

NATIONAL REPORT: ITALY

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A. GENERAL

1. Having regard to the concept of parental responsibilities as defined by the Council of Europe (see above), explain the concept or concepts used in your national legal system.

In the Italian legal system, there is no agreed definition of the term 'parental responsibility'. The Italian legislature uses the expression 'parental authority' (Title IX, Book 1, Italian CC). The concept of 'parental responsibility,' joined with 'authority,' implies the totality of rights and duties exercised exclusively in the interests of the child by the parents.

It must be remembered that the Italian concept of parental responsibility includes both authority (the totality of rights and duties) and responsibility (the attribution of those rights and duties); the terms 'authority' and 'responsibility' are used as synonyms.

Parental authority is conferred in order to ensure the moral and material well-being of the child; the exercise of authority is one of the duties used to comply with the rest of the parental duties.

The concept of parental authority has not been defined by the legislature, nor has its content has been wholly specified. Italian legal literature has developed parental authority's characteristics and determined its limits.

Generally, parental authority is a civil law institution that includes rights and duties that are exercised exclusively in the interests of the child. Legal literature distinguishes the internal aspects of authority (concerning the relationship of parents and child) from the external ones (concerning the relationship of parents and third parties), and personal aspects (concerning the care and the growth of the child) from those of property (concerning the management of minor's properties).¹

If the parents are deceased or for any other reason cannot exercise the authority, the legal authority of the child's place of residence will appoint a guardian for the child. The institution of guardianship, aiming to protect the child, has a function

¹ See P. PERLINGIERI and P. FEMIA, in: P. PERLINGIERI, *Manuale di diritto civile*, Naples, 2000, p. 119.

similar to but not identical with parental authority; the content of guardianship is more limited than that of parental authority.²

Finally, the Italian system provides (though often in an incomplete and incoherent way) for a 'special curator' who is entitled to represent the minor in all legal proceedings affecting her or his interests and if there are conflicts of interest between the child and the child's parent(s) or guardian(s) charged with the exercise of the parental responsibilities (Art. 360 § 6 Italian CC).³

The main function of 'parental responsibilities' in the Italian legal system falls within the definition provided by the Council of Europe.

2. Explain whether your national concept or concepts encompass

(a) Care and protection

'Parental responsibilities' includes the power to make all decisions necessary for the care and the moral and material assistance of the child. In fact, Art. 30 § 1 Italian Constitution denotes the right and duty of the parents to support, educate and provide moral guidance to their children; Art. 147 Italian CC states that in doing this, the child's abilities, natural inclinations and ambitions should be taken into consideration. Therefore, parents must provide for the physical and mental growth of their child, protect and support him or her, and also supervise and form the

² The guardian must provide for the education and moral guidance of the child, but not for the child's support. In addition, the guardian has the power to represent the child and manage the child's properties; however, the guardian's actions are limited to the more pertinent forms of legal supervision and control due to the lack of a parent-child relationship. Regarding the education of the minor and the management of his properties: the guardian must follow the instructions set by the guardianship judge following the guardian's suggestions (Art. 371 Italian CC), the guardian must inventory the minor's properties, (Art. 362 *et seq* Italian CC), the authorisation of the guardianship judge is needed for extraordinary acts of disposition of the minor's property (Art. 374 Italian CC) and the court's authorisation is needed for the more burdensome acts. Finally, if the child's interests should conflict with the guardian's, taking the opinion of the guardianship judge into consideration a substitute guardian will be appointed to represent the minor (Art. 360 Italian CC). If there is a conflict between the substitute guardian and the minor as well, the guardianship judge will appoint a special curator (Art. 360 Italian CC). The guardianship can be qualified as a civil law institution characterised by obligation and gratuity, except for adequate compensation for the guardian, taking into account the amount of the properties and the difficulties relating to its management (Art. 379 Italian CC). See P. PERLINGIERI and P. FEMIA, in: P. PERLINGIERI, *Manuale di diritto civile*, Naples 2000, p. 121.

³ The Italian legal system does not explicitly provide for a special curator acting as the minor's lawyer in all legal proceedings affecting his interests (for example, those concerning the termination or modification of the parental responsibilities pursuant to Art. 330 and 333 Italian CC), nor can provisions of that kind (for example, adoption proceedings) be de facto implemented where they exist due to the absence of a specific, free, court provided, procedural defence. In this respect, the Supreme Court has stated (Supreme Court, 30.01.2002, No. 1, *Giust. Civ.*, 2002, I, p. 1467, commented by A.G. CIANCI) that the incompleteness of the legislation is in principle compatible with the *New York Convention on the rights of child* of 20.11.1989 (ratified and implemented in Italy by the Law of 27.03.1991, No. 176), according to which the child must be party to all proceedings which may have implication for his or her life and personal development.

child, develop his or her personality and promote the child's psychological and physical well-being.

A duty to support the child is one of the obligations of material assistance. This implies satisfying the child's ordinary needs, in line with the material conditions of the family. These obligations of support are not limited to just the basic needs of the minor, but also to any other expense necessary for the development of the child.

(b) Maintenance of personal relationships

Material assistance is joined to a moral one: parental responsibilities imply the obligation to maintain an intense and constant personal relationship with the minor, to spend time with him or her, and to provide care and attention, always with respect to the child's moral and material needs. The Italian legal system normally implies that living with the minor is an attribution of the parental responsibilities.⁴ However, the parent not living with the child still has the right and duty to maintain a personal relationship with the child (so-called visiting right, see Q 43-48). The non-compliance of this right and duty can effect the limitation or termination of parental responsibilities, and may even constitute criminal behaviour as contemplated by Art. 570 Italian Criminal Code ('Violation of the duty of supporting the family').

Moreover, taking care of the moral and material interests of the child, the fundamental task conferred on the parents, can only be realised if there is close and daily contact with the child. The obligation to maintain a personal relationship with the minor 'naturally' implies 'loving the child' and showing him or her affection, even if the parents cannot be obligated to do so.

(c) Provision of education

The obligations of moral assistance include educating the child and providing moral guidance. The parent's educational obligation and responsibility is linked to that of the State (Art. 34 Italian Constitution), which has the duty to provide institutions that enable parents to fulfil their obligations and the duty to supervise the parent's compliance with their obligations. The legislature, without indicating an aim, has specified that parents must take the child's abilities, natural inclinations and ambitions into account.

Potential conflicts that arise between the child's freedoms (religious, ideological, sexual, freedom *etc*) and the parent's rights and duties must be resolved by balancing the opposing needs, respecting the capacity of the child's judgment.⁵

⁴ The link between living together and parental responsibilities is evidenced in Art. 317 *bis*, which confers authority over a child born to an unmarried mother onto the parent with whom the child lives. However, it is also possible for a child and the parent not to live together (such as with joint custody, when one parent, separated or divorced and not living with the child continues to hold parental responsibility. See, among others, Supreme Court, 17.09.1992, No. 10659, *Mass. Giust. Civ.*, 1992, p. 1378, which grants custody to the parents but decides that the child should live with his grandparents). In our legal system there is one-way relationship between living together and parental responsibilities in the sense that although living together is always linked with the exercise of the parental responsibilities, the exercise of the parental responsibilities is not linked with living together.

⁵ See M. SESTA, *Diritto di famiglia*, Padua 2003, p. 383.

Case law recognises the parent's duty to respect their child's choices. In particular, parents have been denied the right to choose their child's religion; a 17 year old teenager has been recognised as having the capacity to choose his own religious creed.⁶ Moreover, it has been stated that parental responsibilities cannot include the right to oppose the cultural-ideological choices of the child, but that the responsibilities must instead be exercised with full respect of the child's fundamental freedoms and inviolable rights.⁷ Finally, the Supreme Court has established that using violence to educate children is unlawful.⁸ Such decisions point out that a child is no longer only an object to protect, but also a holder of rights.

(d) Legal representation

In order to attend to all the interests of the child, parents exercising parental responsibilities have the right and duty to represent their children and to manage their property (Art. 320 Italian CC).

Legal representation aims at allowing the child to participate in his or her own legal life; this includes acts regarding both personal and property issues. However, legal representation excludes 'very personal acts' (for example, the recognition of a natural child; the testament). Still, even if the child is incapable of acting, he or she can validly perform certain acts (*e.g.* a child can exercise the rights and duties deriving from an employment contract, pursuant to Art. 2 § 2 Italian CC). Representation also includes the power to act to protect the minor's personal rights, such as in a civil action for compensating damages resulting from a violation of the minor's rights, or for status actions not implicating conflicts of interest with the minor. Italy's legal system has developed a general principle that grants a child autonomy over his or her person if the child has the requisite power of judgment or is mature enough to make decisions with the necessary awareness.⁹ If the child does not have the requisite maturity, the legislation for the minor's representation contemplates property management (see Q 8f.). These acts grant parents the right to represent an unborn as well as a born child (Art. 462 and art. 784 Italian CC).

