

**JOINT CUSTODY OR ALTERNATING CUSTODY: THE ANALYSIS OF BRAZILIAN LAW NO. 13,058/2014 AND THE DOUBT ABOUT THE INSTITUTE THAT BECAME MANDATORY** | *GUARDIA COMPARTIDA O GUARDIA ALTERNADA: ANÁLISIS DE LA LEY N° 13.058/2014 Y LA DUDA SOBRE EL INSTITUTO QUE SE VOLVIÓ OBLIGATORIO* | *GUARDA COMPARTILHADA OU GUARDA ALTERNADA: ANÁLISE DA LEI N° 13.058/2014 E A DÚVIDA QUANTO AO INSTITUTO QUE SE TORNOU OBRIGATÓRIO*

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**ABSTRACT** | This article discusses about joint custody or alternating custody and the doubt about the doctrine that became mandatory. This research aims to answer the following problem: Does Law No. 13,058/2014 regulate the Mandatory Joint Custody or the Mandatory Alternating Custody? In order to introduce the problem, we aim to compare the features of joint custody and alternating custody, with the enactment of Brazilian Law No. 13,058/2014. We also aim to present the importance of the principle of the best interests of the child, to study the dimension of the family power, and to highlight the concepts and features of joint custody compared to the alternating custody in order to, finally, analyze the kind of guard that was regulated by Brazilian Law No. 13,058/2014. This is a theoretical research, based on the legal work of relevant authors in this field. Moreover, in this paper, we also address topics such as the parents' relationship with their children, family power, and custody and its types.

**KEYWORDS** | Principle of best interests. Family power. Custody. Law No. 13,058/2014.

**RESUMEN** | *El trabajo versa sobre la custodia compartida o custodia alternada: la duda en cuanto al instituto que se hizo obligatorio. Con lo expuesto, se pretende responder al siguiente problema: ¿la Ley n° 13.058/2014 regula la custodia compartida obligatoria o la custodia alternada obligatoria? Para adentrarse al problema, se analizarán las características de la custodia compartida comparada a la custodia alterna, con el advenimiento de la Ley n° 13.058/2014; también presentar la importancia del principio del*

*mejor interés de los hijos; estudiar la dimensión del poder familiar; conocer los conceptos y características de la guardia compartida y guardia alternada, para al final, analizar la especie de guardia que fue reglamentada por la Ley n.º 13.058/2014. Se trata de una investigación de cuño teórico, fundamentada en obras jurídicas de grandes autores. Además, serán abordados, en la presente investigación, temas como: relación de los padres con los hijos, poder familiar, guarda y sus especies.*

**PALABRAS CLAVE** | *Principio del mejor interés. Poder familiar. Guardia. Ley n.º 13.058/2014.*

**RESUMO** | *O trabalho versa sobre a guarda compartilhada ou guarda alternada: a dúvida quanto ao instituto que se tornou obrigatório. Com o exposto, pretende-se responder ao seguinte problema: a Lei n.º 13.058/2014 regulamenta a guarda compartilhada obrigatória ou a guarda alternada obrigatória? Para adentrar ao problema, analisar-se-á as características da guarda compartilhada comparada à guarda alternada, com o advento da Lei n.º 13.058/2014; também apresentar a importância do princípio do melhor interesse dos filhos; estudar a dimensão do poder familiar; conhecer os conceitos e características da guarda compartilhada e guarda alternada, para ao final, analisar a espécie de guarda que foi regulamentada pela Lei n.º 13.058/2014. Trata-se de uma pesquisa de cunho teórico, fundamentada em obras jurídicas de grandes autores. Ademais, serão abordados, na presente pesquisa, temas como: relação dos pais com os filhos, poder familiar, guarda e suas espécies.*

**PALAVRAS-CHAVE** | *Princípio do melhor interesse. Poder familiar. Guarda. Lei n.º 13.058/2014.*

## 1. INTRODUCTION

The dynamics of society causes the evolution of law to occur, within all branches, being no different in family law, and it can be said that it is the branch in which the evolution is more accelerated. However, when the Civil Code of 1916 was still in force, the institute of custody was observed in accordance with the modalities of dissolution of society, since it stipulated Article 325 of the Civil Code: marital dissolution would be observed, as regards the custody of the children, which had been agreed between the spouses, this being in the form of amicable dissolution, because the judicial dissolution was established in favor of the innocent spouse, the one who would not have given cause for marital dissolution, institute named by "Theory of Guilt" (translated) (BRASIL, 1916).

In the current conjuncture of the Brazilian legal system, there are several institutes that present normatization about family power, specifically shared custody. The Civil Code of 2002, before the advent of Law No. 13,058/2014, did not establish a rule of which type of custody would prevail, since the concrete case was verified. However, it was possible to observe a preference in applying shared custody whenever possible. With the enactment of Law No. 13,058/2014, the legislator counted shared custody as a rule, providing criteria for assigning the functions of guardians, which raised doubts about the correct classification of the institute.

