, the Portuguese legislator created a legal regime that should not by any means be confused with adoption: the ‘special guardianship’.

The Portuguese expression ‘apadrinhamento civil’, if translated literally, would resemble something like ‘civil godparenting’. However, in Portuguese, the word ‘godparenting’ does not relate necessarily to religious purposes⁴. Since using ‘civil godparenting’ would be confusing (referring to the religious character of the word), we prefer to use ‘special guardianship’, partly because it has some resemblances to the United Kingdom’s Special Guardianship⁵. In both, the child is perceived as a person in formation and as an autonomous subject of rights. The best interest of the child should be the guiding criterion in this area.

Special guardianship is not a competitive form in relation to adoption. If possible, adoption will be favored by setting a more effective family option. However, when adoption is not possible (or appropriate), the Portuguese legislator found another solution that allows living in a family environment. Our law has made an effort to adapt to different and new forms of family, with ‘special guardianship’ being a demonstrative example of such commitment.

We will address the legal framework of this matter throughout this text, presenting it to those who could find it interesting.

ii) Legal framework

Law No. 103/2009 of September 11⁶ has approved the legal regime of ‘Apadrinhamento Civil’. As already explained, we will translate it as special guardianship.

In Article 2, ‘apadrinhamento civil’ is defined as: a legal relationship, tending to be permanent, between a child, or young person, and an adult or a family that will exercise parenting and establishing emotional ties, in order to enable their well-being and development, constituted by homologation or judicial decision and subject to civil registration.

This new institution was created primarily for children and young people in distress who are placed in foster care and/or are not in a position of adoption (either because they are not being taken for adoption or because they are not adoptable).

In fact, children referred for adoption are usually young children, for whom there are candidates for adopters, and for whom insertion into the biological family is not at all feasible. For those children whose relationship with the biological family is not completely compromised or who, for various reasons (such as age, the troubled past, etc.) do not have candidates for adopters that make their adoption likely, the law did not provide for any other solution than institutionalization⁷. This 2009 Law aimed to provide an alternative response to such children.

The Portuguese 'Special Guardianship' allows for the creation of affective bonds between the child or young person and an adult or a family, who now will exercise parental responsibilities towards the child (except for the limitations contained in the special guardianship commitment or court decision – Article 7), without breaking ties with their biological family.

The goal is to ensure the well-being and development of the child in a family environment, not living the day-to-day life with their biological family, but without breaking ties with it.

Therefore, the bond that is generated is permanent (Article 24) or tending to be permanent, since it allows revocation under some conditions⁸ (Article 25). On the other hand, if this special guardianship is based on the establishment of affective bonds, while a guardianship exists, another guardianship cannot be established for the same child, except if the guardians live as a family (Article 6).

It should also be noted that the legal regime of this form, provided for in Law No. 103/2009 of September 11, applies to children and young people residing in the Portuguese territory (Article 3).

In order to become a guardian for these children, the candidates must be over the age of 25 and previously qualified for this purpose (Article 4).

The qualification is the certification that the individual (or family members) who wish to sponsor a child have the necessary conditions and autonomy of life that allow them to assume the responsibilities proper to the bond in question (Article 12). This qualification is usually performed by Social Security or other institutions that have a cooperation agreement with Social Security. Decree-Law No. 121/2010 of October 27 supplements Law No. 103/2009 of September 11 and establishes, in detail, the requirements for qualification of candidates for civil guardianship.

Consequently, anyone wishing to become a special guardian should communicate this intention to the referred competent authorities, by completing an application form, accompanied by all the necessary documents to prove the requirements referred to in Article 3⁹ of Decree-Law No. 121/2010 of October 27. The decision on the qualification is

preceded by the preparation of a psychosocial report on the candidates by the competent authorities for the qualification (Article 4 of Decree-Law No. 121/2010 of October 27).

The child has also to meet some requirements. In order for the child or young person to be sponsored, certain assumptions will be considered by the court for the constitution of the special guardianship (Article 5, Law No. 103/2009 of September 11).

Hence, special guardianship should have real advantages for the child or young person, and this relationship should only be established when it satisfies the best interests of the child. On the other hand, the assumptions and requirements for adoption cannot be verified.

