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THE LEGAL FRAMEWORK FOR THE PROTECTION OF MINORS UNDER SPANISH STATE LEGISLATION

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Abstract

The current article aims to explain the different protective measures for minors immersed in social and familial conflict situations regulated by the Spanish communal territorial statute law. Public administrative organisms assume competencies in this matter by authorising the taking of different measures depending on the specific circumstances of each case. Undoubtedly, it can be confirmed that the current legal framework has achieved the integrated protection of those children and youngsters whose parents or tutors do not meet, or do so faultily, the duties associated with parental custody. However, its application in practice has also shown the problems and deficiencies this normative framework suffers from.

1. Introduction

The protection system for minors is regulated by the Spanish legal system. This is a constitutional imperative since in chapter III, Title I of the Spanish Constitution of 1978, the responsibility is codified of public powers to ensure the social, economical and legal protection of the family, and within it, specifically the protection of minors, as is stipulated in article 39. The performance of this constitutional mandate obliges the legislature to promulgate precise regulations to redress the lack of legal protection of minors.

Therefore, Law 21/1978, 11 th November, was promulgated to modify the Civil Code and the Civil Procedure Rules in the matter of fostering and other ways of protection of minors*, delivering a meaningful renewal of their protection regulations until then. Later, the endorsement of Organic Law 1/1996, 15th January, for Legal Protection of the Minor and the partial modification of the Civil Code and Civil Procedure Rules* currently in force, underpinned this change in the laws; rectifying certain deficiencies of the previous law. Legislation on minors at state level has been reformed by Organic Law 8/2015, 22nd July on adolescence and childhood protection system modification* and by its homonym, Law 26/2015, 28th July* which updated this legislation, modifying some protective institutions and proceeding to create new protection figures. In this study, we will analyze the current regulations after modifications taken place by this last regulation, the content of which is fundamentally found in the Civil Code (from now on; C.c.) and in the named Organic Law 1/1996 (from now on; O. L. 1/1996).

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* B.O.E. (State Official Report) 17th November 1987, number 275.
* B.O.E. (State Official Report) 17th January 1996, number 15.
* B.O.E. (State Official Report) 29th July 2015, number 180.
* B.O.E. (State Official Report) 29th July 2015, number 180.

2. Minors “at Risk”

This figure was not regulated by Law 21/1987, 11 th November; but by Organic Law 1/1996, 15th January. Modifications carried out by Law 26/2015 in the O.L. 1/1996 related to defining risky situations have the purpose of developing a detailed regulation of this category of minors. Thus, the legislator attempts to comprehensively regulate this situation as well as the procedure for defining it.

It is in article 17 where the risky situation is precisely regulated; which has modified in a relevant way the previous content of this precept of the O.L. 1/1996[*]. As already commented, the legislator proceeds to a more detailed regulation which includes, among others, such aspects as its conceptualization, the programme of administrative intervention, the procedure for defining it, situations of possible prenatal risk... Likewise, it is worth mentioning the prominence given to municipal social services and their importance, together with health and education services in the detection, reception and analysis in cases of children lacking protection. In addition, the necessary collaboration among the different participant organizations is required.

Concerning its definition, it is established that *“(...) it will be considered risk situation the one in which, because of circumstances, shortcomings or family, social or educational conflicts, the minor is harmed in its personal, familiar, social or educational development, in its well-being or in its rights; so that, without reaching the entity, intensity or persistence which would substantiate a declaration of a situation of abandonment and the assumption of guardianship by the ministry of the law, the intervention of the competent public administration is needed to eliminate, reduce or compensate for the difficulties or maladjustments that affect it and avoid its abandonment and social exclusion without being separated from its family environment (...)”*[*].

At this point, the following aspects can be noted. The reform undertaken has not overcome the problem of the lack of specificity about the circumstances producing a risky situation that afflicted the previous version of the aforementioned article[*]. While it is true that it established as a risk indicator, *“(...) among others, having a sibling declared in such a situation unless the family circumstances have changed remarkably (...)”*, the generalizations are maintained which, as legal commentators point out, create significant difficulties of interpretation; granting the public entity a wide margin of discretion in the assessment of a hypothetical risk situation[*]. In an attempt to limit this conceptual generality, jurisprudence has been establishing the trigger causes of this situation[*]. However, it should be noted that the reform has reduced the negative effects that situations of labour or economic precariousness could provoke in the family and which

[*] I.E. LÁZARO (2015) “The reform of the protection system for children and adolescents”, *Family and Successions: legal notebook*, Nº 111., pp. 20 and followings ss., emphasizes that with the new regulation (...) the risk situation significantly improves its regulation (...), given that the previous wording, although it contemplated the existence of the risk situation and differentiated it from that of abandonment, did not apply to its definition (...)”.

[*] The conceptualization made by the legislator is in line with what was previously established by the civil commentators. As an example, L.ALLUEVA (2011) “Situations of risk and abandonment in the protection of minors”, *Journal for the analysis of Law*, InDret, Nº. 4., p.10.

[*] In the opinion of P. BENAVENTE (2011) “Risk, abandonment and foster care of minors. Performance of the Administration and interests at stake ", *Yearbook of the Faculty of Law of the Autonomous University of Madrid*, Nº. 15., p. 20 *et seq.*, in the study carried out before the reform "(...) Organic Law 1/1996, of January 15, on the Legal Protection of Minors, (...) does not define or detail (...) risk situations (...) ".

[*] A. GULLÓN (1996) “On Law 1/1996 on the Legal Protection of Minors ". *The Law*, Nº 1,. p. 1693, understands that in the risk statements, there is a "(...) all-embracing discretion of the Administration (...)", circumstance, we understand, not remedied after the new regulation.