To this end, this article aims to make a comparative parallel between the modalities of shared and alternate custody, in order to respond to the following problems: did Law No. 13,058/2014, promulgated on December 22, 2014, regulate mandatory shared custody or mandatory alternate custody? Considering that the wording of the norm, although presented as shared custody, shows characteristics of alternate custody; In the same way, it is questioned: what is the importance of the principle of the best interest of the child to define the type of custody? What differentiation of the species of shared custody and alternate custody does Law No. 13,058/2014 present?

The aforementioned study is justified, since the institute of shared custody was created by the legislator in the sense that parents, jointly, must mandatorily monitor the development of the child, giving him all assistance entitled in Article 227, of the Federal Constitution, namely: the right to life, health, food, education, leisure, professionalization, culture, dignity, among others (BRASIL, 1988). Similarly, the Statute of the Child and Adolescent (translated) (Estatuto da Criança e do Adolescente - ECA) provides parents with the duty of support, custody and education of minor children (Article 22, ECA) BRASIL, 1990). The confusion between the two modalities of custody, shared and alternate, may contribute to the non-fulfillment of the objectives of the new legislative act regarding custody.

Thus, this research aims to analyze the characteristics of shared custody compared to alternate custody, with the advent of Law 13,058/ 2014; and, as specific objectives: to present the importance of the principle of the best interest of the child and adolescent for the definition of the type of custody; to study the dimension of the family power of the parents over the minor children, as well as knowing the concepts and characteristics of the species of shared custody and alternate custody in a comparative way, to finally analyze the species of custody that was regulated by Law nº 13,058/2014.

This work has as method the theoretical-qualitative research. In this sense, it is necessary to seek bibliographic studies, of jurisprudential analysis, having as a source of research, doctrinal studies, articles published in magazines and websites and also legislation, which address the theme of the work of Law No. 13,058/2014.

## 2. HISTORICAL EVOLUTION AND DEFINITION OF THE INSTITUTE

In the Brazilian legal system, the institute of custody was born with the advent of the Civil Code of 1916, which regulated such modality in case of dissolution of the conjugal society, with provision in Articles 325 and 326, of the repealed Civil Code, in which the parents themselves established the molds of custody, or if there was judicial disagreement, the custody of the children would

be with that innocent parent, that is, that it gave no cause for the dissolution of the marriage.

In this sense, Articles 325 and 326 of the Civil Code of 1916 stipulated:

Art. 325 - In the event of dissolution of the marital partnership by amicable disagreement, it shall be observed what the spouses agree on the custody of the children.

§ 1 If both are guilty, the mother shall have the right to keep in her company her daughters, while minors, and the sons until the age of six.

§2 Children over six years of age shall be entrusted to the custody of their father.

Art. 326 - Being the judicial disagreement, the minor children will remain with the innocent spouse.

§1 If both spouses are guilty, the minor children shall be in the mother's possession, unless the judge finds that such a solution may result in moral harm to them.

§2 Verified that the children should not remain in the possession of the mother or the father, the judge shall grant custody to the person notoriously suitable of the family of either spouse even if he does not maintain social relations with the other whom, however, will be guaranteed the right of access. (BRASIL, 1916). (Translated).

In this tuning fork, it is observed that the repealed Civil Law established the form of rupture of the marital bond as a requirement for the application of custody. If it was friendly, what had been agreed between the parties prevailed; Moreover, if both were guilty, the mother would have priority of staying with the daughters until they reached the age of civil majority, and the sons until the age of six, after which they would be handed over to the father, to exercise the power of custody over the pupil.

However, if the dissolution was given through the judicial intermediary, based on the theory of guilt, the child(ren) would remain with the spouse innocent of the cause of dissolution. According to what was established by the Civil Code of 1916, in its Article 326, §1º, if the fault arose from both, the minor children would be in the mother's possession (BRASIL, 1916).

About this provision, Maria Berenice Dias clarifies:

The Civil Code of 1916 stipulated that, in case of dismissal, the minor children were to stay with the innocent spouse. The legal criterion was clearly repressive and punitive. For the definition of custody, the guilty spouse was identified. He did not stay with the children, who were given as a prize, a true reward to the 'innocent' spouse, punishing the guilty for the separation with the penalty of losing custody of the offspring. (DIAS, 2015, p. 518, emphasis added). (Translated).

However, as the law goes hand in hand with society, the Statute of the Married Woman was created, which removed as a determining cause for the application of custody the age and sex of the children. For the Statute established that, as a rule, custody would remain with the innocent spouse, however, both being guilty, it would remain with the mother. This Statute came to reinforce what was already provided for in the Civil Code of 1916, Article 326, §1° (BRASIL, 1962).

Subsequently, with the enactment of the Divorce Law, No. 6,515/77, Articles 315 to 328 of the Brazilian Civil Code of 1916 were repealed. Thus, the Divorce Law regulated, between Articles 9 to 16, the institution of custody, and this was established in the same way in the Civil Code of 1916, that is, the innocent spouse would have privilege, however, depending on the specific case, there would be situations in which it was up to the judge to decide, in a more advantageous way for the pupil (BRASIL, 1977).

