

# Parental Responsibilities and Health Issues: An Exploratory Study of Legal Disputes

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## Abstract

The dominant paradigm today is that the child's best interests require the involvement of both parents. Consequently, joint parental responsibility continues in most cases even after separation or divorce, and family courts are increasingly called upon to make difficult decisions over children's health. This article is based on exploratory qualitative research and aims to identify the main challenges and possible solutions regarding the way in which parental health decision-making rights are structured and who can decide what, either individually or jointly. Through the thematic analysis of two interviews with mothers involved in family court conflicts over joint parental responsibility disagreements, this article shows that the focus on the joint exercise of parental responsibilities not only fosters family conflicts and court proceedings, but sometimes holds children's health rights hostage to parental rights and court rulings. Despite the limitations of this exploratory study, the findings reinforce the critical nature of family law and policies and the effects on family conflicts.

**Keywords:** Joint parental responsibility; children's health; family courts; Portugal; thematic analysis.

## Introduction

Family courts have long handled situations of family crisis and disruption and dealt with issues such as divorce and custody. The increasing diversity of family structures (e.g., blended and single-parent families) along with the dominant trend towards the exercise of joint parental responsibilities (i.e., the powers and duties assigned to parents in relation to their children) has led family courts to regularly handle a much broader range of issues and parental conflicts than before.<sup>1</sup> Further, the Coronavirus Disease 2019 (COVID-19) pandemic has raised new health and well-being-related conflicts, including those concerning the immunisation of children and access to an unvaccinated or isolated child, parent or grandparent. Thus, family courts are increasingly called upon to make difficult health and well-being decisions, requiring expert advice to determine the 'best interest of the child'.

The changes in family structures and family law and the health crisis highlight one of the fundamental and traditional questions at the heart of family law; that is, 'How should courts regulate the parent-child relationship?'. Other questions have also arisen, such as 'How exactly do and should the courts allocate rights and responsibilities related to healthcare as families fracture and reconfigure?'. International literature (particularly that from the fields of sociology of family law) has traditionally focused on parental conflicts over sole or joint custody and, more recently, on conflicts over parental relocation, religious upbringing, the rights of grandparents or step-parents to visit children whose parents are divorced or separated.<sup>2</sup> Studies on parental conflicts over health and well-being issues in family courts are scarce and have largely focused on conflicts between health professionals and parents about medical decision making for children<sup>3</sup> and on the child's capacity to make healthcare/medical treatment decisions.<sup>4</sup>

<sup>1</sup> Maclean, Managing Family Justice; Scheiwe, "Parental Conflicts."

<sup>2</sup> Lande, "The Revolution."

<sup>3</sup> McDougall, "Overriding Parents' Medical Decisions."

<sup>4</sup> Silverman, "Vaccination Over Parental Objection;" Ó Néill, "Re H."



In Portugal, the law regulating parental responsibilities distinguishes between those related to issues of particular importance, which shall be exercised jointly by both parents, and those relating to the child's everyday activities, which fall under the responsibility of the parent with whom the child habitually resides or with whom the child is temporarily staying.<sup>5</sup> However, the law does not provide any definitions (or examples) of the different types of issues, including health issues. This task has been left to the courts and legal doctrine on a case-by-case basis. The pandemic has served to complicate an area of family law that lacks adequate definition; that is medical decisions involving parents and their children. The persistent vagueness in this area of the law will continue to divide families and have important consequences in the lives of children and parents alike.<sup>6</sup>

The current article adopts an exploratory qualitative research approach to discuss how Portuguese family courts deal with parental conflicts over healthcare issues. It examines the Portuguese legal framework and the perception of mothers involved in family court conflicts over joint parental responsibility disagreements. The aim is to identify the main challenges and possible solutions regarding the ways in which parental health decision-making rights are structured and who can make which decisions, either individually or jointly. The first section of the article explores the literature in terms of the regulation of parental responsibilities and presents a short overview of the Portuguese law regulating the exercise of joint parental responsibility by parents living apart and their conflict resolution when considering health issues. The second section describes the conduct of the exploratory qualitative research through interviews with two mothers and the findings, based on the thematic analysis.

### **Literature Review: The Regulation of Joint Parental Responsibility**

Since the 1980s, legal, socio-legal and feminist studies have focused on child custody laws and disputes with a special focus on gender bias in child custody judicial decisions.<sup>7</sup> It is only recently that new parental conflicts have been the focus of attention, and studies have considered disputes over parental relocation, religious upbringing, the rights of grandparents and step-parents to visitation, and other disputes, including those over children's health and well-being.<sup>8</sup> Even more recently, divorced parents or those in the process of separation have found another reason to argue; that is, the issue of whether or not to subject their child or children to vaccination against COVID-19.<sup>9</sup> Children's inherent vulnerability along with their preclusion from making healthcare decisions for themselves creates responsibilities for their protection that fall not only to their parents, but also to the state and courts.<sup>10</sup> Parents are expected to seek appropriate medical care and to exercise their parental responsibility in accordance with the best interests principle.<sup>11</sup> However, beyond clearly harmful situations that threaten a child's life, many decisions about what is in the best interests of the child are in fact related to questions of values and beliefs (and to a degree, to the subjective preferences of the child, if the child is old enough to have formed any such preferences).<sup>12</sup>