[*] In this way, Judgment of Territorial Court of Lérida, 25th October 2011, reader POCINO, J.M., *J.U.R.*2005, marg. 7910, determines in a specific way those situations considered as "high risk level", quoting verbatim (...) the lack of health and hygiene measures (both of the mother and the minor), partly derived from the lack of proper domicile, the lack of economic support, the destructuring of the family nucleus, and other derivatives (...), lack of encouragement of the minor (...) .

commentators had previously highlighted*, when it is arranged that *"(. . .) the concurrence of circumstances or material deficiencies will be considered a risk indicator but it can never lead to separation from the family environment (. . .)"*.

Due to the continuing ambiguity of the legal provisions, it appears that a judicial interpretation remains necessary of the state's standard list of causes which can lead to a declaration that the minor is "at risk"*; in order to avoid possible arbitrary administrative decisions, since the legislator missed an opportunity on the occasion of this reform of the legislation for the protection of minors.

On the other hand, the reform provides important evidence that the legislator, like the provisions before the reform, still considers that the risky situation does not per se reach sufficient gravity to justify proceeding, with the separation of the minor from his family nucleus; something which does happen when the declaration of abandonment take place, given its greater gravity*.

In relation to family interventions by the competent public administrative institutions, the law requires that the rights of the minor are guaranteed and such interventions must aim at the reduction of the *"(. . .) risk indicators and difficulty which influence the personal, familiar and social situation in which it is (. . .)"**. The rule stipulates that this programme of intervention must be carried out in coordination with schools, social and health services and, where appropriate, with the competent collaborating entities or with other public organisms.

3. Abandonment

In reference to its conceptualization, the definition existing before the reform is kept when pointing the articles 18 O.L. 1/1996 and 172 C.c. that it will be considered *"(. . .) situation of abandonment the one produced as a consequence of the non-fulfilment on the impossibility of or inadequate exercise of the protection duties established by the laws for the guardianship of minors, when they (minors) are deprived of the necessary moral or material assistance (. . .)"*.

However, and contrary to the situation of risk, in the aforementioned section 2 of article 18 of the above mentioned rules, there are established, in an embryonic way in a state-level regulation, the circumstances which determine the declaration of abandonment; being considered one of the greatest novelties of the aforementioned reform* and addressing one of the observations made by the Committee on the Rights of the Child to Spain*. The legislator has considered the declaration

* C.NÚÑEZ (1996) "Some considerations on the Organic Law 1/1996 15th January, on the Legal Protection of Minors", *The Law*, N°. 1., p. 1487. The author, in her commentary on the wording of the Organic Law prior to the reform, states that sometimes there is a declaration of risk or even of abandonment, when there are situations of job or economic precariousness in the family that do not imply neglect or important prejudice for the minor. A consideration that, in our opinion, the new regulation has managed to overcome.

* As it is collected, for example, in art. 49 of Law 3/2011, 30th June, of support for the coexistence of the family in Galicia, B.O.E. 30th July 2011, n°. 182.

* Highlighted by the doctrine, among others L. ALLUEVA (2011) "Situations of risk and abandonment ..." *op. cit.*, pp. 17 *et seq.*, "(...) the situations of risk do not reach the entity, intensity or persistence sufficient to advise the separation of the child from the family nucleus. On the other hand, the situations of helplessness, when facing a greater gravity, do advise such separation. Therefore, the legal consequence that derives is different, that is, the measures in order to mitigate the risk or abandonment will be different, given that the need for protection of departure has different scope (...) ".

* In their study, N. CAPARRÓS CIVERA & I., JIMÉNEZ-AYBAR (2001) *Familiar foster care. Legal and social aspects.* Madrid: Rialp, pp. 150-151, develop the content of these administrative assistance interventions.

* As it is established in the Preamble of Law 26/2015, the clarification and unification of criteria for its declaration is thus sought.

* The requirement for the State to adopt all the necessary measures to ensure that the legislation and administrative regulations in all the Autonomous Communities are completely in accordance with the principles and provisions of the Convention and with its two Optional Protocols.

of abandonment as appropriate in those cases in which the seriousness of existing circumstances endangers the physical and/or moral stability of the minor; thus, among others, when there is abandonment, mistreatment, sexual abuse, gross negligence in compliance with nutritional and health obligations, inducement to begging, delinquency or prostitution, absence of schooling or repeated and not adequately justified lack of assistance to the educational service…

In this sense, and to temper the harmful consequences of such a declaration, the Constitutional Court itself* has repeatedly held that the declaration of abandonment must always be utilised in a restrictive way; being only appropriate when it is satisfactorily proved that the minimum standards in the exercise of custody over minors have not been reached. Thus although the best interest of the children is a basic priority*, so is the right of the parents to have the minor live with them, as well as the right of the minor himself to grow up in his family of origin. We understand that following the approval of the aforementioned reform, this constitutional interpretation remains fully valid.

As pointed out, article 172.1 C.c. decrees that if the minor is declared abandoned, it is the duty of the relevant public institution to assume the *ope legis* guardianship and to put into action protective measures for his assistance. An abandonment situation is considered a "situation resulting from non-fulfillment (of parental duties)…"

From the definition given in the Civil Code, it is implied that once a causal relationship is established between (a) the non-fulfillment or inappropriate implementation of the legal duties concerning the protection of minors and (b) the loss of moral or material assistance suffered by the minor, one must proceed to declare their abandonment*.

In relation to the first criterion, it is worth pointing out that the legal framework in force does not specify which legal protective measures are the ones, the non-fulfilment of which may cause a declaration of abandonment. However, must scholars opine that it those protective measures that relate to the personal parental custody or guardianship*, meaning those duties concerning safeguarding, feeding, accompanying and providing a comprehensive education to the minor.

On the other hand, it is absolutely required that the abandonment declaration is made in relation to a real situation of need. It is essential that the minor is morally or materially neglected. Therefore, it will not be made, if someone carries out those duties, even if the biological parents do not meet their responsibilities or do them negligently*.