This lasted until the advent of the Civil Code of 2002, created through Law No. 10,046/2002. The Civil Code contained, initially, only five provisions that regulated the custody: Articles 1,584 and 1,631 to 1,634. However, the advent of the Shared Custody Law, No. 11,698/2008, was the first advance of this modality, which created the institute as a way for both parents to jointly exercise the decisions related to the offspring. Thus, with the aforementioned Law, custody was established as unilateral or shared (BRASIL, 2008).

However, the legislator issued a new law on custody, creating Law No. 13,058/2014, better known as the Parental Equality Law (translated), which modified Articles 1,583, 1,584, 1,585 and 1,634 of the Civil Code of 2002. To this end, the Law came to determine the meaning of the expression "shared custody", as well as to define this modality as a rule to be applied in Brazil.

Depending on the specific cases, other modalities may be applied; this was due to the fact that the repealed law presented an insecurity in Article 1,584, § 2 of the Civil Code, which thus establishes: "Art. 1,584. Custody, unilateral or shared, may be: [...] §2º. When there is no agreement between father and mother regarding the custody of the child, shared custody will be applied whenever possible" (translated) (BRASIL, 2002).

This caused misinterpretations in the Brazilian scenario, so that it impelled the legislator to create legislation to determine as a rule in Brazil the shared custody, hence the Law No. 13,058/2014.

After a brief journey in the timeline of the custody institute in the Brazilian legal system, it is necessary to present its definition. Custody can be defined as an institute by which parents have, through custody of their children, the duty to raise them, educate them, taking care of their development, health, food, among others.

Likewise, Washington de Barros Monteiro and Regina Beatriz Tavares da Silva teach: "[...] custody is a right and at the same time a duty of parents to have their children under their care and responsibility, taking care of their food, health, education, housing, etc." (translated) (MONTEIRO; Smith, 2016, p. 387).

Thus, it can be noted similarity between the institutes of custody with family power, however, what differentiates one from the other is that in custody the child will be under the custody of the guardian or both, depending on the modality adopted, since the family power is an institute that both parents have the duty of care and responsibility. In fact, custody is considered one of the powers exercised in family power, which is defined as the power-duty that parents possess over their children, imposing on them duties of upbringing, custody and education; and failure to comply with such imposition may result in loss or suspension.

For Paulo Lôbo, custody is defined as: "[...] the attribution to one or both of the separated parents of the burdens of care, protection, zeal and custody of the child" (translated) (LÔBO, 2019, p. 190). Therefore, it can be concluded that custody is a created institute that is assigned to the parents to have custody of

the children in order to guarantee them protection, care, and in order to allow their effective development. This institute presents several modalities that will be addressed in the following section.

### 3. OF THE ARRANGEMENTS FOR CUSTODY

The previous topic presented the evolution of the custody institute, from its validity with the Civil Code of 1916 to Law No. 13,058/2014, in which the parental equality of this institute is currently in force.

Thus, as already stated in a previous moment, custody is nothing more than the mechanism guaranteed by law, which assigns duties to parents so that they have their children in their custody; Custody refers to the zeal, protection and care in its development, in line with the principle of the best interest of the minor.

However, in Brazil, there are regulated by law two types of custody - the shared, also known as joint custody, and the unilateral, also known as exclusive custody - however, the doctrine presents other modalities of custody, namely: nesting custody, also known as nesting custody, and alternate custody, which will be discussed later.

#### 3.1. Unilateral or exclusive custody

Unilateral custody is provided for in Article 1,583, §1º, of the Civil Code, as seen:

Art. 1.583. Custody will be unilateral or shared.

§1 Unilateral custody is understood to be assigned to only one of the parents or to someone who replaces him (Article 1,584, § 5) and, by shared custody, the joint responsibility and the exercise of rights and duties of the father and mother who do not live under the same roof, concerning the family power of the common children. (BRASIL, 2002). (Translated).



Thus, unilateral or exclusive custody is the mode of custody by which the child is under the power of one of the parents, and the other is responsible for exercising the right of visitation. The exercise of this modality arises when the dissolution of the conjugal society occurs or when there is no recognition of the children by one of the parents, as well as in the case of one or both losing the exercise of family power.

To illustrate this concept, the present example defines this modality well, namely: John and Mary are married by the regime of partial communion of property and have an impubere minor son, named Peter; after a long period of loving relationship, their relationship begins to fray, so they opt for the breakup, and begin to question who would be the custody of Peter. If there is no consensus for the application of shared custody, unilateral custody would take place, with which the son Pedro would be with one of the parents, João or Maria, depending on the factual situation and depending on the circumstances, because the custody will be with that parent who best meets the interests of his child.

Under this theme, Maria Berenice Dias presents:

The law defines unilateral custody (CC 1.583 §1º): it is the attribution to only one of the parents or to someone who replaces him. But frankly, it gives preference to shared custody. The custody of only one of the parents, with the establishment of a regime of conviviality, may result from the consensus of both (CC 1.584 I). Still, at the hearing, the judge must inform the parents of the meaning and importance of shared custody (CC 1.584 §1). (DIAS, 2015, p. 523-524). (Translated).