It should also be noted that as long as a special guardianship persists, another one cannot be constituted for the same child, except if the guardians live as a family (Article 6). In the latter case, the special guardianship relationship may be extended to the spouse or person living in a non-marital union, but the respective qualification has to be made.

The special guardianship may be initiated by the Public Prosecution Service, as a representative of the interests of the child or young person; by the Commission for the protection of children and young people, in the context of the proceedings that may be conducted there; by the competent social security body or institution authorized by it; by the parents or the legal representative of the child; the child over the age of 12; or by the court order (Article 10).

When the special guardianship takes place at the initiative of the parent, the legal representative, or the child, they may designate the person or family of their choice, but the designation becomes effective only after their qualification (Article 11 (2)).

The legal bond can be constituted by a court decision or by a special guardianship commitment ratified by the court (Article 13(1))¹⁰. For establishing the special guardianship, and in addition to the mandatory hearing and participation of the children and their parents/legal representative/ or person who has custody (Article 11 (6)), it is also required to have the consent of the child over 12 years old¹¹, the spouse of the special guardian candidate (or his/her non-marital partner), the child's parents (even if they do not exercise parental responsibilities and even if they are minor¹²); the legal representative of the child and/or the one who has the child's custody (Article 14). On the other hand, the court may waive the consent of those who should provide it if they are deprived of the use of mental powers or if for any other reason there is serious difficulty in hearing them (Article 14 (4) , al. a))¹³.

It should also be noted that the constitution of the special guardianship is subject to compulsory civil registration (Article 28).

ii) Most relevant legal effects

Once the special guardianship is constituted, the guardians will exercise the child's parental responsibilities (Article 7). Thus, it is up to the guardians to represent the child, to ensure his/her maintenance, safety, education, health and all other care inherent to a child.

Although the special guardianship is defined, by law, as a bond that is established between a child and an adult (or family), it implies not only a relationship between the child and the guardian, but also between them and the parents of the child. This unique feature is one of the most distinctive aspects when compared to adoption. Article 9 emphasizes that the parents and the guardian(s) have a mutual duty to respect and preserve the privacy of family life, good reputation and cordiality. In addition, they should cooperate in creating the right conditions for the child's welfare and development. The special guardianship depends on this triangular relationship between the different actors (child, parents and guardian).

Also, parents have a set of rights guaranteed by Law No. 103/2009 of September 11. Article 8 establishes that parents, except if they have been disqualified from parental responsibilities from wrongfully infringing their duties towards their children, should have certain rights that must be expressly listed in the special guardianship commitment. For instance, parents will have the right to know the identity of the guardians and have a way of contacting them (a) and b)); to know the place of residence of the child and to have a way to contact him/her (c) and d)); to be informed about the integral development of the child, his/ her educational or professional progression, the occurrence of particularly relevant facts or serious health problems (e)); to regularly receive photographs or other image registration of the child (f)); to visit the child, under the conditions set in the commitment or court decision, in particular on particularly significant dates (paragraph g)). The law provides for the court to be able to impose limitations on the rights of parents to contact and visit their child when the parents, in exercising these rights, endanger the safety or physical or mental health of the child¹⁴ or compromise success of the special guardianship relationship (Article 8 (2)).

Article 20 presents the 'Follow-Up' of special guardianship once it is established. This support aims to create (or intensify) the necessary conditions for the success of this relationship and also to evaluate the child's best interest. This Follow-Up can be done by the Child Protection Committees or by Social Security (Article 20 (2)). This support usually ends 18 months after the constitution of the

guardianship, but it may end earlier if the responsible entity concludes that the normal family integration of the child has occurred (Article 20 (4)).

There is a mutual obligation of maintenance between the two parties in the special guardianship¹⁵ (Article 21). However, that does not affect the parents' obligation to provide maintenance for their children, but if they are unable to do that, the guardians are considered to be 1st degree ascendants for the purpose of the obligation to provide maintenance (Article 21 (1) and Article 2009 of the Portuguese Civil Code). Likewise, the child will be considered descendant in the 1st degree from the guardians for the purpose of the obligation to provide for them, occupying this position for the purposes of Article 2009 of the Civil Code, but is preceded by the guardians' own children if they are able to provide for them (Article 21 (2)).