(e) Determination of residence

Parental authority implies the power to determine the minor's residence. Because a child's residence coincides with the residence of the family in Italy's legal system,

⁶ The Family Proceedings Court of Genoa, 09.02.1959, *Giur. Cost.* 1959, p. 1278. With regard to religious education, a specific provision has been issued (Law 18.06.1986, No. 281 'capacity of choosing the type of the school to be attending and of enrolment for high schools') that expressly established that high school students (and in general students older than 14 years) have the right to choose whether to attend religious lessons and also to choose other optional classes and any other cultural or educational activity (Art. 1).

⁷ The Family Proceedings Court of Bologna 13.05.1972, *Giur. it.*, 1974, I, 2, c. 329, with comments by M.E. POGGI.

⁸ Supreme Court, 16.05.1996, *Dir. Fam. Pers.*, 1997, p. 509, with comments by D. BONAMORE.

⁹ Concerning the general freedom of a child that is capable of judgment in the exercise of the non-familial rights and, more generally, the conduct of personal affairs, see, among others, P. STANZIONE, *Capacità e minore età nella problematica della persona umana*, Camerino: Naples, 1975; ID., *Diritti fondamentali dei minori e potestà dei genitori*, in *Rass. Dir. Civ.*, 1980, p. 425; F. GIARDINA, headword *Minore*, in *Enc. Giur. Treccani*, XX, Rome 1990, p. 1.

the parental responsibilities imply that the parents will live with the minor. Art. 318 Italian CC states the child has a duty not to leave the parent's home, thus affirming the parental power to exercise parental responsibilities in the return of the child through physical coercion and, if necessary, the intervention of the guardianship judge.

(f) Administration of property

Parental responsibilities include the right and duty to represent the child and to manage her or his property (Art. 320 Italian CC). If parental responsibilities are jointly exercised, each parent can individually make ordinary acts of disposition of the minor's property; however, extraordinary acts of disposition (alienation, the establishment of pledges or mortgages; acceptance or renouncement of inheritances, legacy and donation; dissolution of common ownerships, contract loans, initiation of court proceedings regarding those acts, reference to an arbitrator, settlements) can only be exercised out of necessity or if they are obviously beneficial for the child and presuppose the authorisation of the guardianship judge (Art. 320 § 3 Italian CC). There must also be an authorisation to collect principal, and the judge will determine how it shall be invested (Art. 320 § 4 Italian CC). In addition, the continual running of a commercial enterprise presupposes the authorisation of the court, given after prior consultation with the guardianship judge (Art. 320 § 5 Italian CC).

If there is a conflict of interests among the children, or among the children and parent(s) exercising the parental responsibilities, involving property, the guardianship judge has the power to appoint a special curator for the children (Art. 320 § 6 Italian CC). In order to avoid possible conflicts of interest, parents are prohibited from acquiring, even through an intermediary, goods or rights of the child that are objects of their parental authority. Acts performed in violation of this rule can be annulled at the request of the parents exercising the authority, or on the request of the child, his heirs or successors in interest (Art. 322 Italian CC); the action is proscribed until five years after the child reaches the age of consent.

Parents have the legal usufruct of their child's property for the support of the family and the education and moral guidance of the child (Art. 324 Italian CC).

3. In what circumstances (e.g. child reaching the majority or marrying) do parental responsibilities automatically come to an end?

Parental responsibilities expire when the child reaches the age of consent (18 years), or with emancipation (Art. 316 Italian CC). The only existing form of emancipation is the legal one: children older than 16 who marry with the authorisation of the Court (Art. 390 Italian CC). The emancipated minor has a partial capacity to act: with respect to his or her legal actions, he is no longer substituted by the parents (or by the guardian) but a curator assists him or her with extraordinary acts of disposition. This curator, differing from the guardian, has neither the power of representation nor the management of the minor.

Parental responsibilities expire through: death of the child or the parent, declaration of adoptability, legal termination of the parental responsibilities, or

declaration of the lack of biological parentage (a disclaimer of paternity or impugnation of the acknowledgment of a natural child).

The termination of parental responsibilities when the child attains majority does not signal an end to all parental obligations. The duty to support the child persists until the child is economically independent, unless the child refuses to work without just cause. Italian case law¹⁰ has consistently upheld this principle. Judges will equate the child's economic independency with negligent behaviour if the child fails or refuses to earn his or her own income. A parent's duty to support their child ends if the child marries; the obligation of the child's partner to support him or her prevails over the obligation of the parents.

Neither does the obligation to provide moral guidance to the child automatically expire once the child has reached the age of consent; the child has the right to finish her or his studies, allowing the child to acquire the necessary skills to find a job and become economically independent.

4. What is the current source of law for parental responsibilities?

Current sources of law for parental responsibilities can be found in the Italian Constitution (Art. 30 § 1), the Italian Civil Code, (Art. 417, 155, 315 *et seq* and 2048), Italian Divorce Law (Art. 6 Law of 1 December 1970, No. 898, as modified by the Law of 6 March 1987, No. 74) and Italian Adoption Law (Law of 4 May 1983, No. 184, as modified by the Law of 28 March 2001, No. 149).

5. Give a brief history of the main developments of the law concerning parental responsibilities.

The 1965 Code was based on the concept of patriarchy (adultery by a wife was criminal), as was the family. Although both parents had the duty to educate, provide moral guidance and support the child, only the father – explicitly defined as 'head of the family' – exercised the parental responsibilities (so called 'parental authority'); the mother could exercise parental responsibilities only after the father died. External interferences with the family were not tolerated. Fathers had the power to remove a 'rebellious' son from the family, providing him only with the support strictly necessary, or, applying to the court, placing him in a reformatory. It was not possible for children born to an unmarried mother to later be recognised by anyone she married. The guardianship of orphans was entrusted to a person appointed by the remaining parent, or if there was no remaining parent, by the paternal grandfather.

These provisions influenced the 1942 code, but state interference became stronger within the family's ambit. In particular, parents were obligated to educate and provide moral guidance to their children that 'conformed to the moral principles of fascism and its proper idea of a nation.' During that period, two new judicial

¹⁰ Among the most recent Case-Law, see Supreme Court, 03.04.2002, No. 4765, in *Famiglia*, 2003, p.195, with comments by A. QUADRUCCHI; Supreme Court 16.02.2001, No. 2289, in *Fam. dir.*, 2001, p. 275, with comments by W. FINELLI. Among the more previous ones see Supreme Court 07.11.1981, No. 5874, *Giust. civ.*, 1981, I, p. 2837.

institutions were installed: the Family Proceeding Court and the guardianship judge.

The exclusive authority and discipline of the husband-father remained unchanged for many years, even after the robust Italian Constitution in 1948 established the legal and moral equality of the spouses (Art. 3 e 29 § 2), as well as the right and duty of the parents to support, educate and provide the children with moral guidance, even if they were born outside the marriage (Art. 30 § 1). Despite the elimination of reference to fascist nationalism, until the criminal nature of adultery was repealed in 1968, neither Italy's cultural background nor its legal system changed. Changes became progressively more numerous and important following this: in 1970 divorce was introduced, in 1975 the age of consent was lowered to 18 years old (instead of 21) and, above all, the whole of family law was reformed (Law of 19 May 1975, No. 151). Although it is not possible to list all innovations the reform introduced, the modification of Art. 147 stands out. It imposed the parental duty to support, provide moral guidance and educate the child 'taking into account the capacities, natural inclinations and aspirations of the child.' Moreover, the innovation contained in Art. 315 Italian CC dealing with the duty of the children is emblematic because it eliminated the obligation to 'honour' the parents, leaving only the duty to respect them. In addition, the discipline of adoption, introduced in 1983 and modified in 2001 by providing the 'right of the child to grow up within his own family', shows the final and radical change of perspective: from the protected child who was expected to submit to and obey his or her parents, to the minor who is a holder of rights and demands respect.¹¹ However, an opposing tendency reveals that although the entire discipline supposedly consistently focuses on the interests of the child, the system is still *de facto* based on the traditional vision; consequently the child continues to passively be seen as an 'incidental addressee of a series of decisions taken by others'.¹² It can therefore be observed that an effective change of perspective can't be achieved by legislative reforms alone, but must also be accompanied by conscious jurisprudential practise and a major collaboration of the experts in the field of psychological pedagogy.¹³

Still, from this slow evolution, until now *in fieri*, to which the international Conventions for the protection of the minor has contributed (e.g. the Convention of New York of 20 November 1980 ratified and implemented in Italy with the Law of 27 May, No. 176), there has emerged a 'flexible' definition of parental responsibilities, whose content and rigour decrease in accordance with the increasing age of the child and his concrete capacity of judgment.

6. Are there any recent proposals for reform in this area?

Yes, regarding the separation of spouses and the custody of the child; however, these proposals are not substantial but only limited to formal modifications. Some changes contain explicit definitions of parental responsibilities but these do not add significantly to the practical concepts the legal system has so far developed (e.g. the

¹¹ Among the numerous contributions see M. E. QUADRATO, *Il minore tra interesse e diritti: una lettura comparata*, Bari 1995, p. 70.