In this regard, Washington de Barros Monteiro and Regina Beatriz Tavares da Silva, present:

Unilateral or exclusive custody occurs when only one of the parents exercises it, with the making of decisions about education and the other benefits of the child's care. The other parent has the right/duty of visits and supervision. (MONTEIRO; Smith, 2016, p. 387). (Translated).

Finally, in the light of the above, unilateral custody or exclusive custody can be defined as that modality in which only one of the parents assumes the "responsibility" of custody of the child, with the other only having the right of visitation, since the rupture of the marital relationship between the parents does not remove the existing relationship between parents and children.

### 3.2. Shared custody

Shared custody, a modality created in the Brazilian legal system through Law No. 11,698/2008, and modified by Law No. 13,058/2014, consists of the kind by which both parents jointly exercise decision-making in favor of their child, since both are responsible for their custody.

However, the institution of shared custody is provided for in Article 1,583, § 2, of the Civil Code of 2002, in the wording brought by the Law of Parental Equality, No. 13,058/2014, as can be seen: "[...] § 2 In shared custody, the time of coexistence with the children must be divided in a balanced way with the mother and the father, always taking into account the factual conditions and the interests of the children". (BRASIL, 2014).

It is noticed that in shared custody both parents jointly exercise the decisions related to the interests of the children. To improve the concept of this modality, emphasizes Lucas Hayne Dantas Barreto (2003) that:

A system is understood in which the children of separated parents remain under the equivalent authority of both parents, who jointly make important decisions regarding their well-being, education and upbringing. (BARRETO, 2003, emphasis added). (Translated).

However, this notion of shared custody in the joint decision-making of parents about their children creates a closer relationship between the child and his parents, especially those who do not have physical custody. So you can have the child by your side to walk, take to your home, and keep him always

around, that is, the fact that both parents make joint decisions, related to the children, allows both to be part of the day to day of the offspring.

In this tuning fork, Flávio Tartuce presents:

Hypothesis in which father and mother divide the attributions related to the child, who will live with both, this being their great advantage. To illustrate, the child has only one home, living whenever possible with his parents, who are always present in the daily life of the child. (TARTUCE, 2018, p. 252). (Translated).

In the same way presented by Flávio Tartuce, Grisard Filho addresses:

Shared custody assigns to both parents legal custody, both parents exercise equally and simultaneously all the rights-duties relating to the person of the children. It presupposes a broad elaboration between the parents, and the decisions concerning the children are taken together. (GRISARD FILHO, 2016, p. 211). (Translated).

On this same vision, advocates Camila Moreira:

In shared custody there is participation of both parents in the decisions that influence the life of the infant, thus characterizing legally shared custody; However, even in the latter figure, physical custody is under the responsibility of only one of the parents, and there is no alternation of homes (as in alternate custody). (MOREIRA, 2015, p. 1-2). (Translated).

Thus, the fact that the parents actively participate in the interests of the children does not imply that there will be physical custody for both, because according to the already accused, in shared custody there will be no alternation of homes, because the child must have a fixed residence, indicated by the parents, being shared only with regard to decisions related to their formation, and not their usual dwelling.

On this basis, Rolf Madaleno teaches:

Divorce or factual legal separation of the parents does not affect the rules for the exercise of family power, which is exercised jointly with the other parent, whose activity includes the personal and patrimonial aspects related to the offspring, but it is necessary to indicate which of the parents should exercise physical custody of the children, in charge of the daily care of the offspring. (MADALENO, 2018, p. 427-428). (Translated).

This modality presents its positive and negative points. In this sense, the great advantage of applying this modality occurs when both parents have a friendly, peaceful relationship, which will be of paramount importance for the development of the child.

Another point of importance of this modality is linked to the fact that children will always have an approximation with their parents, ruling out the hypothesis of being without contact, so that they can maintain the egalitarian coexistence between the child and his parents.

In this way, Rolf Madaleno presents:

With the separation of the parents, shared custody has the function of preserving in equal conditions their bonds of interaction with their children, remaining as close as possible to the relationship existing during the cohabitation of the parents. (MADALENO, 2018, p. 424). (Translated).

As for the disadvantage brought by this modality, there is the hypothesis that both parents still keep among themselves hurts and disappointments capable of interfering in the application of the sharing of decisions, so that the institution of shared custody will not be effective, considering that the parents must have at least a friendly and harmonious relationship, so that they can make the decisions related to the offspring. Thus, when the parents are in conflict, there will be no way to discuss the decisions of the children, because for this modality it is essential that both have harmonious reciprocity to debate the interests of their pupil.

In this sense, establishes Bruna Neves Rocha (2015):

As for the disadvantages inherent in the shared model of custody, the main focus addressed by the doctrine are the cases in which there are hurts and resentments between the couple, causes that have as a consequence conflicts and constant fights hindering the joint exercise of the decisions to be made. (ROCHA, 2015). (Translated).

Therefore, such a provision is a factor of great negativity, since if there is not even peace between the parents, the application of shared custody will be ineffective, in the sense that even if the Judge applies shared custody, this will not be useful, violating the principle of best interest, since the child will be a mere object of the relationship of the parents.