In almost every family, some disagreements arise. This becomes particularly difficult when parents develop extreme differences in their approaches to parenting, especially when a child is struggling with a psychiatric or a learning disability, and treatment decisions need to be made. In these situations, the parents' ability or inability to reach an agreement can mean the difference between successful treatment and an anxiety-provoking situation. Among some divorced parents, making decisions about their children may be the cause of intense conflict, and one parent might automatically reject what the other parent has to say, which will have implications for the child's needs for medical treatment.<sup>13</sup>

Currently, in western societies, joint parental responsibility continues in most cases after separation or divorce and regulation of parental responsibilities is generally formulated in gender-neutral terms. The dominant paradigm is that the child's best interests require the involvement of both parents.<sup>14</sup> However, this calls for ongoing cooperation between the parents in making at least some decisions, and thus conflicts now arise over the exercise of joint parental responsibility (e.g., disagreements over healthcare decisions) rather than from conflicts over sole or joint custody.<sup>15</sup>

Studies have shown how, in the post-separation period, both fathers and mothers seek to negotiate and balance the demands of new family laws and rules of sharing parental responsibilities as gendered subjects (e.g., within class and race) and as

<sup>5</sup> Portuguese Civil Code, articles 1877 to 1920, in particular article 1906.

<sup>6</sup> Gibson, "The Portion of Goods," 591.

<sup>7</sup> Boyd, "Child Custody," 6; Smart, "Child Custody."

<sup>8</sup> Pedroso, "Mudam-se os Tempos," 81; Lande, "The Revolution," 415–416; Maclean, *Managing Family Justice*; Noales, "Religious Freedom," 137.

<sup>9</sup> Silva, "Reflexões;" Ruo, "Riflessioni su Minorenni."

<sup>10</sup> Auckland, "Parental Rights," 289; Reiss, "Rights of the Unvaccinated Child," 75.

<sup>11</sup> Woolley, "The Limits of Parental Responsibility," 1,060.

<sup>12</sup> Auckland, "Parental Rights," 288.

<sup>13</sup> Garey, "Conflicts Over Parenting Styles."

<sup>14</sup> Scheiwe, "Parental Conflicts," 153.

<sup>15</sup> Scheiwe, "Parental Conflicts," 153.

individuals with a personal history.<sup>16</sup> Negotiating these processes in the context of rupture and transition, such as divorce, can result in tension between the messages contained in the right to cooperation and the maintenance of the parental bond and the family norms that should govern the family's experience and those that families actually experience, which can exacerbate conflicts. Further, socio-legal studies have linked the increase in conflicts over the regulation of parental responsibilities with legal changes promoting the joint exercise of parental responsibilities. Neale and Smart argue that the legal transformation itself gives parents the impetus to engage in a conflict that would previously have seemed fruitless,<sup>17</sup> and according to Collier and Sheldon, for men and women, the joint exercise of parental responsibilities often forces parents to position themselves in competing discourses as parents.<sup>18</sup>

It is important to note that there are different models of regulation of joint parental responsibility, and according to Scheiwe, one can expect differences concerning the legal procedures regarding who has to take action and how frequently action might be taken.<sup>19</sup> Scheiwe distinguishes between three regulation models of joint parental responsibility after separation: (1) the autonomy model, (2) the weak consensus model, and (3) the strong consensus model.<sup>20</sup> Under the autonomy model, a parent's power to act alone is the general rule, and the dissenting parent must apply for a court order. Under the weak consensus model, the joint exercise of parental responsibility is the general rule, but a presumption applies that each parent acts with the consent of the other, thereby granting more space for the individual exercise of parental responsibility. Under the strong consensus model, joint exercise is the general rule for important decisions and for the legal representation of the child, and a parent can act alone only in 'daily matters', 'usual matters' or with regard to 'non-important' decisions. Thus, acting alone is rather limited. If a parent objects (by exercising a veto), the other parent has to go to court and apply for the leave of court to legally act alone.

The Portuguese model of regulation fits the strong consensus model. Thus, under Portuguese law, important decisions must be taken jointly by both parents and daily matters may be decided individually by the parent with whom the child habitually resides or with whom the child is temporarily staying. However, according to Scheiwe, a problem arises, as the strong consensus model creates a stronger pressure to cooperate and brings about more frequent court interventions in the case of parental dissent, as the parent who wants to take an action that is legally valid needs a court decision to allow him or her to take that decision for the child without the consent of the other parent. Further, in the strong consensus model, the main caregiver (usually the mother) has to bear higher transaction costs and has to apply to the court and wait for a decision if she/he is to proceed in accordance with statutory law. This is a gendered effect of 'gender-neutral' rules on parental responsibilities to which feminists have long called attention.<sup>21</sup> Despite formal equality, among separated parents, the primary caregiver for children is still overwhelmingly the mother, and substantial equality is not yet in sight.<sup>22</sup> For instance, in Portugal, in 2021, 81.9% of lone-parent households were female,<sup>23</sup> which shows that child custody is still mainly given to mothers, who consequently bear most of the daily care of children. Thus, the legal system fails to recognise the ongoing inequalities between females and males, between mothers and fathers.