¹² P. CENDON and L. GAUDINO, *I problemi generali*, in: AA.VV., *I bambini e i loro diritti* by P. CENDON, Bologna, 1991, p. 25.

¹³ AA.VV., *La tutela del minore tra norme, psicologia ed etica* by A. MESTITZ, Milan, 1997.

proposal of the law of 9 May 1996, No. 173, on the initiative of the deputies Calzolaio and others).

Projects of reform under discussion mainly concern juvenile justice; a very serious and complex problem concerning the excessive splitting of competences among three different judiciary bodies in our legal system (the Family Proceedings Courts, the ordinary courts, the Guardianship Judge). In particular the proposals of the Law of 8 March 2002, No. 2501 and of the Law of 14 March 2002, No. 2517, after having been approved by the Council of Ministers and forwarded to the Legal Commission of the Chamber, have been unified by proposal No. 2517 with the significant title 'Urgent Measures and delegation to the Government in the field of family law and the law of the minors,' approved with amendments on 8 August 2003.¹⁴

B. THE CONTENTS OF PARENTAL RESPONSIBILITIES

7. Describe what the contents of parental responsibilities are according to your national law including case law

Our legislation has not established the organic or detailed content of parental responsibilities. Taking into account not only the normative facts but also the historical, social, and cultural evolution, the concepts the legal literature elaborates upon confirm that parental responsibility is composed of a number of rights and duties consisting of moral and material support of the minor. More specifically: the support, the moral guidance and education, the protection and care, the protection of the child's health, security and morality; in the promotion of the child's psychological and physical well-being, custody and formation, and the representation and management of his properties. The duties of the parents and the parental authority can be distinguished because it is possible that they will not coincide (*e.g.* in case of termination of the parental authority, the duty to support the child does not expire).

The content of the parental responsibilities is not positively considered in case law (what parents must do is not established) but is rather considered in the negative (it is stated what parents do not have to do). Most judicial proceedings in this field concern (the more serious) cases of omission or violation of the duties related to the parental authority, abuse of the connected rights, or maltreatments, behaviours or decisions that are prejudicial to the children. These behaviours are sanctioned by the limitation or termination of parental authority (see Q 51). Judicial decisions

¹⁴ For a critical analysis of the attempts of reform see *e.g.* L. ROSSI CARLEO, *La riforma della giustizia minorile: spunti di discussione*, in: *Nuova giur. civ. comm.*, pamphlet No. 3, 2004, p. 149; P. VERCELLONE, 'Profili di riforma della magistratura per i minorenni. La novità sta nel tornare a tanti anni indietro', *Giur. it.*, 2002, p. 1339; M. DOGLIOTTI, 'La giustizia minorile e familiare ad una scelta', *Fam. dir.*, 2003, p. 285 and following; A. PROTO PISANI, 'Ancora sul processo e sul giudice minorile (linee di una possibile legge delega di riforma del processo minorile)', *Foro it.*, 2003, V, c.219; P. G. ACQUAVIVA, 'Un passo indietro nella tutela dei minori', *Fam. dir.*, 2002, p. 327 ; G. DOSI, 'Oltre il tribunale per i minorenni verso un nuovo modello di giustizia per la famiglia e per i minori', *Fam. dir.*, 2002, p. 331; A. VACCARO, 'La riforma della giustizia minorile e familiare: due disegni di legge', *Fam. dir.*, 2002, p. 417.

emerge during separation or divorce proceedings; in general, if the parents can't resolve conflicts regarding the education of their children, they mark the start of a more serious crisis affecting the spouses' personal relations and finish with their separation and divorce.

8. What is the position taken in your national law with respect to:

(a) Care

Art. 30 § 1 of the Italian Constitution and Art. 147 Italian CC impose a parental obligation to support the child. This obligation is for everything necessary to grant the child an adequate standard of living, considering the economic and social conditions of her or his family. The obligation is familial in character, the fulfilment of which both parents are entirely responsible for (Art. 1292 Italian CC), proportional to their respective financial capacities. (Art. 148 § 1 Italian CC) If the parents don't have sufficient means, other legitimate or natural ascendants are obliged to supply the parents with what is necessary to comply with their duties towards the children (Art. 148 § 1 Italian CC). If this duty is not met, the court can order part of the obligated parent's income to be paid directly to the other parent or to the person who supports the child (Art. 148 § 2 Italian CC). These cases derive almost exclusively from the separation or divorce of the spouses, and therefore also involve the parent's division and duration of familial obligations.

(b) Education

Art. 30 § 1 of the Italian Constitution and Art. 147 Italian CC impose the parental obligation to educate the children taking into account the children's capacities, natural inclinations and aspirations. The State has the responsibility to provide structures that allow parents to comply with their obligations, as well as the responsibility to ensure the parent's compliance with their duties (Art. 34 of the Italian Constitution). Parents and the State are thus co-responsible for the education of minors. In addition, Art. 1 of the Law of 18 June 1986, No. 281 ('Capacity to choose the type of the school and of enrolment in high schools') confers on secondary high school pupils (which in general would be more than 14 years old) the right to choose whether to take part in religious education and optional classes, or in any other cultural and educational activity. The legislature did not fix a precise age, but preferred to refer to the scholastic level of the minor as the criterion for the presumption of the child's judgment capacity. Such a criterion, in a vision shared by a majority of the legal literature,¹⁵ aims to grant greater freedoms of personal choice to the minor and therefore recognise the full autonomy of minors capable of judgment, in a number of cases going beyond what is explicitly provided for by the law.

In contrast, choices are reserved to the parents of children in the lower school levels, in view of the children's presumed lack of judgmental capacity; however, considering the parental obligation to respect the children's natural inclinations and aspirations, the parents must still satisfy their children's preferences as long as

¹⁵ See, among others, STANZIONE, *Capacità e minore età nella problematica della persona umana*, Camerino- Naples, 1975, ID, *Diritti fondamentali dei minori e potestà dei genitori*, in *Rass. Dir. Civ.*, 1980, p. 452, F. GIARDINA, headword *Minore*, in *Enc. giur. Treccani XX*, Rome, 1990, p. 1.

they are in line with the choices society generally accepts, even when the parents do not share the preferences.

(c) Religious upbringing

Jurisprudence denies parents the coercive power to force a child to conform with their religious practise, recognising a 17 year old boy's capacity, and consequently right, to choose his own religious creed.¹⁶ Following this case, the legislature intervened and conferred the choice of religious education on secondary high school pupils (Art. 1, Law of 18 June 1986, No. 281 'Capacity to choose the type of the school to attend and enrolment in high schools'; see also above, Q 8b Education). The legislature did not fix a precise age, but preferred to refer to the scholastic level of the minor as the criterion for the presumption of the child's judgment capacity. Such criterion, in a vision shared by the majority of legal literature,¹⁷ aims to grant greater freedoms of personal choice to the minor and therefore to recognise the full autonomy of the minor capable of judgment, in a number of cases going beyond what the law explicitly provides. In contrast, choices are reserved to the parents of children in the lower school levels, in view of the children's presumed lack of judgmental capacity; however, considering the parental obligation to respect the children's natural inclinations and aspirations, the parents must still satisfy their children's preferences as long as they are in line with the choices society generally accepts, even when the parents do not share the preferences.

However, the choice of religious education sees more conflicts between parents who profess different religions than with conflicts between parents and child.

(d) Disciplinary Measures

Concerning disciplinary measures and corporal punishment, the Supreme Court established the following principle of law: 'the recourse to violence for the purpose of education cannot be held lawful. The reason has to be found either in the importance that the legal system has attributed to the dignity of man, and so also to the 'minor', now the subject of rights and no longer, as in the past, simply an object for adults to protect; or it has to be found in the fact that the harmonious development of a personality based on values of peace, tolerance and coexistence cannot be reached by violent means.'¹⁸

(e) Medical Treatment

The question of medical treatment relates to two aspects of parental responsibility: those treatments that come under parental rights and duties, and those decisions that parents carry out by virtue of the powers of representation of the minor conferred on them by law.¹⁹ It is only during the last decade that decisions have

¹⁶ Family Proceedings Court Genoa 09.02.1959, in *Giur. cost.*, 1959, p. 1278.

¹⁷ See, among others, P. STANZIONE, *Capacità e minore età nella problematica della persona umana*, Camerino- Naples, 1975, ID, *Diritti fondamentali dei minori e potestà dei genitori*, in *Rass. Dir. Civ.*, 1980, p. 452, F. GIARDINA, headword *Minore*, in *Enc. giur. Treccani XX*, Rome, 1990, p. 1.

¹⁸ Supreme Court, 16.05.1996, *Dir.fam.pers.*, 1997, p. 509, with comments by D. BONAMORE.