In this sense, harmony between parents should be essential for the application and effectiveness of shared custody. It is in this system that the Courts have been positioning themselves when judging custody cases, according to the following judgments:

CUSTODY ACTION CUMULATED WITH SEARCH AND SEIZURE OF MINOR. SHARED CUSTODY. DISPUTE BETWEEN PARENTS. DESCABIMENTO. MAINTENANCE OF PATERNAL CUSTODY. 1. It is not the convenience of the parents that should guide the definition of custody, but the interest of the child. 2. The so-called shared custody does not consist in transforming the child into an object, which is available to each parent for a certain period, but a harmonious form adjusted by the parents, which allows the child to enjoy both paternal and maternal company, in a very broad and flexible visitation regime, but without him losing his references of housing. 3. For shared custody to be possible and profitable for the minor, it is essential that there be a relationship between the parents marked by harmony and respect, where there are no disputes or conflicts. 4. If there are strong indications that in the company of the mother the infant is exposed to the risk situation, custody should be maintained with the father, who has full conditions to exercise it. 5. To find the solution that best meets the interests of the child, a social study should be carried out in the home of the litigants and a psychological evaluation of the child, in order to clarify the alleged mistreatment perpetrated by the mother's partner. Appeal granted. (Appeal of Instrument No. 70067058388, Seventh Civil Chamber, Court of Justice of RS, Rapporteur: Sérgio Fernando de Vasconcellos Chaves, Judged on 16/03/2016). (TJ-RS - AI: 70067058388 RS, Rapporteur: Sérgio Fernando de Vasconcellos Chaves, Judgment Date: 16/03/2016, Seventh Civil Chamber, Publication Date: Diário da Justiça do dia 21/03/2016). (RIO GRANDE DO SUL, 2016). (Translated).

And

INSTRUMENT GRIEVANCE. CUSTODY ACTION. SHARED CUSTODY. DESCABIMENTO. For the time being, the institution of shared custody of the child is not feasible, given the belligerence between the parents. Grievance of instrument devoid of. (Appeal of Instrument No. 70065346595, Seventh Civil Chamber, Court of Justice of RS, Rapporteur: Jorge Luís Dall'Agnol, Judged on 26/08/2015). (TJ-RS - AI: 70065346595 RS, Rapporteur: Jorge Luís Dall'Agnol, Judgment Date: 26/08/2015, Seventh Civil Chamber, Publication Date: Diário da Justiça do dia 31/08/2015). (RIO GRANDE DO SUL, 2015). (Translated).

Therefore, in order to have effectiveness of the said mode of custody, there must be at the "*minimum*" a harmonious and peaceful relationship between the parents of the offspring, in order to ensure the necessary efficient training of the infant, bearing in mind that their interests must prevail over any circumstance that may be presented, since the absence of such requirements will be a factor that will culminate in prejudice in the adequate formation of his pupil, since it will cause you some emotional instability.

Another issue is linked to the fact that one of the parents does not accept the end of the relationship, or does not want this species for the child, that is, the absence of consensus between the guardians becomes a disadvantage for adoption of this institute, and its application will become ineffective, because the relationship of harmony between the parents is the essential adjective to make shared custody efficient, taking into account the principle of best interest, although the Law presents a contrary provision, confirmed by the STJ.

### 3.3. Alternate custody

Of doctrinal creation and without regulation in the Brazilian legal system, the alternate custody is the species by which the child stays a predetermined period of time with the father and another period with the mother. This species is known as the backpacker's custody, due to the fact that the child will be in constant periods of relay with both parents, because, as he has no defined place of residence, he will remain until the end of the period in which he is with guardian X, when he must organize his belongings to go to guardian Y,

for the next period. About this kind of custody, Flávio Tartuce presents the following definition:

The son stays a time with the father and a time with the mother, spending some days of the week with the father and others with the mother. As an example, the child stays from Monday to Wednesday with the father and from Thursday to Sunday with the mother. This form of custody is not recommended, behold, it can bring psychological confusion to the child. (TARTUCE, 2018, p. 251). (Translated).

Likewise, he praises Patrícia de Melo Messias:

This type of custody is characterized by the possibility of the child living in the father's house and in the mother's house alternately, according to adjusted periodicity between them, which can be one year, one month, one week, one part of the week. In order for the minor not to distinguish between the two residences, it is necessary that each of them maintains the same conditions of family environment, so that the child does not differentiate them. (MESSIAH, 2006, p. 25). (Translated).

By way of exemplification of this custody follows the following hypothetical situation: a divorced couple with residence in different states, in which the mother resides in state X and the parent resides in state Y. Thus, as alternate custody is characterized in the alternation of homes, the child would stay the first six months of the year with the father - January to June, and the remaining six months with the mother - July to December.

However, another characterization of alternate custody consists in the exclusivity of the custody of the one who is in full exercise of custody of the pupil, that is, when the child is in the custody of the mother in the period recommended by both, this will have exclusive custody, in the same way applies to the period in which it will be up to the father.