As families become culturally more diverse and the exercise of joint parental responsibilities becomes the dominant model,<sup>24</sup> there will inevitably be disputes about a child's healthcare that become intractable or threaten to be so and situations in which families will seek recourse in the courts.<sup>25</sup> One of the various reasons why courts might be considered appropriate and effective fora for resolving such disputes is that unlike other mechanisms, such as mediation, courts deliver authoritative judgments about what treatment (or care) may and perhaps must be given. In short, courts can decide and thus settle a dispute.<sup>26</sup> However, the empirical studies on conflicts between health professionals and parents regarding medical decision making for children have also acknowledged the disadvantages of the legal procedures that may apply to legal disputes between parents.<sup>27</sup> First, the legal process is adversarial, which is not necessarily an appropriate framing, particularly in an ethically sensitive context, such as healthcare, and the courts will not always be willing or equipped to attend to these complex ethical dimensions. Second, an adversarial framing can have adverse effects on the parties and escalate the conflict and entrenchment of different views, as the focus shifts to the conflict itself rather than the child. Finally, proceedings that make it to court can be time consuming. Further,

<sup>16</sup> Collier, *Fragmenting Fatherhood*, 139; Neale, "Experiments with Parenthood?" 201.

<sup>17</sup> Neale, "Experiments with Parenthood?" 216.

<sup>18</sup> Collier, *Fragmenting Fatherhood*, 205.

<sup>19</sup> Scheiwe, "Parental Conflicts," 161.

<sup>20</sup> Scheiwe, "Parental Conflicts," 157–158.

<sup>21</sup> Boyd, *Child Custody*, 6.

<sup>22</sup> Scheiwe, "Parental Conflicts," 155.

<sup>23</sup> Fundação Francisco Manuel dos Santos/FFMS.PORDATA.

<sup>24</sup> Maclean, *Managing Family Justice*; Scheiwe, "Parental Conflicts."

<sup>25</sup> Auckland, "Parental Rights," 289.

<sup>26</sup> Austin, "Resolving Disagreements," 22; Bridgeman, "Children's Medical Treatment," 2.

<sup>27</sup> Austin, "Resolving Disagreements," 22–25.

debates continue as to the application of the best interests principle in health issues, due to its indeterminacy and vagueness,<sup>28</sup> and the right of children to participate in and potentially direct their own healthcare.<sup>29</sup>

In sum, the law's treatment of children in the healthcare context has been scattered and contradictory, reflecting the pull of competing forces between children's best interests, parents' rights, respecting private and family life, and the role of the state in protecting the vulnerable.<sup>30</sup> In this context, family policy risks appear to be more concerned about assuaging the most vociferous adult lobby than allowing children's perspectives to influence outcomes.<sup>31</sup> Thus, Musio claims that in court procedures, what emerges, above all, is the concern of the judges to find a point of balance between the opposing demands of the parents rather than evaluating what is in the actual interest of the minors involved in each specific case.<sup>32</sup>

### **The Portuguese Law on the Exercise of Parental Responsibility and Conflict Resolution: Healthcare Issues**

In Portugal, in the event of divorce, separation, annulment of marriage and in cases in which parents are not married or do not live together, parents may need to agree on the question of parental responsibility (which must be approved by the court or civil registrar), or, if an agreement cannot be reached, they may refer the matter to court and civil proceedings regulating parental responsibility.<sup>33</sup> According to the General Regime of the Civil Guardianship Process,<sup>34</sup> if there is more than one action concerning the same child, all care and protection and civil guardianship procedures take place jointly.

Articles 1877 to 1920-C of the Portuguese Civil Code establish parental responsibilities as the powers and duties assigned to parents in relation to their children, which include promoting the child's physical and mental development, providing for the child's support and covering expenditures related to the child's safety, health and education. Most parents resolve disputes related to parental responsibilities privately; however, a substantial number go to court. In fact, the inability of some parents to agree on what are issues of particular importance and/or issues of a quotidian nature keeps the Portuguese Family Courts quite busy. In 2020, of a total of 37,808 child-related closed cases, 30,271 concerned the regulation of parental responsibility.<sup>35</sup>

A decision on the exercise of parental responsibility must always be taken based on the following four essential elements: (1) the custody of the minor; (2) the articulation and handling of issues of particular importance and those relating to the child's everyday activities; (3) the visitation regime; and (4) the maintenance due to the child. Any decisions must always be taken based on the child's best interest, and the child's views must always be considered. Courts may also count on the support of multidisciplinary technical teams and other professionals, such as doctors and psychologists, as court assessors. Additionally, in the course of a legal action, the court or the parties may request the intervention of a Family Support and Parental Counselling Centre, a support service for families with children and adolescents at psychosocial risk, working towards the development of parental, personal and social skills.

According to Portuguese Civil Code (article 1906), parental responsibilities on issues of particular importance to the life of the child are to be exercised jointly by both parents in accordance with the terms of the marriage, except in cases of manifest urgency, where either parent may act alone and must provide information to the other parent as soon as possible.<sup>36</sup> The exercise of parental responsibilities relating to the child's everyday activities is attributed to the parent with whom the child habitually resides or the parent with whom the child is temporarily staying. However, in the latter circumstances, in exercising their responsibilities, that parent should not act contrary to the most relevant educational plan as defined by the parent with whom the child habitually resides. The parent responsible for the exercise of parental responsibilities relating to everyday activities may exercise these responsibilities alone or delegate them.

The legal regime regarding the exercise of parental responsibility makes this important distinction, which is linked to the questions of joint or sole exercise; however, the law does not provide any definitions (or examples) of the different types of issues (that fall within the scope of indeterminacy). This task has been left to the courts and legal doctrine on a case-by-case

<sup>28</sup> Salter, "Deciding for a Child," 179.