4. *Ex lege* guardianship

Ex lege guardianship is a protective measure for the minor in social and familial conflict, introduced by Law 21 / 1987, 21st November, and regulated at present by Law 1 / 1996, 15th January, that has modified, among others, articles 172 C.c. and following. *Ex lege* guardianship becomes official automatically when the minor is declared abandoned. As is disposed in article 172.1 paragraph 3 C.c. *"The assumption of guardianship by the public institution produces the*

* Judgment of Supreme Court 28th February, reader ASUA, A., R.T.C. 2001, marg. 11; Judgment of Supreme Court 26th September 1990, reader LEGUINA P., *R.T.C.* 1990, marg. 143; Judgment of Supreme Court 18th October, reader CRUZ, C., *R.T.C.* 1993, marg. 298.
* Judgment of Supreme Court 28th February, reader ASUA, A., R.T.C. 2001, marg. 11; Judgment of Supreme Court 26th September 1990, reader LEGUINA P., *R.T.C.* 1990, marg. 143; Judgment of Supreme Court 18th October, reader CRUZ, C., *R.T.C.* 1993, marg. 298.
* I. RAVETLLAT (2007) "Protection of minors. Special emphasis on child abuse (General part)", *Review of Law UNED*, Nº. 2., pp. 77-94. M. SERRANO (2007) *Minors in protection*. Madrid: Legal diffusion and current affairs.
* J.I. IGLESIAS (1996) *Custody guardianship ex lege and foster care of minors*. Barcelona: Cedecs., p. 169.
* R. DE ROMÁN (1999) *"Guardianship, custody and conservatorship of minors". Protective institutions of minors. (Special reference to the regulations of Castilla-León)*. Burgos: University of Burgos.,p. 104.

suspension of parental or ordinary custody. However those acts related to patrimonial matters which are beneficial to the minor and which are realized by their parents or tutors in their representation will be accepted", this means, the title of ex lege guardianship is theoretically compatible with the parental or ordinary custody, but not in practice.

As disposed in article 172 ter.1. C.c., its implementation, will be carried out through familial or sheltering foster care. The resulting responsibilities of safeguarding the minors (looking after them, feeding them, and providing them with a comprehensive education) will be carried out by the people responsible to exercise guardianship; either the principal of the shelter or the person/people fostering the minor. The relevant public institution will manage the patrimony of the minors, that being the case, and will legally represent them, except in those acts where minors can represent themselves.

The involvement of the public institution must lead to the creation of *ex lege* guardianship which is regulated in article 172.1 C.c. Once it has declared the abandonment of the minor and assumed the automatic guardianship, the administrative institution will have to communicate the decision it has taken to the public Prosecutor and parents, fosters or guardians and the minor himself if he has enough judgment and in any case, if he is twelve years old or over and this within a maximum time period of 48 hours. Whenever possible, this will be communicated in a face-to-face and understandable way which focuses on the causes which originated this situation as well as its effects.

Ex lege guardianship is a protective measure intended only for those minors who are in a situation of abandonment. Besides, it has a provisional or temporary nature, as it is applied only until the originating causes last. It is not, therefore, a definitive protective measure, but a prior step to other, more stable, legal solutions; family reunification if the abandonment situation is overcome, or integration into a different family from that of birth, with a provisional (fostering), or definitive (adoption)[*] nature.

5. Administrative custody

The modifications implemented in the custody field by the new normative framework can be summarized as follows: the creation of a new modality - temporary custody, the modification of certain aspects of the voluntary custody of minors, such as its duration, and the introduction of important variations in its exercise.

5.1. Temporary custody

A new mode of custody is created and codified by article 172.4 C.c. which provides for its formalization by means of an administrative resolution when it is necessary to provide immediate assistance to the minor without having to proceed with his declaration of abandonment. It caters for situations of urgency, while proceeding, as both precepts dictate, *"(. . .) to practice the precise diligence needed to identify the minor, investigate its circumstances and verify, in its case, the real situation of helplessness (. . .)"*. For reasons of legal security it must be subject to temporal limitations. However, the standard only demands that the term be as short as possible.

As indicated in the aforementioned article of the Civil Code, during this time, proceedings must commence ether for a declaration of the minor's abandonment and the consequent assumption of the guardianship *ex lege* by the public institution or for the promotion of the appropriate protection

[*] E. HIJAS (1995) "Guardianship, custody and foster care in Act 21/1987 (substantive and procedural aspects)", *Civil News*, Nº. 1., pp. 36 and following.

measure. The legislator specifies that if there are suitable people to act as guardians of the minor, the procedure is proposed for the constitution of ordinary guardianship. As a guarantor of the compliance of these obligations of the public entity, the Fiscal Ministry is selected; which must promote the actions to adopt the appropriate protection measures if the public entity would not have formalized the guardianship or adopted another resolution within the prescribed period*.

5.2. Administrative or voluntary custody

Assistential custody is a protective measure regulated in the State Law; in particular, in 1st point of article 172 bis C.c., which claims *"(...)Whenever parents or tutors, due to serious causes, are not able to look after the minor, they could request the public institution to assume the custody of the minor during the time needed (...) Additionally, the custody will be assumed by the public institution, when it is stipulated by the Judge when it is legally provided (...)"*.

In the mentioned article the legislator has established two types of custody. The first is called voluntary custody, which would translate into an administrative custody; given that it would be established without judicial intervention. The main characteristic of this custody would be its request from parents or tutors. The second type of custody refers to the judicial custody. Its establishment is dependent on the decision of the Judge in the cases in which such a decision is legally required.

In relation to the first type of custody, it is worth pointing out that the State Law allows those parents and tutors who, for justifiable causes, are temporarily unable to look after their child, to request the public authority to assume the custody for the time needed. These are the three requirements to request it*:

The causes which make it impossible for parents or tutors to look after the minor must be beyond their control. This means that lack of concern, disinterest or carelessness are absent from the attitude of parents or tutors (for example, due to health problems, emigration, loss of freedom, ...)

The circumstances which make impossible the fulfillment of duties concerning the care of the minor must be temporary and transitory.

An express request must be made from parents or tutor/s.