From this perspective, Washington de Barros Monteiro and Regina Beatriz Tavares da

Silva:

In alternate custody, which is not well regarded in Brazilian law, periods are established in which the child remains with one of the parents and then with the other, without that, during each of these periods, one of the parents exercises custody exclusively, keeping for the children two homes. (MONTEIRO; Smith, 2016, p. 388). (Translated).

On the subject, explains Pablo Stolze Gagliano and Rodolfo Pamplona Filho:

Modality commonly confused with the shared, but that has its own characteristics. When fixed, the father and mother take turns with exclusive periods of custody, with the other having the right of visits. Example: from January 1 to April 30, the mother will exercise exclusive custody, with the father having the right to visit, including having the child on alternate weekends: from May 1 to August 31, it is reversed, and so it goes on and on. It should be noted that there is an alternation in the exclusivity of the custody, and the time of its exercise will depend on the judicial decision. It is not a good modality, in practice, under the prism of the interest of the children. (GAGLIANO; PAMPLONA FILHO, 2019, p. 599). (Translated).

However, this type of custody is not well appreciated in Brazilian law, given the alternation of cohabitation homes that is harmful to the child, since he will have double domicile. This duplicity may present problems to the child, in the sense that he will be facing two environments, with different behaviors and habits, that is, when he is in the house of the mother has a certain behavior, and when he meets with the parent, he will possibly come across another environment. That is the point, the minor will never situate in which environment he develops, what is his habitual dwelling, considering that there are different practices and habits.

### 3.4. Nesting or nidation custody

The nesting or nidation custody consists of the modality in which the child has a fixed domicile and the parents must move to his pupil. As noted, in alternate custody, the child is the one who stays a predetermined period with the father and another with the mother, so it is called the custody of the backpack, since it is up to the child to go to the address of the parents.



In the custody of nesting or nidation the situation is different, who will pack the backpack will be the parents, who must move to your child. About this kind of custody, Maria Berenice Dias presents:

There is a mode of shared custody that, in addition to perfect harmony between the parents, requires a certain economic standard. It's what's called *nesting*. The child remains in the residence and it is the parents who take turns, periodically moving each of them to the house in which the child remains. However, in this case, there is a need to maintain three residences. (DIAS, 2015, p. 528). (Translated).

In the same sense, Anna de Moraes Salles Beraldo clarifies:

In nidation it is the parents who take turns, moving to the house where the minors live, in alternate periods. However, due to the high costs, since three houses are needed, one for the father, one for the mother and one for the children, it is practically unrealizable. (BERALDO, 2015, p. 28). (Translated).

It is perceived that the custody of the nesting is characterized by the relay that the parents must do to be next to their pupil, so the child will have a fixed residence and the parents will be responsible for the periodic movement to the residence of the children. Therefore, after brief considerations about the species of custodies - unilateral, shared, alternating and nesting - it is necessary to enter into the problematic of the research that refers to Law No. 13,058/2014, on the institute of custody to which it applies. It is a law that regulates shared custody as mandatory.

#### 4. LAW No. 13,058/2014 AND THE INSTITUTE OF CUSTODY APPLIED

Law No. 13,058/2014 modified Articles 1,583 to 1,585 and 1,634 of the 2002 Civil Code to establish the meaning of the expression "shared custody" and its application.

This Law created a new paradigm on the application of custody in Brazil, determining shared custody as a rule. Before its validity, custody in Brazil could be unilateral or shared, provided for in Articles 1,583 and 1,584 of the Civil Code.

However, the Law brought a new wording to Article 1,583, § 2, of the Civil Code, which now establishes the expression "shared custody", as it is removed from the provision:

~~Art. 1.583. Custody will be unilateral or shared.~~

[...] §2. In shared custody, the time spent with the children should be divided in a balanced way with the mother and the father, always taking into account the factual conditions and the interests of the children. (BRASIL, 2014). (Translated).

In this sense, it is observed that, although Law No. 13,058/2014 refers to the expression "shared custody", the content of the wording contained in the above transcribed provision refers to the characteristics and definitions of alternate custody.

Given this, doubts arose about the actual mode of custody that the aforementioned law made mandatory: it is a mandatory shared custody or mandatory alternate custody.

As already expressed above, shared custody and alternate custody differ in the sense that the former consists of the species by which both parents jointly exercise decisions related to the interests of their children, with regard to their rights and duties.

On the other hand, in alternate custody there is a division in the physical custody of the child, since the child will have a period with one parent and another period with the other, as both agree, and the parents will have exclusive custody in the period that corresponds to them.

However, strictly following the literalness provided for in the wording of Article 1,583, § 2, of the Civil Code of 2002, that provision leads to the

understanding that the Parental Equality Law regulated as a rule the institution of alternate custody.

Thus, the paragraph makes a prediction of time of conviviality divided between the parents, according to the withdrawal in the terms brought, namely: "[...] **the time of conviviality with the children must be divided in a balanced way with the mother and the father** [...]"(translated), that is, this idea of conviviality divided by the parents is characterized in the modality of alternate custody and not of shared custody (BRASIL, 2014, emphasis added). This generates a great deal of confusion, because the expression "time of conviviality divided in a balanced way", translates the idea of divided physical custody in which the infant will stay with his parents.

