



Les nouveaux défis du droit de la famille post-Covid-19

Nuevos desafíos en derecho de familia post-Covid-19

Nuove sfide nel diritto di famiglia post-Covid-19

Les nouveaux défis du droit de la famille post-Covid-19 À travers le monde, la pandémie de Covid-19 a bouleversé la vie quotidienne, les modes relationnels, la situation économique et le travail. Elle a également eu des répercussions sur le droit de la famille et les aspects connexes. Nous sommes actuellement confrontés aux défis de l'après-Covid-19.

DAVIDE PIAZZONI

1.- Judicial system: remote participation in judicial proceedings, hearings and meetings. Whats App notifications; Safety and efficiency. Are these changes going to be permanent ?

- * How does your judicial system reacts to the restrictions of the Pandemia ?**
- * How does it affect to your proceedings and hearings? special view about delays**
- * What are the means of communications with courts in family matters during this time?**
- * Do you have Whats App Notifications? Also by E-Mails ?**

The judicial system did not react very well. At the very beginning of the lockdown (March 9th-May 11th), all the civil procedures and the related due dates for filing papers in Court were suspended, with a few exceptions, in particular for the family law matters among others. After that, we entered a peculiar phase: the judicial system resumed, but with a few limitations.

The Italian Government and Justice Minister chose to foster the IT system which was already in force: remote hearings, e-mail notifications, and so on. This might also be good in some ways.

For example: in 2015, our Digital Civil Trial System (PCT – Processo Civile Telematico) started at the Trial Courts and the Courts of Appeal (but not the Supreme Court) and it has now seen an expansion and an acceleration. Indeed, on October 30th 2020, also the Supreme Court started using the PCT, and it is now mandatory in order to file every civil claim, no matter the Court of jurisdiction. Nevertheless, a few Courts are still excluded (Judges of Peace and Juvenile Court). The system has also improved both for the papers filing and the hearing notifications. Certified e-mail (PEC) notifications are possible since 2010.

Remote Court hearings (through Skype/Zoom/MS Teams) are highly recommended, and going to Court in person should be residual. In spite of that, there is a big gap between virtuous Courts (e.g.: Turin), where every Judge can use a personal computer and a webcam, and other Courts, where this is not the case. In these Courts, it is now a common routine to celebrate hearings only by filing paperwork: 5 days before the hearing, the Parties can exchange brief notes, and file them through the PCT system; 3 days before the hearing, they can exchange responses through the PCT system. On the date of the hearing, no one goes to Court, and the Judge usually provides his/her decision a few days/weeks later.

Remote hearings suffer *de facto* limitations due to the fact that sometimes the Parties have to be personally heard (which is mandatory in most of the family law matters) and/or when there is a deposition. To some extent, in such cases the Judges tend to grant “in person” hearings.

Finally, as per the serving of summons, there is a strictly formal discipline in Italy. Standard e-mail and/or WhatsApp notifications are invalid. The lawyers can serve the Counterpart a summons through PEC (if, and only if, also the Counterpart has a certified e-mail); or via bailiff (infinite queues); or via postal services (hoping that the mailman

does not fail to understand the strict discipline: the Supreme Court has recently sanctioned Poste Italiane on that matter).

In May and in June 2020, the Italian Government stated that “we are not going to give away what we have done during the lockdown”. It is still too early to really understand whether the changes are going to be permanent or not. Lawyers do not agree either: some of them think that the remote or written hearings could be a good solution in most cases (but we need to modify our Civil Procedure Code, to some extent; it has to be said that some hearings could be eliminated, because are useless). Nonetheless, the experience of the “special procedure” provided for corporations (2003-2009) seems to indicate that the Italian lawyers and Judges are not ready for a totally written process. The majority thinks that serving summons via PEC should be extended.

Everyone is asking him/herself why some Civil Courts are still excluded from the Digital Process. On the other hand, our criminal law Colleagues firmly oppose the idea of a “Criminal Digital Process” or remote hearings in criminal law matters.

GIULIA FACCHINI

2.- ADR as an efficient tool for family law.

a. How does react the mediation system ? Remote platforms like: Zoom are legal ?

A. MANDATORY AND OPTIONAL MEDIATION:

First of all, in the Italian Justice System there are two kinds of mediation. The mandatory mediation is a preliminary condition for filing claims in the following lawsuits:

- Community property
- Real estate rights
- Division
- Inheritance
- Prenup
- Lease
- Right of use
- Business lease
- Damage compensation (due to vehicles and vessels, medical responsibility, defamation)
- Insurance, banking, and financial contracts

And the optional mediation.

The mandatory mediation as a preliminary condition is not a requirement for filing a divorce or a legal separation, or any other family matter. That is because in Italy, in any family proceeding, the Public Prosecutor is present as the person who guarantees the best interest of the children involved.

Anyway, the administrative order number 28/2020 (that is part of the emergency legislation promulgated during the pandemic in February 2020) provided that, just upon

the parties' agreement, the mediation also in family matters can be held online through video conference, eliminating the previous requirement for the original parties' signature. In conclusion, the online mediation is possible if there is an agreement between the parties, but anyway it is not very common in family law matters.

b. The preference among clients and lawyers for mediation has increased ?

Yes. Given the justice system slowness, the parties prefer the mediation process. In particular now that the slowness has increased both for the online and in person hearings. For example, in Turin, in a legal separation proceeding, you have to wait for 7/9 months to have a hearing in Court. I must tell you that in person hearings are mandatory in Turin in case there are children involved.

c. In your jurisdiction do you have arbitration cases in family law matters ? In which subjects?

No, in Italy we do not have any arbitration case in family law matters because the Public Prosecutor has to be present as the person who guarantees the best interest of the children involved and he/she cannot participate in a private arbitration.