<sup>29</sup> Mutcherson, *Whose Body Is It Anyway*; Ruo, "Riflessioni su Minorenni."

<sup>30</sup> Reiss, "Rights of the Unvaccinated Child," 75.

<sup>31</sup> Smart, "Towards an Understanding," 12.

<sup>32</sup> Musio, "Scelte Alimentari," 11.

<sup>33</sup> European E-Justice Portal, *Parental responsibility—Child Custody and Contact Rights: Portugal*. See the Civil Code (articles 1877–1972) and, in particular, the changes brought by Law no. 61/2008 of 31 October; and the General Regime of the Civil Guardianship Process, approved by Law no. 141/2015 of 8 September.

<sup>34</sup> Article 11 of the General Regime of the Civil Guardianship Process, Law no. 141/2015 of 08 September.

<sup>35</sup> Direção Geral de Política da Justiça, *Estatísticas da Justiça*.

<sup>36</sup> Where the joint exercise of parental responsibilities on issues of particular importance to the life of the child is found to be contrary to the interests of the child, the court shall, by reasoned decision, determine that those responsibilities be exercised by one of the parents.

basis. However, such interpretations are not unanimous and this legal distinction thus leaves room for a great deal of dispute between parents, especially when parental responsibilities on issues of particular importance to the life of the child are to be exercised jointly by both parents. Every so often, the breakdown of the marital relationship is not amicable, and resentments between ex-spouses are likely to devastate the lives of their children, especially if parents have to make decisions together on important issues in their lives.<sup>37</sup> Even judges agree that the indeterminate character of issues of particular importance and issues of everyday life, which also raises doubts about their implementation, is likely to increase parental conflicts and, consequently, children's insecurity.<sup>38</sup>

If the dominant paradigm is that the child's best interest requires the ongoing involvement of both parents, which calls for some level of cooperation between the parents in making at least some decisions, than, paradoxically, what has been observed is an increase in conflicts over the regulation of parental responsibility, as parents cannot seem to agree on what is an important and/or a day-to-day issue. The authors<sup>39</sup> concur that the notion of an issue of particular importance should only concern a limited number of situations; however, the examples provided by legal doctrine in matters, such as healthcare, schooling, change of residence or alternating residence decisions, do not seem to respond to the range of issues that families need to deal with, especially when these emerge in a context of tension and divergence. Thus, Sottomayor<sup>40</sup> is of the view that the distinction between day-to-day acts and acts of particular importance is difficult to establish in the abstract, as there is a large grey area between these two categories that is made up of intermediate acts, whose boundaries depend on the customs of each specific family and society at a given moment in time.

Thus, the areas between what is considered important and what is considered day to day are grey and poorly defined, and the examples provided in legal doctrine may mask reality instead of providing solutions. Moreover, some 14 years after the Civil Code was amended as to what comprises parental responsibility, the way in which the law is interpreted, and particularly the lack of stability in terms of the cases that meet the criteria for important versus day-to-day decisions, leads to acute conflicts between parents.

In terms of health/medical decisions, (Portuguese) authors agree that health is considered one of the most important aspects of parental responsibilities, as it is first a fundamental right, and some parental decisions can affect another fundamental right: the right to life.<sup>41</sup> To determine the particular importance or the routine character of a medical act, it is necessary to consider the gravity, the necessity and the possible consequences of that act for the child's health and well-being. The authors also highlight the fact that the child's health does not depend solely on surgical interventions. Consequently, authors like Rodrigues consider that the choice of the attending physician, and routine or mandatory medical acts (including vaccination) must be seen as acts of everyday life.<sup>42</sup> As for the choice between a public hospital and a private clinic (which, in certain cases, can imply the payment of large sums), this may be an issue that belongs to that grey area of indeterminacy related to issues of particular importance. The Guimarães Court of Appeal held that in a case in which there is no evidence of any abuse on the part of the parent who took the decision of choosing a private clinic, and who will also have to pay half of the expenses, especially when it was verifiable that the use of the public service would be inefficient or would take too long, the consultations and medical or clinical acts that led to the medical expenses presented cannot and should not be qualified as matters of particular importance.<sup>43</sup>

One subject on which courts and experts cannot seem to agree is that of mental health, and particularly psychological support and consultation (and legal doctrine also appears to be silent on this matter). In this specific matter, and when a psychological evaluation is not judicially required, the opinion of the Order of Portuguese Psychologists is that an intervention of a psychological nature (the evaluation and/or clinical/psychotherapeutic follow-up process), in contexts of potential parental litigation, should be understood as an issue of particular importance, as it consubstantiates an extraordinary situation in a child's life and thus requires the informed consent of both parents (legal representatives or whoever has 'the child's de facto custody').<sup>44</sup> However, that is not the view of the Oporto Court of Appeal. According to this Court, nowadays, parents often seek psychological support for their children to provide them with greater emotional comfort in the sometimes tumultuous path of

<sup>37</sup> Dias, *Uma Análise do Novo Regime*.

<sup>38</sup> Acórdão do Tribunal da Relação de Lisboa, Processo 897/12.1T2AMD-F.L1-1 (02/05/2017).

<sup>39</sup> Ramião, *Divórcio e Questões Conexas*, 145; Coelho, *Curso de Direito da Família*, 797; Fernandes, *O Exercício das Responsabilidades Parentais*, 28; Sousa, *O Desacordo Dos progenitores*, 22.

<sup>40</sup> Sottomayor, *Regulação das Responsabilidades Parentais*.