Also, there is a marriage impediment between the special guardianship elements. The rule, provided for in Article 1600 of the Portuguese Civil Code, is that everyone has the capacity to contract marriage, except those for which any of the marital impediments provided for by law are found. Impediments are circumstances which, in any event, preclude or prevent the conclusion of the marriage, the circumstances in which the marriage cannot be concluded, otherwise the act may be annulled or sanctioned¹⁶. They are the causes of disabilities or other legal prohibitions on marriage.

The bond of special guardianship is considered an impediment to the conclusion of marriage between guardian and guarded (Article 22 (1)). This impediment is susceptible of exemption by the Civil Registry, who grants it when there are serious reasons justifying the conclusion of marriage (Article 22, (2)). The conclusion of marriage, without waiver, and despite the existence of the impediment, entails, to the guardian, the inability to receive from his consort any benefit by donation or will (Article 22 (3)).

Once the sponsorship is constituted, the guardian and the guarded are entitled to benefit from the legal system of absences and leaves equivalent to that of parents and children, to receive social benefits on the same terms as parents and children, and to accompany each other in sickness care, as if they were parents and children (Article 23 (1)). In addition, guardians are entitled to regard the child as dependent for tax purposes (Article 23 (2)).

Special guardianship is a permanent bond which may, however, be terminated by revocation¹⁷ (Article 24 (1)). It can be revoked at the initiative of any of the parties, the competent Social Security body, the Child and Youth Protection Commission, the Public Prosecution Service or the court.

The reasons for the revocation can be found in Article 25, i.e. when: (a) there is agreement by all

parties involved in the guardianship commitment; b) the guardians repeatedly and wrongfully neglect their duties assumed with the guardianship, to the detriment of the child's best interests, or when, due to illness, absence or other reasons, they are not in a position to fulfill those duties; c) special guardianship has become contrary to the interests of the child; (d) the child or young person engages in behaviors, activities or consumption which severely affect his or her health, safety, training, education or development without the guardians adequately opposing to such behaviors; e) the child persistently engages in behavior that severely affects the person or family life of the guardian, so that the continuation of the guardianship relationship is untenable; f) there is agreement of the guardians and the guarded (once adult).

To revoke the special guardianship, a court decision is required (Article 25 (2)).

In any stage and whenever it would seem appropriate, the court may order the intervention of public or private mediation services, with the consent of the interested parties, or at their request (Art. 25 (6)).

The revocation is subject to compulsory civil registration (Article 28). The effects of civil sponsorship cease when the decision of revocation becomes final (Article 27).

However, Article 26 provides for the maintenance of some rights to the guardians, when the special guardianship has been revoked against their will, and without their fault, and as long as its exercise is not contrary to the interests of the child. Thus, the former guardians retain the right to know the place of residence of the child (paragraph a)); to have a way of contacting the child (paragraph b)); to be informed about the integral development of the child, his or her educational or professional progression, the occurrence of particularly relevant facts or serious health problems (paragraph c.)); to regularly receive photographs or other image registration of the child (paragraph d)); and to visit the child, especially on the occasion of especially significant dates (paragraph e)).

iii) Special Guardianship challenges and the child's best interest

Having essentially in mind institutionalized children whose life project does not admit adoption, special guardianship seeks to provide an alternative response to such children through family integration of the child with the guardians (Article 20 (4)).

And, naturally, considering the project of life of these children, the best interest of the child imposes the existence of a process of guardians' qualifica-

tion with the aim to assess the suitability and autonomy of life of people who want to become caretakers. It is in relation to this qualification process that some obstacles may arise in the practical application of the institution. As noted above, the legislator considers that while the effects of special guardianship entail a simpler and faster regime when compared to the adoption regime, the qualification of guardians should not be less demanding than the selection of candidates for adopters, since, in both cases, it is a question of forming an emotional bond between a child and a person or a family. Although it makes perfect sense, it has sometimes scared a few potential candidates who do not wish to entail such complex process.