One of the novelties introduced by Law 26/2015, refers to its maximum duration which must not exceed two years, as is provided in articles 172 bis ap. 1 C.c.* and 19.2 O.L. 1/1996, unless exceptionally its extension is considered convenient in the minor's interest or *"(...) for the foreseeable family reintegration in a short period of time (...)"*, as stated in the mentioned articles respectively. The last ground adds that in these cases, the family must commit to submit to the professional intervention determined by the public entity.

As the legislator warns in the Preamble of the Law 26/2015, 28th July, the purpose of this time limitation is to avoid chronic situations concerning the custody of a minor which prevent him from developing permanent and stable family situations*. After this period of time, the minor will have

* In our opinion, despite the absence of a legal term for this measure, the reference in the aforementioned precept "(...) to the indicated period (...)" can be interpreted in that it must be determined in the administrative decision declaring the provisional custody.

* J.I. IGLESIAS (1996), *Custody, ex lege guardianship and foster care of minors, op. cit.*, pp. 97 and following.

* Fortunately, the indeterminacy of the duration of this figure present in the wording of art. 172 bis ap. 1 C.c. of the Preliminary Draft has been modified when it stipulated "(...) that it will not be able to surpass the one foreseen by the law as the maximum period of temporary care of the minor (...)", although it is true that art. 19 .O.L of the aforementioned Draft Bill expressly stated the maximum duration of two years.

* Circumstance revealed prior to the reform by jurisprudential doctrine. Judgment of Territorial Court of Zaragoza

to return with his family or be declared in abandonment, according to the procedure established in the mentioned precept of the Civil Code*.

5.3. Judicial custody

The indeterminacy of the legislator about the particular legal grounds on the basis of which the Judge must award the custody, has contributed to the existence of opposite doctrinal interpretations about this aspect of custody. On the one hand, it is argued that it is only applicable in those cases stated in the Civil Code; on the other hand, and from a less restrictive standpoint, it is asserted that judicial custody must be awarded whenever parents or tutor/s cannot provide the needed assistance to the minor, whatever the cause.

The majority doctrine* seems to limit judicial intervention to the cases covered by the Civil Code that could be listed as follows:

Firstly, it would be applicable in the case covered by the second paragraph, first point of article 103 C.C.*, in which temporary measures in the nullity demand are envisaged, when it is determined *"(. . .) Exceptionally, children can be trusted to grandparents, relatives or other people who agree to, and if not possible, to a relevant institution/organism, conferring the exercise of the guardianship that will execute under the judge authority (. . .)"*. Besides, its application would take place when the Judge must pronounce the orders/regulations he considers appropriate in order to keep the minor from danger or prejudice *"(. . .) in the cases there is a change of holder of the custody (. . .)"*, as established in article 158.2 C.c.

However, another school of thought* disagrees with the previous proposal and claims it is not only relevant as regards those specifically described cases related to a specific process, but also as regards any other case in which the judicial authority, due to diverse circumstances, deems appropriate to award custody over the minor. In the author's opinion, the purpose of the legislator is to provide an overall protection of the minor; so it does not appear correct to limit the protective actions only to those cases described in the Civil Code, and this protection/support should be extended to all cases where the minor is in an environment which makes it vulnerable.

The practice of administrative custody will be carried out through familial or residential foster care. But in contrast to the cases when a public entity assumes the ex lege guardianship of the minor, in these particular cases there is no suspension of the inherent exercise of the parental custody or guardianship, so parents or tutor/s remain responsible for their child or ward.

21st July 2004, reader SOLCHAGA, *J.U.R.* 2004, marg. 217648. Also, different authors had influenced this issue; J.I. IGLESIAS (1996), by noting that the expression "(...) for as long as necessary (...)" alludes to the necessary requirement of the temporality of the measure, *Custody, guardianship ex lege and foster care of minors, op. cit.*, p. 137.

* Despite not being explicitly included in the previous wording of the regulation, it was not uncommon for public entities, endorsed on numerous occasions by the judicial organisms, to agree the declaration of abandonment after the exercise of custody or even detect a situation of helplessness after requesting the guardianship by their parents or guardians. For illustrative purpose, *vid.*, Judgment of Territorial Court of Toledo 13 th December 2001, reader DE LA CRUZ, A.C. 2002, marg. 378; Judgment of Territorial Court of Madrid 23 th May 2002, reader HERNÁNDEZ, R., A.C. 2002, marg. 1351; Judgment of Territorial Court of Valencia 30th April 2002, reader MANZANA, M.P., J.U.R. 2002 marg. 185690; Judgment of Territorial Court of Gerona 12 th July 2002, reader FERNÁNDEZ, J.M., A.C. 2002, marg. 1156.

* F.BENITO (1997) "Proceedings against risk situations and abandonment of minors, guardianship by Ministry of law and custdoy in voluntary jurisdiction", *The Law*, pp. 1742 and following; B.GONZALEZ (1997) The voluntary jurisdiction. Doctrine and forms. Pamplona: Aranzadi., p. 823

* That article was repealed by law 42/2003, 21st November (*B.O.E.* nº. 280, on 22nd November 2003), amendment of the Civil Code and the Civil Procedure Law on family relations of grandchildren with grandparents.

* B.VARGAS (1994) *The protection of minors in the legal system: adoption, abandonment, automatic guardianship and minor's custody. Doctrine, jurisprudence and legislation regional and international.* Granada: Comares., p. 66.

5.4. *The exercise of custody and automatic guardianship*

Regarding this aspect of both institutions, the legislator has introduced important developments that required a specific regulation that, on the whole, appears to be a positive development, although it should have been deepened in greater detail as regards certain issues, as we explain below.

5.4.1. Prioritization of familial versus residential foster-care

In relation to the exercise of custody, art. 172 ter C.c. states that it will be carried out through family foster care or in case this is not possible or convenient in the minor's interest, by residential care. In the same sense, art. 11.b O.L. 1/1996 establishes that when maintenance in their family environment is not possible, *"(...) the adoption of family and stable protection measures will be guaranteed, prioritizing, in these cases, family foster care as opposed to institutional (...)"*[*].