<sup>41</sup> Rodrigues, *Questões de Particular Importância*; Ramião, *Divórcio e Questões Conexas*; Sottomayor, *Regulação das Responsabilidades Parentais*.

<sup>42</sup> The non-resident parent has, nevertheless, the right to be informed about the outcome of such medical consultations; that is, the content that was transmitted to the other parent, any auxiliary means of prescribed diagnosis and medication, as well as the possible need to resort to specialised pediatric consultations. Acórdão do Tribunal da Relação de Lisboa, Processo 1742/19.2T8ALM-A.L1-2 (04/06/2020).

<sup>43</sup> Acórdão do Tribunal da Relação de Guimarães, Processo 1108/13.8TBCHV-A.G1 (25/03/2021).

<sup>44</sup> Agulhas, *Guia de Boas Práticas*, 9.

divorce processes. Such psychological support helps children to understand and absorb the new reality in which they are now living. Thus, these days, the frequency of psychology appointments for children has to be considered a stabilised reality and consequently as an issue of a day-to-day nature.<sup>45</sup>

## Research Method and Data Collection

An exploratory qualitative research method was employed to investigate the joint exercise of parental responsibilities, especially with regard to health issues, from the perspective of those experiencing it. By adopting a naturalistic and narrative approach, this study aims to understand the meanings that people attach to phenomena (e.g., actions, perceptions and experiences) within their social worlds.<sup>46</sup> To maximise the depth and richness of the data collected to address the research question, the sample of the interviewees tend to be fairly homogeneous and share critical similarities.<sup>47</sup>

Based on the personal contacts of the authors of this study, parents involved in family court conflicts over joint parental responsibility disagreements were invited to take part in the study. The first contact was made electronically via email and included information about the project, consent forms and a background questionnaire. As a result, a purposive sample was collected to select 'information-rich' cases.<sup>48</sup>

*Sample:* Two mothers were available to participate in this study.<sup>49</sup> One participant, Amelia, is aged 46 years, has been divorced for 9 years and is the mother of two boys, aged 11 and 16 years. The other participant, Olivia, is aged 31 years, is not yet officially divorced but has been separated for a year and a half and is the mother of two girls, aged 1 and 3 years. In both cases, they (or their ex-husbands) have applied for more than one court order related to parental responsibilities. Further, Olivia had a domestic violence case against her ex-husband and Amelia's children have had a care and protection case, which included allegations of violence by the father.

*Data collection:* Two individual semi-structured in-depth interviews were conducted online by the authors in July 2022 and audio-recorded and transcribed verbatim (and later translated by the authors, assisted by two native English speakers). The participants were asked to discuss their experiences in sharing parental responsibilities, including health issues, in the following three domains: 1) personal experiences in sharing parental responsibilities after separation/divorce; 2) the role of the court in moments of disagreement between the parents; and 3) what could be done differently in this type of case.

*Data analysis:* A thematic analysis was conducted of the in-depth-interview data. This method allows the authors to identify, analyse and interpret repeated patterns of meaning from the qualitative data collected.<sup>50</sup> Following the steps proposed by the literature, the first step comprised becoming familiar with the data, which was facilitated by the transcription process and the in-depth reading of the interviews. Next, the authors proceeded to create initial codes, and in doing so, produced a large set of codes. The initial codes were created independently by two members of the research team. The codes were then reorganised and grouped into broader categories (of tentative themes and sub-themes). In this step, the categories created depended on their relevance to the study and not on their frequency throughout the interviews. All the members of the research team participated in this reorganisation process, which promoted the discussion of the data and the refinement of the proposed themes. Finally, the themes were further revised and the interviews were re-read to verify the coherence and pertinence of both the themes and the quotations that illustrate them. The provisional designations of each theme and sub-theme were refined through successive meetings among the team members. Based on the thematic analysis, four major themes emerged that appear to reflect the mothers' experiences and that are set out in the following thematic map (see Table 1).

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<sup>45</sup> Acórdão do Tribunal da Relação do Porto, Processo 4597/16.5T8PRT-C.P1 (25/09/2018).

<sup>46</sup> Ormston, "The Foundations of Qualitative Research."

<sup>47</sup> Creswell, *Qualitative Inquiry and Research Design*, 118–120.

<sup>48</sup> Patton, *Qualitative Evaluation and Research Methods*.

<sup>49</sup> The names mentioned in the article are fictitious names to guarantee the anonymity of the mothers in our case study. For the same reason, references to the family and children courts and geographical locations were deleted.

<sup>50</sup> Braun, "Using Thematic Analysis in Psychology."

**Table 1. Thematic map of the study**

Theme	Sub-theme
<b>Divorce and joint parental responsibilities</b>	Long and troubled process/different phases
	High conflict
	Involvement of diverse entities (e.g., the courts and social services)
<b>Health issues</b>	Need for a consensus/veto right
	Mental healthcare/support
	Health expenses and cost management
	Power struggles
	Child hostage/triangulated
	Gender patterns
	Pandemic issues (vaccination)
<b>Relationship with the court and other entities</b>	Loss of confidence
	Devaluation of their opinion/voice
<b>Possible solutions—What could be done differently?</b>	Promoting functional communication between the parents
	Listening to the parent with whom the children live
	Providing psychological support to deal with the process
	Establishing clear boundaries between what can and cannot be controlled

### The Exploratory Results: Joint Exercise of Parental Responsibilities and Legal Disputes Over Healthcare

The ideal of a conflict-free and cooperative post-separation family in which problems are resolved by private negotiation is possible but is not the most common experience for most families.<sup>51</sup> For both the mothers in our case study, the court played a central role in the conflicts over parental responsibilities, including health care issues.