¹⁹ See P. VERCELLONE, *Il corpo del minorenne: i trattamenti sanitari*, in *Trattato di diritto di famiglia* directed by P. Zatti, II, *Filiazione* by G. COLLURA, L. LENTI and M. MANTOVANI, Giuffrè: Milan, 2002, p. 987; G. TURRI, 'Minorenni e 'autodeterminazione in senso debole'.

been delivered in this field. They pose two problems: First, if and how, taking the officially recognised treatments into consideration, a 'wrong' decision by the parents can be substituted, (and consequently qualified as an incorrect exercise of the inherent parental authority powers); and second, whose decision prevails if there is a conflict between the parents and the child.

With regard to the first problem between the parents and third persons, our legal system always chooses the right to life. The parent does not have the power to deny necessary treatments for the minor. If this is done, the judge, following indications given by the doctor, can issue a measure he or she considers in the best interests of the minor, pursuant to Art. 333 Italian CC; in this way the judge can make the medical treatment proposed by the doctor lawful.²⁰ The jurisprudential tendency is to choose the medical treatment sustained by conventional medicine, with the aim to not neglect seriously dangerous situations. Still, decisions have also been made that pay more attention to the minor's will.²¹

With regard to the second issue of familial relationship between the parents and their children, in regard to specific medical treatments Italian legal rules expressly give importance to the minor's will. With a guardianship judge's prior authorisation, a minor can have an abortion (Art. 12 Law of 22 May 1978, No. 194), use contraceptives (Art. 12 Law of 22 May 1978, No. 194) and if addicted to drugs may seek the intervention of appropriate treatments and rehabilitation (Art. 120 of the Consolidated Text on the drugs law). The outcome of an HIV test may be communicated exclusively to the minor if she or he requested the exam (Art. 5 § 4 of the Law 135/1990). Although there are few specific provisions in the Italian legal system, the general principle is to grant full autonomy to a minor capable of understanding any decision of personal character (such as those relating to medical treatments) in areas adjacent to those expressly indicated.

(f) Legal representation

Art. 320 Italian CC confers to parents holding parental authority the powers and duties to represent their children and to manage their properties. The legal representation aims to remedy the minor's inability to represent himself or herself.

In addition, the child, even if incapable to act, can validly perform certain acts (e.g. a child can exercise the rights and duties deriving from an employment contract, pursuant to Art. 2 § 2 Italian CC). Representation also includes the power to act for the protection of the minor's personal rights, such as a civil action for compensation of damages if the minor's rights are violated, or for status actions not implicating conflicts of interest with the minor. Italy's legal system has developed a general principle that grants autonomy to a child for personal acts if the child has the power of judgment, or is mature enough to make decisions with necessary

Sintesi di un dibattito', *Questione giustizia*, 2000, p. 1108; A.C. MORO, *Manuale di diritto minorile*, Zanichelli: Bologna, 2000, p. 274.

²⁰ See Family Proceeding Court of Bari 25.10.2000, *Minorigiustizia*, 2001, No. 2, p. 201.

²¹ Family Proceeding Court of Brescia 18.05.1999, *Nuova giur. civ. comm.*, 2000, I, p. 204; Family Proceeding Court of Appeal of Ancona 26.03.1999, *Fam. dir.*, 1999, p. 467, annotated by B. LENA; Family Proceeding Court of Venezia 07.10.1998, *Dir. fam. pers.*, 1999, p. 693.

awareness.²² If the child does not have the requisite maturity, the legislation for the minor's representation contemplates property management (see Q 2f.). The parental rights for these acts include representation of both their born and unborn children (Art. 462 and 784 Italian CC).

9. What is the position taken in respect of the child's right to be heard with regard to the issues mentioned under Q ((a)-(f)). What relevance is given to the age and the maturity of the child?

The Italian legal system is not homogenous when it comes to the minor's right to be heard (e.g. Art. 6 § 9, 1 Italian Divorce law; Art. 4, 10, § 5 1 Italian Adoption Law; Arts. 316 and 348 Italian CC). However, a joint reading of these Articles and a particular consideration of their systematic coordination with the principles established by the international Conventions ratified in Italy (in particular the Convention UNO of 20 November 1989 concerning the child's rights, ratified and implemented in Italy with the Law of 27 May 1981, No. 176 and the 1996 Convention of Strasbourg concerning the exercise of the child's rights, ratified and implemented in Italy with the law of 20 March 2003, No. 176) underlines the Italian legal system's recognition of the minor's right to be heard in procedures effecting the minor's life or development²³ if the minor has the necessary capacity of judgment. Besides cases where this is expressly provided for or deemed 'strictly necessary', the judge may choose to hear the minor under the condition that the minor has the capacity to form her or his own opinion (capacity of judgment). Consequently, the legislature's ability and authorisation to draft specific rules (e.g. the limitation of the age) regulating strict and pre-established criteria is negated.

The judge is not forced to consider a minor's opinions because minors are not forced to give them; however, the judge must consider them against other elements when reaching a decision. The necessity to 'hear' the minor and to 'take the minor's opinion into consideration' if the minor has the requisite capacity of judgment is generally accomplished by the minor's participation in decisions regarding himself or herself and by an active involvement in evaluating the minor's awareness and allowing him or her appropriate influence at every chance. In this way consideration of the minor's changed judgment can be confirmed: from being the subject of other's decisions to being an active participant in the decisions.

²² Concerning the general freedom of the minor having capacity of judgment relating to the exercise of the nonproperty and, more generally, the conduct of his personal affairs, see among others, P. STANZIONE, *Capacità e minore età nella problematica della persona umana*, Camerino-Naples, 1975; ID., 'Diritti fondamentali dei minori e potestà dei genitori', *Rass. Dir. Civ.*, 1980, p. 425; F. GIARDINA, headword *Minore*, in *Enc. Giur. Treccani*, XX, Rome 1990, p. 1.

²³ The Italian jurisdiction has recognised this principle apart from the existence of an explicit rule. See Supreme Court, 23.07.1997 No. 6899, *Giust. Civ.*, I, p. 2295, which confirmed that in procedures concerning the minor, the necessity to hear the minor is based on the strength of the minor's will and personality. These procedures are based on individual cases and emerge from direct interviews with the interested person, so they cannot be established in advance by general criteria. See also, among others, the Constitutional Court 30.01.2002, No. 1 in *Giust. civ.*, 2002, I, p. 1467 with the note of A.G. CIANCI. See also C.M. BIANCA, *Diritto sull'esercizio della potestà*, in: *Trattato di diritto di famiglia* conducted by PAOLO ZATTI, II *Filiazione* by G. COLLURA, L. LENTI and M. MANTOVANI, Giuffrè, Milano, 2002, p. 1039.

10. Do(es) the holder(s) of parental responsibilities has (have) the right to administer the child's property ?

Yes, but it is a 'right' connected with a duty to be exercised only in the interest of the minor.

11. If yes, explain the content of this right.

Parental responsibilities include the right and duty to represent the child and to manage her or his property (Art. 320 Italian CC). If parental responsibilities are exercised jointly, each parent can individually make ordinary acts of disposition of the minor's property; however, extraordinary acts of disposition (alienation, the establishment of pledges or mortgages, acceptance or renouncement of inheritances, legacy and donation; dissolution of common ownerships, contract loans, initiation of court proceedings regarding those acts, reference to an arbitrator, settlements) can only be exercised out of necessity or if they are obviously beneficial for the child and presuppose the authorisation of the guardianship judge (Art. 320 § 3 Italian CC). The collection of principal amounts must also be authorised, and the judge will determine how they shall be invested (Art. 320 § 4 Italian CC). In addition, the continuing operation of a commercial enterprise presupposes the authorisation of the court, given after prior consultation with the guardianship judge (Art. 320 § 5 Italian CC).

If a conflict of interests regarding property arises between the children, or between the children and the parents exercising the parental responsibility, the guardianship judge can appoint a special guardian (Art. 320 § 3 Italian CC). In order to avoid possible conflicts of interest, it is prohibited for the parents to acquire, even through an intermediary, goods or rights of the child that are the object of their parental authority. Acts performed in violation of this rule can be annulled at the request of the parents exercising the authority, or on the request of the child, his heirs or successors in interest (Art. 322 Italian CC); the action is proscribed until five years from the time the child reaches the age of consent.

Parents have the legal usufruct of their child's property for the support of the family and the education and moral guidance of the child (Art. 324 Italian CC).

12. Are these restrictions with respect to:

(a) Certain goods /and or values (inherited property, gift.....)

No, the restrictions provided by Italian legal system do not concern the object but the activity.

(b) Salary of the child

Yes, the minor has the capacity to work pursuant to Art. 2 § 2 Italian CC.