In the author's opinion, the formal prioritization of familial vis-à-vis residential foster-care, is extremely positive because it allows the child to integrate into a family instead of a care center, which undoubtedly will bring it significant emotional benefits[*]. However, in homage to the child's supreme interest, the legislator has also established the possibility of prioritizing the choice of residential foster-care when circumstances so dictate[*]. Finally, it should be noted that this method is not only considered subsidiary with respect to familial foster care, but also in relation to other protection measures.

5.4.2. The principle of familial reintegration

One of the issues on which the reform has a special impact is that relating to family reunification. It is in art. 11 O.L. 1/1996 that the guiding principles in this matter are contained, which were already contemplated in the previous wording of the aforementioned precept, among which the supremacy of the best interest of the minor stands out and insofar as it is not incompatible with it, *"(...) maintenance in his family of origin (...)"*[*]. In harmony with this, the 2nd paragraph of art. 172 ter C.c., determines that the supreme interest of the minor will be pursued and priority will also be laid, insofar as it is not contrary to it, on: *"(...) its reintegration into the family itself and that the custody of the brothers is entrusted to the same institution or person so that they remain united (...)"*. In addition, a review is required every six months at least, of the visitation regime and any other form of communication between the minor and his family.

In this regard, a new art. 19 bis in the O.L. 1/1996 entitled 'provisions common to custody and guardianship' has been introduced. In it, the obligation of the public entity to prepare an individualized plan of protection for each child in its custody or guardianship is established in which the objectives, forecast and term of the measures to be adopted will be established *"(...) included, in its case, the family reintegration program (...)"*[*].

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[*] This premise was not contemplated in the Preliminary Draft, so its inclusion in the final drafting of Law 26/2015 clearly determines the legislator's intention of influencing the preference of familiar versus residential care.

[*] In this line of principle, *vid.*, A.NÚÑEZ (2008) "The system in the protection of minors", in *Current aspects of the legal protection of minors*. Navarra: ed. Aranzadi., p. 208, who understands that the modality of familiar foster care versus residential is much more beneficial because it is in the family "(...) where there is greater stimulation, continuity in care, more intense relationships and more individualized and personal treatment, and therefore, it is in this context that the physical and, above all, emotional needs of children are covered in a more effective and healthy way (...) ".

[*] In relation to the criteria defended by the jurisprudence and the scientific doctrine on the assumptions in which it is preferable the constitution of the residential shelter in front of the family, prior to the reform, vid., L. NORIEGA (2010) *Familiar foster care of minors. Its regulation in the Civil Code and the Civil law of Galicia*. Madrid: ed. Colegio Registradores de la Propiedad, pp. 239 and following.

[*] See, E.CORRAL (2001) "The interest of the child and the right of parents not to be separated from their children", *General Law Review*, Nº. 682., pp. 6709 and following.

[*] Not included in the previous wording, but indicated by the scientific and jurisprudential doctrine. *Vid.*, M.A. PÉREZ

Likewise, it is indicated that when a minor presents some type of disability, any support that he has been receiving must be maintained and if not in receipt of support the adoption of those measures that are adequate for his needs must be made. This legislative amendment seems very commendable for two reasons; the first of them, because one of the biggest problems that the previous regulation suffered from was the relative lack of a specific project for each child, which in practice caused the lack of definition of their situation. And the second, because there was no express mention of the family reunification program. This section affects paragraph 2 of the aforementioned precept by stating that *"(...) when the prognosis is derived from the possibility of returning to the family of origin, the public entity will apply the family reintegration program (...)"*. In addition, when the public entity decrees family reunification, it must carry out a subsequent follow-up of support to the minor's family.

Another pending issue in the previous regulatory framework was related to the conditions that the family had to fulfill in order to permit family reunification. In fact, the problem was to determine when the obstacles to such were to be deemed irreversible[*]. In the author's opinion and without pretending to be exhaustive, what could be cited as disqualifying causes for the exercise of parental authority which are extremely serious and difficult to solve include: the physical or psychological abuse inflicted on the child continuously, sexual abuse, serious and irreversible mental illnesses of the parents, the chronic problems of drug dependence or alcoholism...

At present, the law itself, without actually stipulating the cases in which the family reintegration of the abandoned child is feasible, which it would have been desirable to do, has taken an important step when establishing in section 3 of the aforementioned art. 19 O.L. 1/1996 that for a decision to be taken in this sense *"(...) it will be essential that a positive evolution of the same [family] has been verified, objectively sufficient to re- establish the family coexistence, that the links have been maintained, that the purpose of carrying out the parental responsibilities adequately is evident and it should be noted that the return with it must not involve significant risks for the child as confirmed through the corresponding technical report (...)"*.

6. Familial foster care

This is a protective measure for the minor immersed in a familial conflictual situation. When it is not possible for the parents, whatever their circumstances, to exercise correctly their functions, the minor will be separated from its original family environment through an abandonment declaration and will be integrated into another family core. Familial foster care is an essentially private protective measure. People who foster minors temporarily fulfil all the duties related to guardianship; look after the minors, feed them, keep them accompanied and provide them with an overall education. There is in fact a considerable overlap with the content of the duties concerning parental custody described in article 154 C.c., although only as to the personal aspect, since the foster careers do not assume any duties related to the representation or administration of the personal property of the

(1997) "The social deprivation of the child: a general view on the matter of institutions for the protection of minors", in *The lack of social protection of minors and the institutions of protection regulated in the Organic Law for the Protection of Minors.* A Coruña : University of A Coruña., pp. 28-30. H.DÍEZ (2003) "The impossible return of the child who has been fostered to his family of origin?". *Private Law Review*, Nº 7., p. 176; LÓPEZ F., LÓPEZ, B., FUERTES J, SÁNCHEZ J.M. & MERINO J. (1995) *Childhood needs and child protection*). Madrid: Ministry of Social Affairs., p. 58. Likewise, there are numerous jurisprudential pronouncements issued in this sense; among others, Judgment of Territorial Court of Asturias 19th September 2005, reader RODRÍGUEZ-VIGIL, E., *J.U.R.* 2005, marg; Judgment of Territorial Court of Granada 23 th February 2005, reader GALLO, A., *J.U.R.* 2005, marg. 135049

[*] This is what H. DÍEZ, expresses, "The impossible return of the child who has been fostered to his family of origin?", *op. cit.*, pp. 180 and 181, when it considers that although it is true that it is very difficult to determine if the child will be able to return to his family, attention should be paid to the transitory of the situation of homelessness and the causes that caused it.

minor[*].