However, in Italy we have another way to reach an agreement in a family law matter without going through the Civil Court: it is called "Negoziazione assistita", is similar to the "Procédure participative" as it is called in France.

In this kind of proceeding, all the parties have to retain an attorney and agree to a full discovery of his/her own personal and financial conditions, working in good faith.

The signed agreement, similar to what is called "acte d'avocat" in France, must be sent to the Public Prosecutor's Office where the Court of jurisdiction is.

The Public Prosecutor's Office verifies whether the agreement satisfies all the family law provisions in the best interest of the children involved (legal and physical custody, child support).

If the Public Prosecutor's Office finds that a provision does not respond to the best interest of the children involved, it will file the suit to the Civil Court where a hearing with the parties is scheduled in case they refuse to comply with the modified agreement.

This kind of proceeding has increased in particular after the Spring lockdown, and we can expect another increasing in the future.

It is very important to affirm that this kind of proceeding values the lawyers' mediation skills that is going to be more and more important.

d. Do you think that ADR system is a good alternative to court in some cases ? in which cases?

I should say that in Italy, in front of 100 legal separations out of 85 end up in agreements. This means that the lawyers already do an important mediation work before filing the papers in Court.

Personally, I believe in the “negoziiazione assistita” as a new useful ADR tool. I also wrote many books on this topic, and I trained my Colleagues.

I think that this ADR tool is really helpful to help the parties to reach a faster and tailored agreement in any family law matter. Clearly, the ADR works only when the power between the parties is balanced, and it does not work in case of domestic violence. We should also remember that the 2011 Istanbul Convention at the article 48 provides that «Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention».

DAVIDE PIAZZONI

3.- Old and new problems: economic crisis, communications and alimony renegotiations, divorce, intra familiar violence and mental health.

Briefly:

*** What happened during this Covid-19 crisis with communication between parents-child? Was it interrupted or suspended ? How does react your country legislation to these problems ? New laws ? The same legislation but in different circumstances ?**

It has been a huge problem, that every Court solved on a case-to-case basis, using different tools. We can count 11 published decisions on this matter, during the lockdown; every decision took into consideration a different situation, so we can not state that a common jurisprudence formed.

The principle that was intact and intangible was that the physical custody had to be shared between parents, because it is too important for the children to stay in touch with both parents. The Italian Government never obstructed this principle (and it could not have done that because it would have been against the International Conventions, the European Law, and our Constitution). On the contrary: the FAQs published in the government website during the lockdown stated expressly that all the transfers from one house to the other were allowed in order to guarantee the children their right to stay with both parents. However, the Courts provided differently sentences: some of them gave more importance to the balance between opposed interests; some simply stated that, given the transfer restrictions, also the physical custody was suspended (that was the case for some

protected children, living in a structure far from their parents; but also for a case of exclusive legal and physical custody).

Even though the main lockdown has ended, these decisions stand. This is only to clarify how our Judges argue, but the decisions do not have the dignity of a “precedent”.

*** Crisis and alimony: renegotiations. A lot of new processes ? Solutions in time of crisis...**

At this very moment, we have not been flooded by renegotiation procedures. Nonetheless, it has to be said that our Judges tend to exclude renegotiations of previous decisions, in particular if the crisis is temporary. The temporary crisis is strictly linked to the justice system slowness: it takes from 6 months to 1 year to conclude a Trial Court proceeding. On the other hand, it does not look like that the separation or divorce procedures have increased. This may be related to the economic crisis (one tends to suffer more burdens, when he/she does not have the means to fly away) or to the re-discover of family liens.

*** How was the situation of mental health in families, specially between children..**

The lockdown has strongly influenced behavior patterns. Parents go from hysterical protection, to the most large “laissez-faire”. Children have lost or suspended most of their social skills. We have 2 or 3 generations of children and young boys and girls who simply did not have any relationship during the lockdown. That is dramatic, considering that social relationships are a fundamental part of growing up. Now kids are better, given the limited shutdown of schools. However, teenagers are stuck between the will to be together (also physically and sexually) and the fear of contagion.

The long period school shutdown (from March to September; and it’s not over yet) created loneliness, isolation, and educational problems, which have affected mostly the weakest:

- low and middle class families, that do not have 2 or more PCs at home, faced the dramatic choice of parents’ smart-working against children school lessons;
- psychologically weak children and teenagers have suffered the lockdown. We do not have any statistic yet, but the general impression is that para-depressive syndromes are going to increase.

The lockdown has created huge problems in violent family contexts: being locked with an abusive person is not easy.

Moreover, the first lockdown and now the “limited lockdown” arise problems that concern also the elders: grandparents have rarefied visits to grandchildren; and elders are often “buried at home”.

GIULIA FACCHINI

4.- Client-lawyer relations: does the use of technology make lawyers more accessible and relations more streamlined ?

a. How was your expertise in this subject. More proximity or less contact in your relationships with clients.

During the lockdown I had to call or video call many clients via mobile phone because my office was shutdown. Actually, the fact that they were able to speak with me directly made them really happy. Instead, I wasn't that happy, because I could not benefit from my secretary and assistants collaboration, so I ended up being available 24/7. The clients most affected from their familiar crisis were really worried and distressed from the hit of the pandemic, so for them to have the lawyer easily accessible was very satisfying.

b. How it affects to spontaneity and fluency.

Even after the end of the lockdown, (in Italy, in May 2020), many clients asked for or accepted an online contact, also because it is easier and avoids the time loss due to the commuting. In my opinion, I think it is still important to meet the clients in person, at least for the first appointment. This allows me to better know the client, also in his/her non-verbal language. For the follow up appointments, I can meet them in person or online, depending both on their exigencies and on the work that needs to be done. In my opinion, the client is spontaneous also during the online communication.

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