(c) Certain transactions

Yes, extraordinary acts of disposition (alienation, obtaining a lien or mortgage, acceptance or renunciation of inheritances, legacies or donations, dissolution of common ownerships, contract loans, initiation of court procedures relating to these actions, reference of an arbitrator, settlements) can only be performed without the

authorisation of the guardianship judge in cases of necessity or if there is an obvious advantage for the child (Art. 320 § 3 Italian CC). If a conflict of interests regarding property arises between the children, or between the children and the parents exercising the parental responsibility, the guardianship judge can appoint a special guardian (Art. 320 § 3 Italian CC). In order to avoid possible conflicts of interest, the parents are prohibited from acquiring, even through an intermediary, goods or rights of the child that are the object of their parental authority (Art. 322 Italian CC).

13. Are there special rules protecting children from indebtedness caused by the holder(s) of the parental responsibilities?

Yes; acts performed in violation of the rules regarding the administration of the minor's properties can be annulled at the request of the parents holding the parental responsibilities or at the request of the child, the child's heirs or the child's successors in interest (Art. 322 Italian CC); the action is proscribed until 5 years after the child reaches the age of majority. If the minor's property is improperly administered the court can prescribe conditions to be observed for the administration, can remove both or one of the parents from the administration and can partially or wholly deprive them the legal usufruct of the property. If both parents are deprived, a guardian will be entitled to administrate the child's property (Art. 334 Italian CC).

14. Do the contents of parental responsibilities differ according to the holder(s) of the parental responsibilities (e.g. married, unmarried, parents not living together, stepparents, foster parents or other persons). If so, describe in some detail how it differs.

While the contents of the parental responsibilities differ if the parents are not living together, the parents' marital status has no influence.

Art. 317 Italian CC concerning a child born to an unmarried mother (or born out of the marriage) states that parents who live together exercise the parental responsibilities. Otherwise, the parent with whom the child lives exercises the parental responsibilities while the other parent has the right to supervise the education, moral guidance and conditions of the minor's life.

Art. 316 § 2 regarding a legitimate child (born during the marriage) states that the exercise of the parental responsibilities is based on a common agreement of the parents. The parent to whom the child has been entrusted because of separation, divorce or annulment has full exercise of parental responsibilities, unless the judge provides differently. The parental responsibilities are realised by the power to make decisions with respect to the everyday life of the minor. Both parents must make decisions concerning issues of major importance for the children, otherwise they will be made by the judge. The parent not living with the child has the right and duty to supervise the child's moral guidance and education, and can at any time petition the judge concerning prejudicial decisions the other parent has made concerning the child. The non-residential parent also has the right to visit the child and to keep the child for a certain period, respecting the methods determined by the court. Other members of the family also have the right to visit the child if it is considered necessary for the development of the child (see Q 43-48).

C. ATTRIBUTION OF PARENTAL RESPONSIBILITIES

I. Married parents

15. Who has the parental responsibilities when the parents are:

(a) Married at the time of the child's birth

Both parents (Art. 316 § 2 Italian CC).

(b) Not married at that time but marry later?

Both parents (Art. 280 Italian CC).

16. How, if at all, is the attribution of parental responsibilities affected by:

(a) Divorce

(b) Legal separation

(c) Annulment of the marriage

Pursuant to Art. 317 § 2 Italian CC, joint parental responsibilities expire neither as a consequence of separation, divorce or annulment, nor if only one of the parents holds custody of the child. If only one of the parents lives with the child, it is possible to differentiate the other parent's exercise of parental responsibilities²⁴ (Art. 155 Italian CC and Art. 6 § 4 Italian Divorce law).

The Italian legal system is uniform as far as the actual regulation of the parent-child relationship after separation, divorce or annulment;²⁵ however, it does not give specific methods because the leading criteria are exclusively the moral and material interests of the minor. Still, the judge has wide discretionary authority in which to examine the minor's interests in each individual case.

The law provides three different types of custody: exclusive custody, joint custody and alternating custody, and thus provides differentiated modalities for exercising parental responsibilities. If there is just cause can the judge order the minor to live with a third party or at an institute for education (Art. 155 Italian CC), or he can order the family custody (Art. 6 § 8 Italian Divorce law).

With exclusive custody, the custodial parent has the right to exercise full parental responsibilities unless the judge provides otherwise. This parent has the right to

²⁴ M. GIORGIANNI, *Della potestà dei genitori*, in *Commentario al diritto italiano della famiglia* by G. CIAN, G. OPPO and A. TRABUCCHI, IV, Cedam: Padova, 1992, p. 336

²⁵ With regard to children, the legal literature and the courts agree to apply the more recent rule (at the moment the rule concerning divorce). Even if the rules concerning separation (Art. 155 Italian CC) and divorce are formally different and do not correspond, separation and divorce are regarded as the same problem and solutions are based on the same premise: the children must suffer as little as possible from the family crises. Therefore the differences must be exclusively attributed to the different moments in which they were introduced. In addition, if there is an *invalidness of the marriage*, the parent-child relationship is ruled by the separation and divorce rules (Art. 129 § 2 Italian CC).

make all decisions regarding the daily life of the minor. Issues of major importance must be decided by both parents; otherwise the issue is submitted to the judge. The non-custodial parent consequently has limited parental responsibilities; this parent has the right and duty to make major decisions for the child with the other parent and to supervise the child's education and moral guidance. The non-custodial parent can petition the judge when the she or he believes the other parent has made prejudicial decisions; she or he has the right to visit the child and to keep the child for a certain period, according to the court established methods (Art. 155 § 3 and Art. 6 § 4 Italian CC). Other members of the family (*e.g.* grandparents) also have the right to visit the child if it can be considered necessary for the development of the child (see Q 43-48).

Joint custody implies that both parents hold custody and exercise parental responsibilities, even if the child only lives with one of them. Both parents share the same rights and parental responsibilities in respect to decisions regarding the minor. In theory, this form of custody seems to respect the most interests of the minor because the minor has both of his parents; however, this is often not realisable in practise. For a useful application, some conditions are indispensable. The parents should have a good relationship and the capacity to be good parents. They should also live close to each other.

Alternating custody means that one of the parents has custody of the child for predetermined periods. Each parent has the exclusive exercise of parental responsibilities during his or her period of custody. The courts and legal literature dispute whether this type of custody respects the interests of the minor; they consider it potentially harmful because it risks creating insecurity and instability, a particularly serious matter during the evolutionary period of the minor (see Q 41).

These short considerations explain why the practice of custody being granted to only one of the parents is the rule our jurisdiction follows²⁶ even though the law concedes wide discretionary power to the judge when it comes to the interests of the minor.

(d) Factual separation

Parental responsibilities do not expire after a factual separation. The parents can freely decide on the attribution of their relative duties and rights, except for the right of both parents to petition the judge to ascertain the conditions established in the interest of the children.

17. To what extent, if at all are the parents free to agree upon the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage ? If they are, are these agreements subject to scrutiny by a competent authority.

Parents are free to make an agreement, but the judge always controls the agreement made. This control, expressly provided by law, aims to verify that the conditions of

²⁶ There are numerous proposals introducing joint custody as the rule when cohabitation of the parents ends as the result of a pronounced separation, divorce or annulment of the marriage. These proposals testify to our jurisdiction's diffuse dissatisfaction towards the choice of granting the custody to only one parent - consistently the mother (see Q 19).

the agreement are not in conflict with the interests of the child. If they are, the judge can rule against the agreement. If an agreement between the parents cannot be reached, the judge is entitled to make the decision, based exclusively on the moral and material interests of the child.

18. May the competent authority attribute joint parental responsibilities to the parents of the child even against the wish of both parents/one of the parents? To what extent, if at all, should the competent authority take account of a parent's violent behaviour towards the other parent?

No; if not expressly provided by law, the judge cannot attribute the joint exercise of parental responsibilities without the consent of both parents. For joint exercise of parental responsibilities, Italian law requires the following conditions: a good relationship between the parents, both need the capacity to be good parents and they should live close to each other.²⁷ It is not possible to order joint parental responsibilities against the wish of the parents or of one of them.²⁸

Violent behaviour by one of the parents towards the other (spouse as well as partner) can create prejudice to the violent parent's physical and moral integrity or to his liberty, it may fulfil the elements of Art. 572 Italian Penal Code (maltreatment of family or minors) and it also has relevance in civil terms. At the request of one of the parties the civil judge can order the cessation of this prejudicial behaviour and also for one of the parents to leave the family's house (Art. 342*bis* and 342*ter* Italian CC, recently introduced by the Law No. 154, of 4 April 2001 and modified by Law No. 304, of 6 November 2003). The judge can also order the intervention of a local social service, centre for family mediation or associations who support and receive victims of abuse and maltreatment. The judge can order the periodic payment of an allowance in favour of one of the cohabitants who, because of the ordered removal from the family's house, remains without appropriate means. The judge will establish the methods and terms of the payment and decide if the obligated parent must have his or her employer deduct the relevant amount from his or her salary to be paid directly to the recipient. The judge will establish the duration that one of the cohabitants must stay away from the family's house. This cannot be for longer than 6 months from the removal-order and can only be extended at the request of one party for grave reasons and for a period that is strictly necessary. If there are difficulties or oppositions regarding the execution of the removal order, the judge will order necessary measures, including security forces and the health official.