The Law is specific when it states that the sheltered must be underage minors. In relation to those who could take them in, although the normative framework is not clear enough, it has been concluded that heterosexual couples with kids are preferred, although the Law allows any adult with full ability to become a familial foster-carer. It is worth mentioning that, at present, single people and *more uxorio* couples – whatever their gender and whether they are registered or not in the appropriate Registers[*], are suitable foster-carers.

The most important changes introduced in this measure of protection, refer mainly to the establishment of the foster status in which the rights and obligations of these people, are set out in art. 20 bis O.L. 1/1996 as well as the rights of the foster child, art. 21 bis O.L. 1/1996.

On the other hand, the legislator has reformed the modalities of family foster care; it is preceded by the regulation of urgent family foster care. A maximum duration is laid down for the so-called temporary family foster care before simple family foster care is established and the pre-adoptive family foster care is abolished, which is considered a phase of adoption and is regulated by art. 176 bis C.c.

In another sense, article 173. bis C.c. indicates that familial foster care can take place in the minor's own extended family or in another's, and in this last case may be specialized *"(...) understanding as such the one that takes place in a family in which one of its members has qualification, experience and specific training to perform this function with respect to minors with special needs or circumstances with full availability and therefore receiving the corresponding financial compensation, without assuming in any case a working relationship"*. The specialized reception could be professionalized when, meeting the aforementioned requirements of qualifications, experience and specific training and there is a working relationship of the foster carers with the Public Entity.

As commented, fostering could assume urgent, temporary or permanent modalities according to its objectives[*].

6.1. Urgent familial foster care

This is appropriate, mainly, for children under six years old, Its duration may not exceed six months, while the corresponding protection measure is decided, art. 173 bis.2 a) C.c.

The purpose of this modality of foster-care is twofold: on one hand, the institutionalization of the minor is avoided and on the other hand there is a deadline for an in-depth assessment of the individual, family and social circumstances that have led to the situation of lack of protection. In principle, its practical application is being restricted to children under six years old, although the doctrine advocates its extension to any minor who must be separated from his family urgently. Also, despite the silence of the legislator, it is intended that its execution is carried out by professional foster-carers who must make themselves available to receive a child in any circumstance and time. The maximum duration of this foster-care arrangement will be six months; a period in which

[*] A.J. PÉREZ (1998) *Family law, adopción, foster care, guardianship and other institutions for the protección of minors. Opinions, legal text, case studies, case law and forms*. Valladolid: Lex nova, p. 328.

[*] L.NORIEGA *The familial foster care of minors. Its regulation in the Civil Code and the Galician Civil law, op. cit., pp.71- 84 and following, collects the foundation of scientific doctrine on this issue.*

[*] An analysis on the use of the institution throughout the years, vid., J. FERNÁNDEZ (2008) *Familiar foster care in Spain: an assessment of results: research conducted by the research group on family and childhood (GIFI) of the University of Oviedo, through an agreement with the Ministry of Labour and Social Affairs*. Madrid: Ministry of Labour and Social Affairs.

competent professionals must effect the corresponding diagnosis* in which the feasibility of the child's return to its family environment or the adoption of a more stable protection measure will be decided.

6.2. Temporary familial foster care

The Civil code stipulates that the formalization/execution of the temporary familial foster care will be obligatory in these two cases; when the reintegration of the minor back into their original familial environment is foreseen, or as a temporary measure while a more stable arrangement is adopted, since this measure fulfils the intrinsic role of familial fostering. This therefore highlights its temporary and transitory nature*, as determined by art. 173 bis.2 b) C.c.

In this way, in the first hypothesis temporary familial foster-care will take place when the study of the familial and personal situation of the minor determines that family reunification is possible*. It is considered convenient, whenever possible, that in these cases the familial fostering is authorised within the context of the minor's extended family (grandparents, uncles, aunts.., or any other relative who can assume this role) and to avoid, as much as possible, the assumption of a fostering role by individuals who are not connected to the original family environment*.

In relation to the second hypothesis, its authorisation would proceed in those cases in which the reunification of the minor with its family is not possible, or when it would not be possible to select a more stable protective measure either; due to causes attributable to the minors themselves, or due to the lack of suitable people to assume these roles. It is considered appropriate to integrate the minor into a non-related family only for the strictly necessary time period, in order to avoid the creation of strong links between the minor and their foster-carers, which would make much more difficult the subsequent separation. It is essential that the foster-carers are aware of the temporary and transitory nature of this measure. During the fostering period, the public entity must start the relevant legal proceedings to make possible the adoption or guardianship of the minor.

In a novel way, the legislator establishes that the maximum duration of this type of foster care cannot exceed two years; unless an extension of the measure is advisable in the minor's interest.

6.3. Permanent familial foster care

This is provided for by article 173 bis 2nd c) of C.c. stating that the permanent familial foster care will take place when *"(...) at the end of the period of two years of temporary foster care and this because family reunification is not possible, or directly in cases of minors with special needs or when the circumstances of the minor and his family so require (...)".*

It is understood that this measure will only be resorted to when there is no possibility for the minor to return to his or her original family or when, due to other circumstances, adoption or guardianship are not viable options either, and it is advisable to integrate them in a stable and long-lasting way in the foster family, with no need to create parental links*. Among the causes

* P. AMORÓS & J. PALACIOS (2004) *Familiar foster care*. Madrid: Alianza., p. 198.