Another point where we see some implementation difficulties is the relationship between parents and guardians. These are, under Article 9, guided by the mutual duty of respect, and parents and guardians should cooperate in creating the right conditions for the welfare and development of the child.

The rights of parents must be included in the written commitment of special guardianship, including those referred to in Article 8 (such as to contact the child, to know the place of his/her residence and to visit him/her¹⁸).

Note that the right to visit the child is important to keep the bond with the parents, but it also may be a cause of conflict.

It seems clear that the success (or failure) of the special guardianship relationship depends on good understanding and cooperation between parents and guardians. Obviously, in the best interest of the child, it is important to maintain a relationship with the parents, but it must not be forgotten that it is the guardian who exercises parental responsibilities.

The certainty and regular fulfillment of the commitment of special guardianship should guide the relations between parents, guardians and the child (thus, this is a triangular relationship).

And here we have another problem: while the special guardianship depends on the cooperation between parents and guardians, can this be ensured in our current society? Sometimes we are witnessing, not only in the field of Family Law, a number of phenomena that tell us that society is not altruistic (and, with some exceptions, if someone does something for the benefit of others, he/she does not do so without benefiting himself/herself). For the implementation of special guardianship, there must be selfless people willing to take on the role of guardians. In addition, as mentioned above, the social benefits for special guardianship are not significant and can be unappealing.

At the same time, regrettably, special guardianship is a form that, although not so recent, is still disregarded by some of those who would be in a

position to promote it and is unknown to much of the population.

It is believed (and expected) that gradually it will be more publicized, known and applied¹⁹. The advantages are evident for situations of children who, for different reasons, are not susceptible to adoption and where special guardianship could be the answer to their growth and development in a family environment. For some time now, we have been discussing possible incentives for special guardianship, making this form more appealing to its potential actors. We believe that the main cause of insufficient use of this form is ineffective publicity, which makes this option unknown to most citizens.

What matters is to ensure affective securing solutions for children, and there are different ways to make them official, depending on the specificities of the case. The acuity that exists today in our system is to be praised. We have different answers for different situations. What is lacking is making both equally effective.

iv) Final thoughts

The purpose of special guardianship is not to be confused with adoption.

Adoption has strikingly strong and relevant effects: there is full integration of the child in the adopters' family, like if he/she is their own. The legal ties with the child's biological family will be extinct, the surname will be replaced and this connection will be irrevocable.

Special guardianship, on the other hand, presupposes a coexistence between the guardianship bond and the natural affiliation bond, keeping the right to maintenance and the succession effects between biological parents and their children (even though they are subject of special guardianship).

This form will be a solution for children who cannot move to adoption but who also do not have a viable life option with their natural family. In these cases, special guardianship is a measure based on affection that coexists with natural affiliation, i.e., does not undermine the bond with the biological family.

The special guardianship aims to insert the child in a familiar environment, allowing his/her safe and sound upbringing. It is supposed to be permanent²⁰, since it is intended to be a life project for the child, it is not a transitory measure. As such, it will be a new family form that deserves consequent protection and promotion.

Providing the Portuguese system with this new form of family was intended to ensure effective securing solutions for children, which we highly praise.

Примечания

1. This isn't a literal translation. As explained in the text, we will translate it as 'special guardianship', for clarity of concepts.

2. Rosario Valpuesta Fernández, *La disciplina constitucional de la familia en la experiencia europea*, Tirant lo Blanch, Valencia, 2012, p. 44.

3. In this wake, British sociologists have suggested replacing «the family» by «family practices». German sociologists also advocate the shift to «forms of life» («*Lebensformen*»). «In both cases the plural form replaced the singular». Ilona Ostner, «Cohabitation in Germany – Rules, Reality and Public Discourses», *International journal of Law, Policy and the Family*. Vol. 15, N.º 1, Oxford Univ. Press, Oxford, 2001, p. 91.

4. Even though we use the word 'apadrinhamento' for catholic godparenting, the word 'apadrinhamento' itself doesn't have any implication of God or religion.