Whether this form of protection, characterised by urgency and timeliness, presumes a cohabitation²⁹ of the parents (spouses or non spouses) or if it is also applicable pending or after a factual separation, or during the process of separation, divorce or annulment of the marriage has been discussed. In this case, the order to leave the family's house would also include the prohibition to frequent

²⁷ See the Court of Genoa 18.04.1991, *Giust. Civ.*, 1991, I, p. 3095, with note of M. MIGLIETTA; Court of S. Maria Capua Vetere 14.09.1993, *Giur. merito*, 1994, p. 226 with note of G. MANERA; Court of Catania 06.06.1994, *Dir. Fam. pers.*, 1995, p. 222.

²⁸ See the Court of Milan, 14.07.1993, *Gius*, 1994, p. 99.

²⁹ See also the Court of Genoa 07.01.2003, *Fam. dir.*, 2004, p. 387, annotated L. CARRERA; Court of Naples 01.02.2002, *Fam. dir.*, p. 504, annotated A. FIGONE.

the victim's habitation or to have contact with her or him.³⁰ At any rate, it deals with a residual protection which applies when the conditions for the suspension or limitation of the parental responsibilities according to Art. 330 and Art. 333 Italian CC are fulfilled.³¹

19. Provide statistic information on the attribution of parental responsibilities after divorce, legal divorce or annulment of the marriage.

The mother holds parental responsibilities in 85.5% of separation cases, the father in 8.8%, both parents in 1.6%, in 1.6% the children are separated (one living with the mother and the other one with the father) and in 2.6% of the cases other solutions are made (entrustment to relatives or other institutions).³² Consequently, the cases in which parental responsibilities are held by the mother dominate³³ (the so called daily exercise). However, arguments concerning the children composed only 18.2% of the cases (in these cases are also those in which the father applied for the parental responsibilities); in 75.7% of these cases the mother holds parental responsibilities and in 15.7% the father. In addition, the mother's parental responsibilities are considered to correspond more closely to the child's interests during early childhood (0-6 years).

II. Unmarried parents

20. Who has parental responsibilities when the parents are not married?

Both parents, if they have recognised the child together and are still living together. If they do not live together, the parent with whom the child is living is entitled to exercise parental responsibilities. If the child does not live with either parent, the one who first recognised the child has the right of exercising parental responsibilities, unless the judge provides differently in the interests of the child (Art. 317*bis* Italian CC).

21. Does it make a difference if the parents have formalised their mutual relationship in some way (registered partnership, civil union, *pacte civile de solidarité*)?

³⁰ See the Court of Florence 15.07.2002, *Fam. dir.*, 2003, p. 263, with a critical note of G. DE MARZO.

³¹ Concerning the possibility of also applying Art. 330 and 333 Italian CC in cases of 'indirect' abuse and maltreatment or in cases where the act is committed towards relatives instead of the minor but (such as the other parent) to whom the minor is so close that its 'harmonic and balanced psychophysical upbringing' is compromised, see the Family Proceedings Court L'Aquila 19.07.2002, *Fam. dir.* 2003, p. 482.

³² The dates are based on research completed by the analysis of Civil Court of Roma decisions regarding judicial separation during 1999. See M. MALAGOLI TOGLIATTI, A. LUBBRANO and L. CARAVELLI, 'La CTU per l'affidamento del minore. Una ricerca sulle sentenze di separazione giudiziale emesse dal Tribunale civile di Roma', *Famiglia*, 2004, p. 27.

³³ The dates are not very different from those given in previous research made by different Italian Courts, among them also the Court of Rome. See AA.VV., *L'affidamento dei figli nelle sentenze giudiziali* by A. DELL'ANTONIO and D. VINCENTI AMATO GIUFFRÈ, Milano, 1992.

No, it does not make any difference. Our legal system does not provide any kind of formalised relationship.

22. Under what conditions, if at all, can

(a) The unmarried mother obtain parental responsibilities

The unmarried mother can obtain parental responsibilities if she lives with the child or if she was the first to recognise the child, unless the judge decides that the child's best interests require otherwise.

(b) The unmarried father obtain parental responsibilities

The unmarried father can obtain parental responsibilities if he lives with the child or if he was the first to recognise the child, unless the judge decides that the child's best interests require otherwise.

23. How, if at all, is the attribution of parental responsibilities affected by the ending of the unmarried parent's relationship ?

The ending of a cohabitant's relationship is treated the same as a separation, divorce or annulment of a marriage (see Q 16). The parent holding the custody has full parental responsibility, meaning the right to make all decisions regarding the child's daily life. Both parents must make decisions concerning issues of major importance for the children; otherwise, a solution will be made at the discretion of the judge. The parent not living with the child has the right and duty to supervise the child's moral guidance and education, and can at any time petition the judge concerning decisions the other parent has made which prejudice the child. The non-residential parent also has the right to visit the child and have the child stay with her or him for a certain period, respecting the methods determined by the court. Other members of the family also have the right to visit the child if it is considered necessary for the development of the child (see Q 43-48).

The non-residential parent can obtain limited parental responsibilities. If the judge has not ordered joint parental responsibilities at the request of the parents (see Q 16), the non-residential parent has the right and duty to make decisions with the other parent regarding issues of major importance for the child. The parent not living with the child also has the right and duty to supervise the child's moral guidance and education, and can at any time petition the judge concerning decisions the other parent has made which prejudice the child. The non-residential parent also has the right to visit the child and have the child stay with him or her for a certain period, respecting the methods determined by the court (Art. 155 § 3 and Art. 6 § 4 Italian CC). Other members of the family also have the right to visit the child, if it is considered necessary for the development of the child (see Q 43-48).

24. May the competent judicial authority attribute joint parental responsibilities to the parents also against the wish of both parents/one of the parents? To what extent, if at all, may the competent authority take into account a parent's violent behaviour towards the other parent?

No; unless expressly provided by law the judge cannot attribute the joint exercise of parental responsibilities without the consent of both parents. For joint exercise of

parental responsibilities, Italian law requires the following conditions: the parents have a good relationship, they should both have the capacity to be good parents and they should live close to each other.³⁴ It is not possible to order joint parental responsibilities against the wish of the parents or of one of them.³⁵

Violent behaviour by one of the parents towards the other (spouse as well as partner) can create prejudice to the violent parent's physical and moral integrity or to his liberty, it may fulfil the elements of Art. 572 Italian Penal Code (maltreatment of family or minors) and it also has relevance in civil terms. At the request of one of the parties the civil judge can order the cessation of this prejudicial behaviour and also for one of the parents to leave the family's house (according to Arts. 342bis and 342ter Italian CC, recently introduced by the Law No. 154, of 4 April 2001 and modified by the Law No. 304, of 6 November 2003). The judge can also order the intervention of a local social service, centre for family mediation or associations who support and receive victims of abuse and maltreatment. The judge can order the periodic payment of an allowance in favour of one of the cohabitants who, because of the ordered removal from the family's house, remains without appropriate means. The judge will establish the methods and terms of the payment and decide if the obligated parent must have his or her employer deduct the relevant amount from his or her salary to be paid directly to the recipient.

The judge will establish the duration that one of the cohabitants must stay away from the family's house. This cannot be for longer than 6 months from the removal order and can only be extended at the request of one party for grave reasons and for a period that is strictly necessary. If there are difficulties with or oppositions to the execution of the removal order, the judge will order necessary measures, including security forces and the health official.

Whether this form of protection, characterised by urgency and timeliness, presumes a cohabitation³⁶ of the parents (spouses or non spouses) or if it is also applicable pending or after a factual separation, or during the process of separation, divorce or annulment of the marriage has been discussed. In this case, the order to leave the family's house would also include the prohibition to frequent the victim's habitation or to have contact with her or him.³⁷ At any rate, it deals with a residual protection which applies when the conditions for the suspension or limitation of the parental responsibilities according to Art. 330 and Art. 333 Italian CC are fulfilled.³⁸

³⁴ See the Court of Genoa 18.04.1991, *Giust. Civ.*, 1991, I, p. 3095, with note of M. MIGLIETTA; Court of S. Maria Capua Vetere 14.09.1993, *Giur. merito*, 1994, p. 226 with note of G. MANERA; Court of Catania 06.06.1994, *Dir. Fam. pers.*, 1995, p. 222.

³⁵ See the Court of Milan, 14.07.1993, *Gius*, 1994, p. 99.

³⁶ See also the Court of Genoa 07.01.2003, *Fam. dir.*, 2004, p. 387, with a added note of L. CARRERA; Court of Naples 01.02.2002, *Fam. dir.*, p. 504, with a added note of A. FIGONE.

³⁷ See the Court of Florence 15.07.2002, *Fam. dir.*, 2003, p. 263, with a critical note of G. DE MARZO.