Amelia described the process as a long and troubled one, involving different phases:

I have been divorced for 9 years. The process has gone through several phases. We have different ways of being and educating and seeing things, you know? Initially, the full custody was mine, although we always discussed all decisions regarding the boys. (...) I have been to court three times; I have been there three different times. Because ... the first time because of the pension, then shared custody, and the third time because of the aggressions (...).

Olivia's experience as a separated parent is also far from a conflict-free process. As Olivia stated:

Everything in my case is problematic, every issue, everything you can imagine is problematic. (...) In my view, we would not typically be the family that would get divorced and have the problems that we have, but as it turns out we fit into the small percentage of people who have more problems and where there are greater difficulties. This is according to the entities that are involved, which are many (...).

It is important to note that family courts and judges do not act alone. In both cases, different entities worked closely with the courts in the course of the legal actions, including Local Commissions for the Protection of Children and Young People (Comissões de Proteção de Crianças e Jovens, CPCJ) and Family Support and Parental Counseling Centers.

The two interviewees have different court arrangements. In Amelia's case, the joint exercise of parental responsibilities and shared residence was established, but this was not always the case (Amelia and her ex-husband had initially agreed that Amelia would have sole custody and the father could visit the children every 15 days). In Olivia's case, the parents have a provisory arrangement. As she explained, 'we have a provisional regulation. (...) the girls live with me. They sleep two nights with their father every 15 days when he is in the country. Which means there are many times that they do not sleep there'.

<sup>51</sup> Sclater, Divorce, 27.

In relation to health issues, Amelia shares parental responsibilities with the boys' father, while Olivia has sole parental responsibilities in those matters. As Olivia stated:

(...) what we have in the court minutes, because the judge thought that there were things that the father said and did in relation to the girls' health that made no sense, everything that has to do with health issues is decided by me, and communicated to the dad. He doesn't give an opinion, he simply has to pay half of all medical expenses involving a medical decision, which have a medical declaration and [an] order to do so. That's it! This is what is defined in the decision. (...) We don't go to court systematically, because basically the court gave me the green light to decide ... but it's not a *carte blanche* (...). (...) when I know that I am going to take a decision about their health, which can be seen as controversial or that the court can later ask [me] to justify, before taking it I already have the medical report with me, from more than one doctor, I have all the exams to follow, and I send them to the court and to the social services.

They have different court arrangements; however, in practice, when both Amelia or Olivia need to decide on healthcare issues regarding their children, they both have to inform their children's fathers, and if their ex-husbands oppose their decisions, they may have to deal with a veto situation. Amelia described this situation well in relation to the provision of psychological support to the children, stating:

The father did not agree with the psychological support, and so I had to pay for all the expenses because the father did not agree. I thought they needed it, and everything pointed to that, but the father didn't agree. (...) [A]ny medical appointment that was not covered by the public health system the father would disagree with, he would not participate financially, you see. He had information on the entire situation. Although he didn't agree, I took all responsibility and informed him in every situation. (...).

In Olivia's case the situation is more intricate and litigious. Despite having sole parental responsibilities in relation to health decisions, Olivia cannot decide to go to a private hospital, even though she has health insurance. This causes her some problems. As Olivia explained:

I have to go to the public hospital emergency, you see? Because the father forced me to. I have health insurance, but I can't go to private doctors. I can only go to the specialized doctors. For all the rest, I have to go to the public hospital, which means I have to miss work hours, I have to spend endless hours there when I could go to the private hospital. But I can't, because the father says that private doctors say what I want because they receive money.

This veto right from the fathers seems to allow them not only the maintenance of their parental authority in relation to health decisions but also a (male) last word that continues to fuel the conflicts between the parents. Amelia fittingly described the situation of a power struggle based on parental authority as follows:

I talked to him [my ex-husband] about the psychological support, but he didn't want that. He threw a tantrum. He didn't agree with the psychological support, for him it was useless. It was useless. It wouldn't solve what he saw as misbehaviour problems ... 'I won't pay!', he said. And I said: 'fine you don't pay!'. And then he continued: 'he [son] went to talk to you, he didn't talk to me about it'. Like: if he had talked to me maybe I would have thought about it ... It's these outbursts he has: 'he talked to you' ... He plays this game a lot of times.

In both cases, the healthcare issues could be described as highly conflicted with parental authority around unresolved financial issues providing a focus for intense power struggles between the parents. As for the issue involving the choice between a public hospital and a private clinic, in many cases, the parental disagreements appear to be connected to economic reasons, in particular to the kind of expenses involved and how these will be divided between the parents. Moreover, the fact that families are affluent or have sufficient funds to meet most everyday needs does not preclude money from being a serious source of conflict.<sup>52</sup> Consequently, children (are forced to) play a central role in the economic disunity process of their parents, who frequently demonize each other, inevitably bringing the conflict down to the children.<sup>53</sup> This situation was clear in Olivia's case. As she explained:

The father doesn't pay for anything that has to do with health expenses, okay? He doesn't pay anything. I pay for everything. Medical appointments, medication, he doesn't give a cent for it. With the court order, he has to pay for half of the expenses as long as there's a doctor's prescription, and even then he doesn't pay. He refuses to do it. He wrote me an email saying that he will assess the need to pay according to the receipts and invoices, and if he thinks there is a need, he'll transfer the money. In all these months, of a total of 400 Euros of medical expenses, he just sent me 20 Euros!