5. Just some similarities. They are different institutions. For UK's Special Guardianship, visit <http://www.legislation.gov.uk/ukxi/2005/1109/contents/made>, [consulted August, 25th].

6. This law is still in force today, although it had a few changes by virtue of Law No. 141/2015 of September 8.

7. Helena Gomes de Melo/João Vasconcelos Raposo/Luís Baptista Carvalho/Manuel do Carmo Bargado/Ana Teresa Leal/ Felicidade d'Oliveira, *Poder paternal e responsabilidades parentais*, 2.ª ed., Lisboa, Quid Juris, 2010.

8. That will be addressed later on.

9. Such as: personality; maturity; affective capacity; emotional stability; educational and relational skills; housing conditions; appropriate economic and family situation; lack of health limitations; adequate motivation and expectations; willingness to cooperate and receive training; willingness to respect the rights of biological parents; etc.

10. Usually it is under the Children and Family Court's competence of the area where the child is located. However, outside the areas covered by the jurisdiction of any Children and Family Court, it can happen in a general court – Article 18 (although, today, most districts in Portugal have specialized courts).

11. Even though the child should always be heard (when it is possible according to his/her age), the consent is only required from children aged over 12 years. Before that age the child can and should express his/her interest and thoughts but they are not binding to the court. After the age of 12 years, the child will not only be listened to but also his/her will will be respected. A special guardianship cannot be determined against the child's desire after reaching the age of 12 years.

12. If parents have been disqualified from parental responsibility for wrongfully infringing their duties towards their children, their consent will not be needed.

13. Child and Youth protection committees or Social Security must inform the court of cases in which they believe that consent should be waived (art. 14 (5)).

14. Child safety will be compromised if parents have left him/her abandoned anywhere, alone at home for a long period of time, allowed to use or play with dangerous objects, etc. The physical or mental health of the child is jeopardized not only in cases of physical or men-

tal abuse, but also in situations of poor hygiene, poor diet, poor health care, use of offensive words, or when the child witnesses constant discussions and/or aggression from adults, amongst other not appropriate behaviors.

15. Let's keep in mind that this bond should be life-long so the child will grow up and later on be able to support the guardian if needed.

16. Pereira Coelho/Guilherme de Oliveira, *Curso de Direito da Família*, vol. I, 5.^a ed., Coimbra, Imprensa da Universidade de Coimbra, 2016, p. 291.

17. Or death, if the guardian or the guarded passed away. Nevertheless, there are no succession effects in special guardianship (unlike adoption).

18. As previously mentioned, the rights to contact and visit the child may be limited or removed, when parents jeopardize, in the exercise of these rights, the safety or physical or mental health of the child. But it won't be always easy to know when the parents' behavior will be undermining the success of the special guardianship relationship.

19. Maria Raquel Guimarães, «O novo regime português do 'apadrinhamento civil' (Lei n.º 103/2009, de 11 de Setembro)» in *Estudos em homenagem ao Professor Doutor Heinrich Ewald Hörster*, Coimbra, Almedina, 2012, p. 480.

20. But, as already analysed, it can be revoked within some requirements.

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5. Rosario Valpuesta Fernández, *La disciplina constitucional de la familia en la experiencia europea*, Tirant lo Blanch, Valencia, 2012.

THE PORTUGUESE «SPECIAL GUARDIANSHIP» – SOME THOUGHTS REGARDING THE CHILD'S SUPERIOR INTEREST

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It is difficult to give a definition of «family» since it is constantly changing. The notion of «family» evolves over time and the law has to be able to develop as well. Also, it has to have the ability to embrace new family forms that arise from the need to provide new solutions, especially for children in need.

One of these new forms of family is the Portuguese «special guardianship» («apadrinhamento civil») which entails the child's superior interest by providing a family upbringing with the guardians and, at the same time, also allows the child to maintain a tie with the biological family. It is a different legal form from adoption and is intended to help children – who can't live with their biological families – to have a friendly family environment to grow up with. The legal outline of the special guardianship presents the requirements and the legal effects of this new family form.

Keywords: apadrinhamento civil ('special guardianship'), child's best interest, new forms of family.

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