³⁸ Concerning the possibility to also apply Art. 330 and 333 Italian CC in cases of 'indirect' abuse and maltreatment, or in cases where the act is not committed towards the minor but towards relatives (such as the other parent) to whom the minor is so close that his or her 'harmonic and balanced psychophysical upbringing' is compromised, see the Family Proceedings Court L'Aquila 19.07.2002, *Fam. dir.* 2003, p. 482.

25. To what extent, if at all, are unmarried parents free upon the attribution of the parental responsibilities after the ending of the relationship ?

Parents are free to make an agreement, but the judge always controls the agreement made. This control, expressly provided by law, aims to verify that the conditions of the agreement are not in conflict with the interests of the child. In they are, the judge can rule against the agreement. If the parents cannot reach an agreement, the judge is entitled to make the decision; he must exclusively take the moral and material interests of the child into consideration.

The only difference between married and unmarried parents concerns the competent judicial authority deciding custody and the methods of the exercise of the parental responsibilities. With married parents, the Ordinary Court is competent (the court competent for the procedures of separation, divorce and annulment of the marriage); for unmarried parents the Family Proceedings Court is the competent authority (see Q 55).

26. Provide statistical information available regarding the attribution of parental responsibilities for unmarried parents.

There is no information available; however, it can be assumed the statistics would be comparable to those collected with reference to married couples (see Q 19).

III. Other persons

27. Under what conditions, if at all, can the partner of a parent holding parental responsibilities obtain parental responsibilities, when he/she is:

(a) Married to that parent;

In such a situation, the partner can apply to the Family Proceedings Court for a particular form of adoption of the minor (Art. 44 (b)). This adoption does not break the ties between the adopted minor and his family of origin, but confers the *status* of an adopted child on the minor and attributes full parental responsibility, identical in content to that of the biological parent-spouse, to the person who adopts the child.

b) living with that parent in a formalised relationship (registered partnership, civil union, pacte civil de solidarité.....);

The Italian Legal system does not provide for such formalised relationships. Consequently such situations are allow neither the possibility of adoption (Art. 44 (b)), Italian Adoption Law), nor the possibility to obtain the parental responsibility.

c) or living with that parent in a non formalised relationship?

The partner that lives with the parent cannot apply for the adoption if it is not one of the particular situations described by Art. 44 (b)) Italian Adoption Law; adoption is only allowed for the biological parent. Therefore, neither is it possible to obtain parental responsibility.

28. Does it make any difference if the partner of the parent holding parental responsibilities is of the same sex?

Yes. The Italian legal system only permits adoption to the spouse of the biological parent and does not foresee formal union to people of the same sex (registered partnership, civil union, *pacte civil de solidarité*).

29. How, if it all, is the attribution of parental responsibilities in the partner affected by ending of his or her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.

If Art. 44 (b) Italian Adoption Law grants the spouse of a parent's the right to adopt, ending the marriage will have the same consequences to the attribution of parental responsibility as those that follow from a separation, divorce or annulment of the marriage (see Q 16). As the attribution of the parental responsibility to the unmarried partner of the parent is not possible, the termination of their relationship does not have any consequences.

30. To what extent, if at all, is the parent holding parental responsibilities and his or her partner free to agree upon the attribution of parental responsibilities after the ending of his or her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28

If Art. 44 (b) Italian Adoption Law grants the parent's spouse the right to adopt, the biological parent and the adoptive parent are free to agree upon the attribution; but in every case the attribution is be controlled by the judge with regard to the agreement's compatibility with the minor's interests. In all other cases nothing inhibits the consensual subdivision of duties that flow from the parental responsibility, respecting the fact that the Italian legal system confers parental responsibility to neither the partner nor the ex-partner of the biological parent.

31. Under what conditions, if at all, can other persons not being a parent or a partner of a parent holding parental responsibilities, obtain parental responsibilities (e.g. members of the child's family, close friends, foster parent...)? Specify, where such other person may obtain parental responsibilities, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

Art. 343 Italian CC states that if both biological parents die or are prevented from the exercise of their parental responsibilities for another reason, guardianship can be exercised at the minor's residence by the legal authority. This means that the parents' rights and duties are conferred on a third person, the guardian, who exercises the parental responsibilities in the absence, impossibility or incapacity of the parents. As has been clarified (see note 2), although the guardianship is modelled after parental authority, there are significant differences between the two due to the absence of rapport between the guardian and the minor.

With regard to the choice of the guardian, Art. 348 Italian CC provides for the judge to appoint the person designated by the last parent to exercise parental responsibilities (by testament, public act or authenticated private deed). If there is

no indication or if it is not possible to appoint the indicated person due to serious reasons, the guardian is preferably chosen from the minor's relatives or next of kin. The appointed person must be of irreproachable conduct and fit for the task. Moreover, he or she must be able to provide moral guidance and education to the minor taking the minor's abilities, natural inclinations and ambitions into account.

32. Under what conditions, if at all, can a public body obtain the parental responsibilities? Specify, where it is so obtained, if it is in addition to or in substitution of existing holder(s) of the parental responsibilities.

A public or private body can obtain parental responsibilities only if the parents die, or if neither of them can hold such responsibilities. Art. 354 Italian CC provides that if there are no next of kin or persons able to hold the guardianship in the place the minor resides, the judge can assign the child to a private or public body located in the city where the minor resides. The private or public body delegates to one of its members the exercise of the guardianship.

33. To whom are the parental responsibilities attributed in the case of:

(a) Death of a parent holding the parental responsibilities

To the other parent (Art. 317 § 1 Italian CC).

(b) Death of both parents were of them was the holder of the parental responsibilities at the time of his death

To the guardian nominated by the guardianship judge (Art. 343 *et seq* Italian CC).

34. To what extent, if at all, may the holder(s) of the parental responsibilities appoint a new holder(s) upon his or her/their death? If such an appointment is permitted, is a special form required, e.g. will?

Art. 348 Italian CC provides that the judge must appoint as guardian the person the last parent who held parental responsibilities indicated by will, public deed or authenticated private deed, unless it is not possible to appoint the designated person due to serious reasons.

D. THE EXERCISE OF THE PARENTAL RESPONSIBILITIES

I. Interests of the child

35. In exercising the parental responsibilities, how are the interests of the child defined in your national legal system?

Our legal system requires that judges must exclusively take a minor's moral and material interests into account in decisions affecting minors, but it neither defines nor clarifies the content of these interests. The elasticity of this legal formula is intentional, as the formula must be adjusted to the facts of each case. The interests can only be the interests relating to each individual case.

II. Joint the parental responsibilities

36. If the parental responsibilities are held jointly by two or more persons, are they held equally?

Yes (Art. 316 § 2 Italian CC).

37. If the parental responsibilities holders cannot agree on an issue, how is the dispute resolved? For example does the holder of the parental responsibilities have the authority to act alone? In this respect is there a distinction between important decisions and decisions of a daily nature? Does it make any difference if the child is only living with one of the holders of the the parental responsibilities?

Art. 316 Italian CC describes the exercise of the parental responsibilities regardless of the parents marital status (in describing the exercise of parental responsibilities by natural parents, Art. 317 *bis* Italian CC makes express reference to the applicability of the rules contained in Art. 316 Italian CC). This provision of law states that if issues of minor importance are concerned (those issues relating to daily life), the parents holding the parental responsibilities are free to decide individually. However, if the issues are of major importance (for example the selection of the religious creed, the type of school to attend, the medical treatment, the decision to allow the child to travel abroad, to the decision of permitting him to participate to TV shows *etc*) both parents can petition the judge (of the Family Proceeding Court). In case of imminent danger, the father can make urgent decisions or those which cannot be delayed.³⁹ The judge suggests the most suitable decisions in the interests of the minor and of the family unity. If there is still disagreement, the judge will confer the power to make a decision to the parent who, in each particular case, she or he considers more suitable to pursue the best interests of the minor. If the child lives with only one parent, the ways in which the parental responsibilities are exercised are differentiated. The decisions relating to daily life are made only by the parent living with the minor, while the other can supervise the child's education and moral guidance, and can petition the judge if he or she feels that decisions prejudicial to the interests of the minor have been taken. In case of disagreement on important decisions (which the parents must make jointly) both parents can petition the judge.

In this situation, the determination of the competent Court is a real problem. It is disputed whether Art. 316 Italian CC is applicable only to the 'united' family or also to the 'divided' family, with special reference to the parents that obtained a separation, a divorce or an annulment of marriage decision. It is not only a theoretical dispute, it has important practical consequences since the courts that issue the decision are different: The Family Proceeding Court pursuant to Arts. 316, or the Ordinary Court pursuant to 155 Italian CC and Art. 6 Italian Divorce law,

³⁹ Such provision of law is the last remaining option which constitutes the expression of a different historical context and must be regarded as inconsistent with the principle of moral and legal parity of the parents. It therefore should also be applicable for the mother.

which issues orders concerning the custody of the children in separations, divorces or annulments of marriage.⁴⁰

38. If holders of the parental responsibilities cannot agree on an issue, can they apply to a competent authority to resolve their dispute? If applicable, specify whether this authority's competence is limited to certain issues e.g. residence or contact.