<sup>52</sup> Papp, "For Richer, for Poorer," 2.

<sup>53</sup> Morris, "Family Conflict;" Henchoz, "Le Divorce et l'Argent des Hommes," 39.



There are often assumptions that, on the one hand, one party is demanding too much and is seeking to punish the other party, while, on the other hand, the other party does not want to meet his or her responsibilities. According to Henchoz, this system of representations does not arise spontaneously, but follows on from a gendered representation that is present in some heterosexual couples of the 'spendthrift woman' and the 'generous man'. The marital break seems to promote a culture of suspicion around economic exchanges, which is confirmed by legal professionals, who reinforce that it is the duty of the separated father to contribute, above all, to the costs related to the child.<sup>54</sup>

The legal regulation of parental responsibility requires a new mode of parenthood that involves a sustained commitment on both parents. Nevertheless, mothers normally have to take on additional burdens, as they take responsibility for the main parental care and simultaneously have to sustain/justify and communicate their decisions to the fathers. All this occurs while the mothers continue to assume most of the parental care for these issues. As Amelia stated:

Of course I talk to the father, but the one who is always there, who is always available, who is always called, is me. (...) while playing football, a goalpost fell on top of the oldest. I informed the father. I had to go take the kid to the hospital. Luckily, it was just the hand that got harmed. The father just didn't care. He simply ignored it. He didn't show any kind of interest.

Similarly, Olivia noted:

Regarding vaccination, the responsibility is all mine. I take them to the clinic. I inform the father in advance when it is scheduled, but the father is never available, because I do not take his calendar into account, he says ... just note that vaccinations and periodic appointments are all scheduled until December of this year, and have been scheduled since March, and I emailed the father in April! There were no changes. He's not present because he just doesn't mark it on his calendar, but that's his problem, okay?

Thus, as Olivia indicated, the gendered pattern of the caring mother and the authoritarian father appears to prevail, despite the courts' (supposedly gender-neutral) ruling. Further, the courts' concern for the equal treatment of both the mother and father and the balance of their demands and the consequent disregard for the children's needs illustrates the issue raised by Smart and Musio (see above).<sup>55</sup> Olivia described the pull of competing forces between the respect for a parent's rights and the concern for the welfare of children, including the idea of the child's rights being held hostage to the parental conflict. She stated:

(...) the court (...) wants to guarantee that both mother and father have the same rights. But is the court there to guarantee my rights or is its role to guarantee the rights of my two daughters? (...) I don't care about my rights, my rights come after guaranteeing their rights, because they are both children. How is it that the entities that exist, instead of ensuring their safety and well-being, want to guarantee the rights of the parents?

As Collier and Sheldon argue,<sup>56</sup> the joint exercise of parental responsibilities (or in Olivia's case the obligation to inform the father and/or the court) often forces the parents to position themselves in relation to competing discourses as parents, which may exacerbate the conflict. For the mothers in our study, on many occasions, taking part in the conflict in the courts had been their only option to ensure their children's right to healthcare, especially to mental healthcare/support. Amelia softened her position, but health issues are seen as a last stronghold, and an issue upon which mothers do not give in. As Amelia explained:

(...) there are things I can't control, namely what's going on over there [when her children are at their father's place]. I can be alert to situations, but I cannot control them. (...) But when it has to do with my kids' health, I just can't close my eyes. (...).

Amelia went on to describe a small gain she managed to obtain in court:

The court ruled the father must learn to be a father, and as such the children must be with him. Okay! But they need psychological support. Of all that, the good thing was that I managed to get psychological support for my youngest, and his educational needs were accepted. The eldest had an appointment with the child psychiatrist. This I got. (...) But only with those doctors who had an agreement with the public health system. The father did not give in on this. But then I started to give in, to make the changes. It has to be with the doctors who have an agreement with the public health system? Fine!

In relation to the probability of future conflicts related to health issues, sharing decisions entails sacrifices and difficulties and the degree of parental collaboration may well diminish over time. For example, Olivia foresees new conflicts in the future related to the COVID vaccination. She stated:

<sup>54</sup> Henchoz, "Le Divorce et l'Argent des Hommes," 30.

<sup>55</sup> Smart, "Towards an Understanding," 12; Musio, "Scelte Alimentari," 11.

<sup>56</sup> Collier, *Fragmenting Fatherhood*, 205.

When I was told it would be available from the age of 3, I blessed myself to heaven, okay? Because the father says that the COVID vaccine is wrong. (...) He is not anti-COVID because he already realized that it exists, but he is anti-COVID vaccination since they were produced quickly, because there is no test... (...) But hey, we have to look at the cost benefits (...). Knowing that the girl will soon turn 4, if the vaccination is available in Portugal, as in other countries, from the age of 3, I can see a very big fight coming my way ... I anticipate many discussions in court ...

As for Amelia, she admitted that in the future, she will go against the father's will, stating: 'Honestly, if my kids ask me again that they want to go to a psychologist and the father doesn't agree, I'll grab them and I'll go. Because I think it's really important, because they're not doing well'.