* MM HERAS (2002) *The conventional foster care*. Madrid: Montecorvo., p. 227; M.LINACERO (2001) *Legal protection of the minor*. Madrid: Montecorvo., p. 312.

* A.M.PADIAL (2007) "Protección of abandoned children youngster with social exclusion risk", in *Legal studies on the protection of childhood and adolescence*. Valencia: Tirnat lo Blanc., pp. 93-94. H. DÍEZ (2004) *Simple familiar foster care as one of way of exercising the custody of minors*. Madrid: Ministry of Labor and Social Affaris., pp. 460-461.

* R.J. MOLERO (2006) *Foster care in large families: a study of the profile and needs*. Valencia: City Hall of Valencia.

* M. LINACERO (2001) *Legal protection of the minor, op. cit.*, p. 313; F. RODRÍGUEZ (1997) "The foster care of

which gave rise to the development of this measure, it is worth mentioning the presence of physical or psychological problems, including socially maladjusted behaviour… which complicate the possibility of adopting these minors. On the other hand, it is considered appropriate to authorize this measure when there are relatives or people close to the environment of the minor who cannot however adopt them, as they default on the legal requirements for doing so.

The Civil Code, in the mentioned article, decrees that only the relevant public organism will have the power to request the Judge to grant the permanent foster-carers the inherent faculties of guardianship for the execution of their responsibilities; mainly those referring to the representation of the minor and the management of their property.

7. Residential foster care

Residential foster care will take place when the public entity holding the administrative or ex lege guardianship of minors, determines to integrate them into a foster care shelter. Law 26/2015 has introduced important modifications in the regulation of this measure. Art. 21.1 of the O.L. 1/1996 establishes for the first time in a rule of state law, the basic obligations with respect to minors that must be fulfilled in the residential centers; pursuing, fundamentally their protection, integration as well as "*(...) the welfare of the minor, his physical, psychological, social and educational development within the framework of the individualized protection plan defined by the Public Entity (...)*".

On the other hand, one of the most important new features of this legislation is the express declaration of the subsidiarity of the measure of residential care in relation to familial foster care included in art. 21.3 of the O.L. 1/1996. It stipulates that this principle will apply to any minor, but especially to children under six years old. And the Law adds *"(...) Residential foster care for children under three years old will not be granted, except in cases of impossibility, duly verified, of adopting the foster care measure at that time or when this measure does not suit the best interests of the child. This limitation to agree on residential care will also apply to children under six years old in the shortest possible period of time. In any case, and in general, the residential foster care of these minors will not last more than three months (...)"*. In our opinion, it is very praiseworthy that the legislator has set the priority of familial foster care as higher than the residential one and we also consider it of the utmost importance that children under three, except in cases where other measures are impossible, should not enter a center, following the jurisprudential and doctrinal principles governing this issue[*].

Finally, it should be noted that one of the main characteristics of this type of foster care is its temporary nature; since several scientific studies have proved that the confinement of the minor in these types of centers, and the subsequent absence of a familial environment where they can grow

minors. *Aranzadi Civil*, Nº. 3., p.141; P. AMORÓS & J. PALACIOS *Familiar foster care, op. cit.*, p. 84

[*] Judgment of Territorial Court of Santa Cruz de Tenerife 14th July 2003, reader ARAGÓN, P., *J.U.R.* 2003, marg. 24600; Judgment of Territorial Court of Lérida 25th October 2004, reader POCINO, J.M., J.U.R. 2005, marg. 7910; Judgment of Territorial Court of Cuenca 9th December 1995, reader VESTEIRO , J., *A.C.* 1995, marg. 2416; Judgment of Territorial Court of Cantabria 4th February 2003, reader DE LA HOZ , J., *A.C.* 2003, marg. 1345; Judgment of Territorial Court of Castellón 18th October 2004, reader SOLAZ, E., *J.U.R.* 2004, marg. 313931; Judgment of Territorial Court of Zaragoza 29th October 2004, reader NAVARRO, E., *J.U.R.* 2004, marg. 297765; Judgment of Territorial Court of Navarra de 15th February 2005, reader GOYENA, F.J., *J.U.R.* 2005, marg. 85280; Judgment of Territorial Court of Asturias 19th September 2005, reader RODRÍGUEZ-VIGIL, E., *J.U.R.* 2005, marg. 236955; Judgment of Territorial Court of Cantabria 25th April 1997, reader DE LA HOZ, J., *A.C.* 1997, marg. 903; Judgment of Territorial Court of Cádiz 29th July 2004, reader SANABRIA , A.L., *A.C.* 2004, marg. 2020; Judgment of Territorial Court of Salamanca 25th May 1996, reader ANAYA , F., *A.C.* 1996, marg. 942; Judgment of Territorial Court of La Rioja 3rd February 2003, reader MOTA, J.F., *J.U.R.* 2003, marg. 93395; Judgment of Territorial Court of Málaga 16th May 2000, reader ANGITA , J., *J.U.R.* 2000, marg. 264224.

up, translates into a severe lack of emotional bonding, which is critical for their psychological and emotional development[*].

8. Conclusions

The reform of the child protection system has been achieved through the promulgation of two legal frameworks: Law 26/2015, 28th July and Organic Law 8/2015, 22nd July. Both laws have introduced changes in different regulations, including the Civil Code and the Organic Law 1/1996, 15th January. In general terms we can say that the changes brought about are significant; providing greater certainty to this legal regime than existed in the previous legislation. However these reforms do not amount to a real renewal of that system because they do not provide for new protective measures for the minor, with few exceptions. In any case, this legislation was necessary because the passage of time had left outdated or without practical application certain legal institutions contained in previous regulatory frameworks, in addition to suffering from known shortcomings and defects that the promulgation of the new legislation has tried -and in some cases- managed to overcome.