On this questioning, Flávio Tartuce stands:

With the *Law of Mandatory Shared Custody*, the provision went on to establish that, 'in shared custody, the time of coexistence with the children must be divided in a balanced way with the mother and the father, always taking into account the factual conditions and the interests of the children'. In short, it should be noted that the aforementioned criteria were withdrawn, with the repeal of the three items of Article 1,583, §2, of the private codification. With all due respect to the contrary thinking, to this author the novel legislation brings two problems. At first, when there is mention of a *divided physical custody*, it seems to be *alternate and not shared custody*. (TARTUCE, 2018, p. 244-245). (Translated).

He continues:

By Law 13.058/2014 a small amendment was included, and the locution 'which should aim at the balanced division of time with the father and mother' will be included at the end of the diploma. Again, there is a clear misconception in confusing shared custody with alternate custody, with the use of the term *division*. (TARTUCE, 2018, p. 250). (Translated).

It is noticed that the legislative wording causes a great uncertainty in knowing which institute of custody the new legislation has made mandatory - whether shared custody or alternate custody -, since, according to the line of literary interpretation of § 2, of Article 1,583, of the current Civil Code, the

characteristic indications of the text tend to the modality of alternate custody, not shared custody.

It is worth mentioning that the main distinction of the two modalities is in the physical custody of the offspring, because in the alternate there will be alternation of homes, and, in the period in which the parent is in the company of the child, the latter will have exclusive custody. Differently, in the shared, the parents will have the division of functions, of tasks, the sharing is linked to the joint responsibility for the formation of this vulnerable being.

Thus, asserts Eduardo de Oliveira Leite (2015):

Shared custody is the joint responsibility (of both parents) in the exercise of rights and duties arising from family power, with fixed residence of the minor, in the maternal house, or in the paternal house. [...] The scope of shared custody is not (nor has it ever been) to divide the time of coexistence in a balanced way between the parents, but rather corresponds to the practical application of the joint exercise of parental authority - albeit with different temporal spaces - in the case of fragmentation of the family. (LEITE, 2015, p. 1-5). (Translated).

He continues:

The "*balanced form*" corresponds to a child spending a period of time (week, fortnight or month) with one or another parent; fifteen days with the father and the remaining fifteen days of the month with the mother. This is not shared custody, but rather alternate. (LEITE, 2015, p. 3-4, emphasis added). (Translated).

In fact, sharing the interests related to the children does not mean to say that the latter should stay in uninterrupted periods with each parent, this is not configured as shared custody. Joint decisions about the rights of offspring, active participation in the life of the infant are what approach the idea of shared custody.

On this aspect, the Council of Federal Justice presents two statements that clearly explain the real meaning that must be taken into account by the

judging interpreter in the application of the norm, as observed in statements 603 and 604:

Statement 603 - The distribution of time spent in shared custody must be primarily in the best interests of the children, and the division in a balanced way, referred to in § 2 of Article 1,583 of the Civil Code, should not represent free coexistence or, on the contrary, mathematically equal distribution of time between parents.

Statement 604 - The division, in a balanced way, of the time of coexistence of the children with the mother and the father, imposed in the shared custody by §2º, of Article 1,583, of the Civil Code, should not be confused with the imposition of the time provided for by the institute of alternate custody, since this does not imply only the division of the time of permanence of the children with the parents, but also the exclusive exercise of custody which is in the company of the son. (CIVIL LAW JOURNEY, 2015). (Translated).

Thus, the view brought by the statements shows that, although some confusion is created in the device when it establishes that "[...] **the time of conviviality with the children must be divided in a balanced way with the mother and the father** [...]"(translated), the judge, when applying the norm to the concrete case, must start from an interpretation that the device alludes to shared custody, escaping to the letter of the literality of the norm, establishing that the meaning brought by the content of § 2º, Article 1,583 of the Civil Code is attached to the division of functions, of tasks between the parents, since, in shared custody, the parents share the decisions of interest of their pupil with regard to the creation, education, formation of their identity, the assurance of the rights provided for in the Federal Constitution and the Statute of the Child and Adolescent.

It should be emphasized the understanding that in shared custody there will be the division of functions, of responsibilities related to the formation of the offspring, and not of the alternation of homes by the children, since, thus, it would not be a question of shared custody, but of alternate custody. Celeste Leite dos Santos and Maria Celeste Cordeiro Leite dos Santos (2015) emphasize:

Shared custody presupposes the division of responsibilities of the parents who have family power, regarding decisions about the daily routine of their children: school, health plan, extracurricular courses, who will be responsible for taking and/or picking up at school, English course, swimming, etc. [...] The sharing of responsibilities does not imply the alternation of residences, since such a modality would lead to the universalization of alternate custody. [...] In this sense, the residence of the minor (housing) should be fixed, that is, the place where he will develop his daily activities, since it is an essential nucleus for the formation of his identity and healthy development. (SANTOS; SANTOS, 2015). (Translated).