When asked about their opinion concerning the court interventions, both mothers described a loss of confidence in the courts (and in the child custody institutions) and felt that their voices had been devalued during the successive hearings and proceedings. Amelia commented:

I don't believe in the courts at all! I don't believe in them. They have disappointed me greatly. Because I felt completely unappreciated, everything I said was ... It was as if I wanted to take the kids away from their father, and that was never my idea!

Similarly, Olivia said: 'I felt like I was being mocked ... and that my daughters weren't really being taken care of.' For this reason, when asked about what should/could be different in the court procedures, Amelia replied: 'What would I do differently? If I were a judge, maybe I would listen more carefully to the person who's always been with the children, who's been present in their lives, who really knows them'.

Further, the interviewees highlighted the importance of communication between the parents and pointed out that having psychological support was essential to deal with the process. Amelia noted:

I think the communication between the parents is extremely important. Even if they no longer function as a couple, they are still parents and there must be a lot of communication between them. I think the situation between them has to be resolved. But they cannot forget that they are parents. The decisions they make have to be thought about in terms of their children and not in terms of themselves. (...) It was also important that, from the beginning of this whole process, I have had psychological support, and I have been working a lot on myself, on the ways of facing this whole situation.

## Discussion and Conclusions

This article has discussed the legal framework, separated parents' experiences of healthcare disputes and identified the main challenges and possible practical solutions from the point of view of the interviewed mothers. Two main conclusions can be drawn from the analysis of the legal response to family crises and disruptions over healthcare decisions. First, while the legislative reforms concerning the joint exercise of parental responsibilities were intended to reduce conflict and promote a different, more balanced and equal model of parenting, our interviews painted a different picture. The legal response to family crisis aims to decrease the dispute, but seems to inflame it instead. In our interviewees' experience, forcing mothers and fathers to cooperate and inform each other about health-related decisions and to appeal to the court when the other parent objects to the action led to more conflicts. Consequently, the analysis seems to confirm Scheiwe's hypothesis that a strong consensus model, such as the Portuguese model, leads to more conflicts and court proceedings.<sup>57</sup> This reinforces the need for future international and comparative research on the relationship between different models of regulation of joint parental responsibility and family conflicts and court proceedings concerning parental conflicts over the exercise of joint parental responsibility. In general, we can expect a strong consensus model to correspond with higher conflicts and the worsening of a family's critical condition, while the autonomy and weak consensus models may reduce conflict or at least not promote it. It is also important to consider other factors, such as the availability of legal aid or the existence of mediation (compulsory or voluntary) in each country, which may play a role in the resolution of conflicts.

Second, the focus on the joint exercise of parental responsibilities not only fosters family conflicts and court proceedings but sometimes holds children's health rights hostage to parental rights and court rulings. In the pull of competing forces in the courts' treatment of healthcare situations, the respect for a parent's fundamental right to the care and custody of a child sometimes precludes or delays concerns about the welfare of children. The interviewees' experiences concerning the disputes over mental health assistance and/or the use of public or private health systems reveal the focus of the courts on finding a balance between the opposing demands of the parents rather than evaluating what, in each specific case, is in the best interests of the children involved. Further, the artificial division in the Portuguese law between quotidian acts and acts of particular

<sup>57</sup> Scheiwe, "Parental Conflicts," 161.

importance, which are to be exercised jointly by both parents, is particularly difficult to establish in healthcare situations. The health (and well-being) of a child depends heavily on day-to-day acts, such as food/diet choices, daily medication and care, that may potentially have serious long-term health effects. The interviewees' experiences show how this grey area limits parents' autonomy (forcing them to anticipate future conflicts, collecting justifications for their decisions) and delays children's access to health treatments. These two cases illustrate that it is worth investigating in detail the links between different models of regulation of joint parental responsibility and children's access to health care. The ways in which specific laws and rules may affect children's (access to) the right to health, which is enshrined in article 24 of the Convention on the Rights of the Child (i.e., 'children have the right to enjoy the highest attainable standard of health and access to health care services'), can vary, depending on the court arrangements but also (and frequently) on their parents' preferences and disputes.

These conclusions bring us back to the question of 'How exactly do and should the courts allocate rights and responsibilities related to healthcare as families fracture and reconfigure?'. The analysis in this article was limited and further international comparative studies are required; however, there are strong arguments for models that grant more space for the individual exercise of parental responsibility in what concerns health issues by the parent with whom the child habitually resides. This also indicates a need to eliminate the delimitation between day-to-day acts and acts of particular importance. In relation to the court procedures, the interviewees' discourse also provides clues about the importance of communication whether by the courts in relation to parents or between the parents.

The current study had two key limitations. First, its scope was limited. The study focuses on the experiences of only two mothers, which restricts the density and robustness of the research findings. Second, the criteria used to select the interviewees in this research (i.e., mothers and fathers with disagreements concerning health issues) might have introduced a bias, thereby exacerbating the relevance of the conflicts. Thus, future studies should also include more interviewees to examine different parental experiences, cover possible diverse experiences and reach some degree of theoretical saturation. Nevertheless, these findings broaden the existing international comparative landscape by examining the Portuguese system and women's experiences with the judicial system in particular.

This study also revealed new paths open to a research agenda which are expected to gain relevance in a context of an increasing transformation and diversity of families in societies in crisis (environmental, economic and conflictual) in which new health issues are emerging daily. It reinforces the critical nature of family law and policies and their effects on family conflicts. Parenting regulation models face new challenges that we must become aware of to fulfil the purpose of protecting the health rights of the most vulnerable; that is, children.

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