Regarding the situation of a minor ‘at risk’, the current regulatory framework seems to be successful. In particular, the author considers to be very positive for the legal certainty it provides, the regulation of the procedure for defining minors in this category, which was absent from the previous legislative text. However, in our opinion, greater concreteness is required in specifying the precise situations in which a declaration that a minor is at risk may be made; so as to avoid potentially excessive latitude for discretion in choosing whether to make such a statement. There is also a need for the legal stipulation of the measures to be administratively applied in these cases.

It should be noted that one of the most important innovations of the reform is the precise stipulation of the circumstances generating ‘abandonment’. As discussed, it has helped alleviate the uncertainty that existed around this legal institute.

One of the few figures created *ex novo* by the new legislation is the referred to provisional custody for those cases in which it is necessary to provide immediate assistance to a minor and at the same time, allow a reasonable time to pass to study his family situation. As discussed, the author fully agrees with the legislator on the opportunity of its regulation, thus avoiding that in these cases the minor is immediately declared to be in a state of abandonment, without having sufficient elements on which to base such a decision. However, there is no clear reference to the maximum time duration of this measure, which in the writer’s view it would be important to determine to avoid unnecessary lengthening of this mode of custody.

In relation to administrative or voluntary custody, it must be noted that the only change introduced, albeit one of unquestionable significance, is that relating to the provision of a maximum of two years duration, while preserving the other criteria in terms of its formalization and procedure.

Another success of the new regulation is that of having for the first time enunciated in the context of State legislation, the principle of the priority of familial foster care relative to residential care. On the other hand, the importance of the principle of family reunification has also been highlighted and, although the conditions that the family has to fulfill to allow the return of the child to its bosom have not been expressly specified, the legislator has established a series of conditions for this reunification to be effective.

In general, we can affirm that the practical implementation of the normative framework, especially after the reform, in regards to the protection of minors has proved its capability to protect all

[*] A. NÚÑEZ (2008) "The system for the protection of minors, in *Current aspects of the legal protection of minors, op. cit.*, p. 208.

these minors, who, due to diverse circumstances, are in a risky or abandonment situation caused by the non-fulfilment or faulty fulfillment of the duties related to parental custody or guardianship. However, this process also reveals, in the opinion of the author, certain problems that will be briefly exposed.

In the first place, the scarcity of administrative human and financial resources generates a number of problems in the implementation of the various legal protective measures for the minor. So after the 'at risk' declaration it is not possible to develop and execute a protocol which prevents the minor from leaving their environment. Besides, it is worth pointing out that the practice of administrative custody is usually executed by transferring the minor into a residential care-home and not to a family, thus leaving unfulfilled the legal principle which gives priority to the provision of familial foster care instead of the residential one.

On the other hand, it is worth mentioning the system is excessively strict and severe. It is the public authority which determines the choice of the protective measures and of the people who will foster the minor. It is not possible therefore to have the constitution of a familial foster care managed by the biological parents without the intervention of the public entity; although it is true that these parents may propose to the public institution that they act as the potential fosters for their children, although their proposal is not binding.

One of the main requirements of the protection of minors is to define their situation as quickly as possible. Thus, the legislator points out, it is essential that the public body, after studying the personal and familial circumstances of minors entering the protection system, makes a diagnosis in which it is determined whether family reunification is possible or whether more permanent measures must be resorted to, such as adoption or guardianship. The reform of the regulations has had a specific impact on this aspect, establishing the legal criteria to determine when family re-immersion is possible.

Without expressly establishing the circumstances that should promote family reunification, which must be analyzed in each specific case, the legislator has established the generic criteria that must meet for its operation. Thus it is required that the family has been rehabilitated according to objective criteria, that the family links have been maintained, that the family is able to look after the minor adequately and that it is found that the return does not involve significant risks to the minor through the corresponding technical report. In the cases in which the minor is in familial foster care, the time spent with his foster family and the links established with them must also be taken into account.

Finally, it is worth pointing out a problem that unfortunately occurs in our country. The author refers to the significant current difficulties encountered when adopting an underage minor (the greater this difficulty the younger the minor is), although there is a large number of people who want to adopt children. We can mention some reasons to explain this situation; among them the very complicated process for obtaining the definitive privation of parental custody – an essential requirement for the adoption of minors – as regards those biological parents who have demonstrably not fulfilled their parental duties and have provoked severe physical and emotional harm to their children and this based on their right to keep their children with them. It is still assumed, on some occasions, that children are their parents' property.

Prior to the reform, another of the causes that had an impact on this problem was the excessive duration of the protection measures. As we have stated, the legislator has chosen to establish maximum periods of duration for the measures, to avoid the prolongation of situations that are *ipso facto* considered temporary and provisional.

However, the author cannot ignore the fact that the establishment of the legal criteria for family reunification, especially those related to familial foster care exposed above, legally allow a situation

that occurred in practice prior to the enactment of Law 26/2015 and that was the following one. In the cases in which the public entity decided upon the termination of the familial foster care measure, the foster-carers would often request authorization from the relevant Court not to give effect to the decision to terminate the foster-care arrangement; referring to the strong bonds between them and the minor and the harm the resulting separation would cause. The Court would usually rule in their favour, based on the importance of protecting: "the security of the minors within their foster families." Thus it would impede the possibility that the minor would be adopted or returned to its original family; and this without taking into account that the foster care measure can only last until the minor reaches its legal age, since it is excluded from the protective system after that time.

Currently, it is the law itself that establishes as a priority the existence of affective bonds with the caregivers and their environment, by prioritizing the maintenance of familial foster care to the detriment of family reunification.

In spite of the problems previously exposed, the author acknowledges that since the present legislation has come into force, the protection of underage minors with social or familial disabilities has been enhanced; permitting the separation of the minor from its family through an abandonment declaration should the minor suffer from any physical, psychological or emotional damage or prejudice. Furthermore, a more appropriate regulation of the different protective measures has contributed to a greater degree of efficiency when putting them into practice. One of the greatest achievements of the legislator has been the establishment of the legal priorities for officially recognizing familial foster care as opposed to residential care; giving priority to the minor's right to live in a familial environment by following the ruling legal procedures in our neighboring countries.

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