As can be seen, sharing is related to the division of tasks of the offspring. It is not possible to establish division of homes in a modality that does not value such a substance, because, therefore, it would move away from the definition of shared custody, entering the universe of another modality, the alternate custody.

Therefore, the solution is the interpretation, to be used by the judge, that the real meaning of the content of the rule in question, when it has ***"time of conviviality divided between parents and children"*** (translated), is linked to the responsibilities of the parents, although the wording is incongruous, referring us to alternate custody, the legislator means - and this was well clarified in the statements brought by the CJF - that this division is related to the functions that each parent will perform, performing a division of tasks in a balanced way, always seeking to value the principle of best interest.

Likewise, it can be adopted as another method of resolving the discussion, which generates the device, the alternative of changing the wording provided for in Article 1,583, § 2, of the Civil Code. Here is the following wording suggested: *"In shared custody, the joint decisions of the children will take place in an egalitarian and harmonious way between the parents, always taking into account the factual conditions and the interests of the children."* That is, the substitution of the expression *"the time of conviviality divided between parents and children"*, for *"the joint decisions of the children will take place in an egalitarian and harmonious way between the parents"*, would already cease the confusion caused by the device, when it intends to establish the modality of shared custody, because such abolition would immediately remove the

hypothesis of alternate custody. Thus, the device would be regulating shared custody. (Translated).

## 5. FINAL CONSIDERATIONS

Law No. 13,058/2014, known as the Parental Equality or Shared Custody Law, aims to apply this modality as a rule in Brazil, even if parents are in conflict, because the purpose is not to remove the affective ties between parents and children.

The custody is the institute by which the power-duty of material and moral assistance is attributed to a given individual in the formation of that individual who is in his custody. Thus, the research presented four species - shared, unilateral, nesting and alternating - each bringing its own characteristics and peculiarities.

In shared custody, both parents jointly exercise the decisions related to the interests of the offspring, with regard to their upbringing, education, custody, protection, as well as to guarantee the applicability of the rights provided for in the Federal Constitution and in the Statute of the Child and Adolescent. In it, the child will have a fixed residence, and the sharing is related to his rights and duties. Unilateral custody, on the other hand, is the species in which only one of the parents exercises exclusive custody of the child, both physically and in decisions regarding its formation, with the other parent having only the right of visitation, without being able to intervene in the decisions of the offspring.

The other forms are alternate and nesting. The first consists of the modality in which the child will stay with both parents in temporary periods for each. Thus, this modality the doctrine usually calls "custody of the backpack", because whenever the period in which the child is with a certain parent ends, he will have to pack his backpack to stay the other period with the other parent. In the custody of nesting, the meaning is the same, however, the differentiation lies in the fact that there are three residences: one of the father, another of the mother and that of the child. In this modality, it is the parents who will have to

pack the backpack to go to the child in temporary periods, defined as both agree.

Therefore, shared custody is the best modality when the parents have a peaceful relationship, because this hypothesis is the one that best meets the interests of the children, based on the principle of the best interest of the minor. However, in the imminence of litigation, it would not be the most accepted, so that unilateral custody will be applicable, since for the effectiveness of shared custody the parents must have harmony and respect among themselves.

The great theme of the work lies between shared and alternate custody, since Law No. 13,058/2014 brought some doubt of which custody it came to regulate, when it provides in Article 1,583, § 2 that, in shared custody, the time of coexistence with the children must be divided in a balanced way with the mother and father.

Although, by the literality of the paragraph provided for in the Article, it can be concluded that it is regulating alternate custody, considering that in shared custody there is no need to talk about divided coexistence between parents and children.

However, by the concepts addressed in the modalities of shared and alternate custody, and, analyzing the literality of the law, it can be concluded that the Law of Parental Equality came to regulate the alternate custody, considering that the device itself presents the time of conviviality divided between the parents. This is configured as alternate custody, not shared.

Thus, if the legislator intended to create specific legislation to regulate shared custody, the literality provided for in Article 1,583, § 2, is not consistent with the doctrinal concepts of shared custody, since it is dealing with alternate custody.

Therefore, if the legislator wants the regulation of shared custody, the interpretation can be made by the judge that the content brought by the norm in comment, when it has **"time of conviviality divided between parents and children"** (translated), is linked to the division of tasks, of the responsibilities that each parent will perform in favor of his pupil, always seeking to value the



principle of the best interest of the children. Otherwise, to effectively end the confusion brought by the wording of the norm, the legislator may, as a second alternative, modify the literality of the Article, having as a suggestion the following wording: *"In shared custody, the decisions of the children will take place jointly, egalitarianly and harmoniously between the parents, always taking into account the factual conditions and the interests of the children"* (translated), that is, it would replace the terms **"the time of conviviality divided between parents and children"**, for **"the joint decisions of the children will take place in an egalitarian and harmonious way between the parents"** (translated). Thus, a norm regulating shared custody would be evidenced, immediately excluding the hypothesis of alternate custody.

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