Yes, in case of disagreement on an important decision, both parents, living together or not, can petition the judge. The judge will suggest the most suitable decision in the interests of the minor and the family unity. If the disagreement persists, the judge is supposed to confer the power to make the decision to the parent who, in each case, he or she considers most suitable to pursue the interests of the minor. The judge can decide on any important issue that generates a dispute between the parents, such as the determination of the domicile or the conditions of the visitation rights.

39. To what extent, if at all, may a holder of parental responsibilities act alone if there is more than one holder of the parental responsibilities?

The holder of the parental responsibilities can only act alone with respect to decisions of minor importance (of daily nature), or to urgent measures and to those which can't be delayed without prejudice. The other parent has the power to petition the judge when he thinks that such decisions are prejudicial to the interests of the minor (Art. 316 and 155 Italian CC).

40. Under what circumstances, if at all, may the competent authority permit the residence of the child to be changed within the same country and/or abroad (so called relocation) without the consent of one of the holders of the parental responsibilities?

The competent authority, taking the interests of the minor into consideration, may permit the child to change residence within the same country and/or abroad (so called relocation) without the consent of the other holder of the parental responsibilities if the parents don't live together or if they are separated, divorced or if their marriage has been annulled.

⁴⁰ On one side it is felt that Art. 316 Italian CC can be applied in difficult situations between the parents (separated or divorced) when there is a partial joint exercise of the parental responsibilities. (M. GIORGIANNI, *Della potestà dei genitori*, in: CIAN, OPPO and TRABUCCHI, *Commentario al diritto italiano della famiglia*, IV, 1992, p. 757; M. MANTOVANI, headword *Separazione personale dei coniugi*, I) *Disciplina sostanziale*, in: *Enc. giur. Treccani*, XXVIII, Roma, 1992, p. 24; see Case Law Supreme Court 07.02.94, No. 1401, in *Dir. fam. pers.*, 1994, p. 1383). On the other, it is felt that Art. 316 Italian CC can only be applied to parents who live together. (GRASSETTI, in: CIAN, OPPO and TRABUCCHI *Commentario al diritto italiano della famiglia*, II, Padova, 1992, p. 699; BONILINI, TOMMASEO, 1997, Case Law, see Supreme Court, united sections, 02.03.1983, No. 1151, *Dir. fam. pers.*, 1983, p. 38, and 02.03. 1983, No. 1152, *Foro it.*, 1983, I, 826). Therefore, considering the loss of the family unit due to separation or divorce, possible conflicts between separated or divorced parents have to be solved by the Ordinary Court. In practice, the second solution has prevailed. (see also Q 55).

41. Under what conditions, if at all, may the competent authority decree that the child should, on an alternating basis, reside with each holder of the parental responsibilities (e.g. every other month with mother/father)?

The competent authority can decree that the child should reside on an alternating basis with each holder of parental responsibilities whenever the authority deems it to be in the interests of the child. In practise, this never happens. Neither case law nor legal literature consider alternating custody of the child to be in the interests of the minor. On the contrary it is considered potentially prejudicial and to provoke serious uncertainty and instability during the minor's growth (see Q 16).

III. Sole parental responsibilities

42. Does a parent with sole parental responsibilities have full authority to act alone, or does he/she have a duty to consult:

(a) The other parent

A parent can hold sole parental responsibilities only if the other parent is dead or has been deprived of authority pursuant to Art. 330 Italian CC. (see Q 51) Therefore, the parent holding sole parental responsibilities has full authority to act alone, without the need to consult the other parent.

(b) Other persons, bodies or competent authorities

A parent can hold sole parental responsibilities only if the other parent is dead or has been deprived of parental authority pursuant to Art. 330 Italian CC (see Q 51). Therefore, the parent holding sole parental responsibilities has full authority to act alone, unless there are extraordinary acts of disposition of the minor's property. Then the authorisation of the guardianship judge is needed and in its absence such acts can be voided (Art. 320 Italian CC).

E. VISITATION RIGHT

43. Having regard to the definition by the Council of Europe (see above), explain the concepts of visitation right used in your national legal system.

The Italian system recognises the minor's right to have enduring, steady and serene contacts with both parents even if there are marital problems or their cohabitation ends. The Italian legal system considers contact with the parent who does not reside with the child to be a minor's fundamental right. This concept is broader than the one defined in the EC Regulation No. 2201/2003, as it includes the right to meet the child and take him or her to a place other than the child's habitual abode for a limited period of time.

Such contact is also a right and duty of a parent who does not have custody or live with the child (Art. 155 § 2 Italian CC and Art. 6 § 3 Italian Divorce law). Since this parent maintains parental responsibilities (even if they are exercised differently from the parent that resides with the child), she or he also keeps the fundamental right and duty to have a relationship with the child. The non-residential parent can only maintain the relationship through frequent and constant contacts, which also discharges the parent's obligation to supervise and to cooperate with the growth of

the child and with the child's education and moral guidance. The contact is a primary obligation of the parent, to be observed in the moral and material interests of the child even before it constitutes a parental right.⁴¹

Maintaining continuous, permanent and untroubled contacts with both parents is in the interests of the minor. Because the peaceful growth of the child requires both parents, the right and duty of contact is recognised even in the absence of a specific judicial order. Judges tend to describe the conditions of visitation in a precise and clear way in order to help the non-residential parent exercise this right and in order to avoid additional sources of friction with the other parent.⁴² The parent the child lives with must permit the non-residential parent to exercise visiting rights within the limits of the interests of the minor, which prevail if there is a conflict over the parental rights (see Q 47). The visiting right generally implies frequent and regular meetings with the minor (usually once a week as well as every other weekend); moreover the non-residential parent has the right and duty to keep the child for specific periods during the year (for example during the holiday seasons and the summer holidays).

Even in the absence of a precise provision of law the judge can also prohibit or grant visiting rights to other relatives (such as the grandparents, the brothers or the sisters) if this is in the child's interests (see Q 44c).

44. To what extent, if at all, does the child have a right of contact with:

(a) A parent holding the parental responsibilities but not living with the child

The minor has the right to enduring, steady and serene contacts with both parents because both of them contribute to the healthy growth of the child. The visitation right is therefore a fundamental right of the minor's which must be observed whenever the minor shows interest, providing it does not interfere with the child's educational obligations, sporting activities and recreational activities. The right of visitation generally implies frequent and regular meetings with the minor (usually once a week as well as during every other weekend); moreover the non-residential parent has the right and duty to keep the child for specific periods during the year (for example during the holiday seasons and the summer holidays).

(b) A parent not holding the parental responsibilities

In our legal system, a parent without parental responsibilities either is deceased or has been decreed in forfeiture of his or her parental responsibilities pursuant to Art. 330 Italian CC. This is applied because of disrespect or neglect of the duties pertaining to the responsibilities, or in case of abuse of the powers pertaining to it along with serious damage to the child (see Q 51). The parent whose forfeiture has been decreed as 'incapable to act as parent' is deprived of all parental rights and duties, with the exception of the obligation to support the child. In this case, the judge may also order the child to be taken away from the family home due to the seriousness of the situation or order the parent mistreating or abusing the minor to leave the family home. However, forfeiture of parental responsibilities does not

⁴¹ G. F. BASINI, *Lo scioglimento del matrimonio*, sub art. 6 L. 898/70, in *Il Codice Civile. Commentario* founded by P. SCHLESINGER and directed by F.D. BUSNELLI, Giuffrè, Milan, 2004, p. 742.

⁴² Supreme Court, 03.05.1986, No. 3013, *Mass. Giust.*, 1986, p. 850.

automatically imply the loss of any contact with the minor (see Q 53). Contact is not necessarily linked to parental responsibilities and can therefore be granted to persons that do not hold it. The judge has broad discretion through which he will determine the means, limits and exclusions of contact in the exclusive interests of the minor.

In general, if the forfeiture decree is based on mistreatment or abuse, the parent is denied visitation rights; if instead the decree is based on neglect the visiting right can be recognised with limits and cautionary measures which take the interests of the minor into account.⁴³

(c) Persons other than parents (e.g. grandparents, stepparents, siblings etc...)

Even in the absence of a precise provision of law, the judge can grant or prohibit the visiting 'rights' of other relatives (such as the grandparents, the brothers or the sisters) by taking the interests of the minor into account. Since these relatives have neither parental responsibilities nor their exercise, they are not recognised as holders of rights but rather as 'having an interest deemed by the law as important.'⁴⁴ Periodical contacts between grandparents and the minor grandchildren is normally recognised due to the fundamental right of the minor to maintain a relationship with her or his grandparents. This relationship can only be limited or denied if there is evidence to the effect that the continuation of this relationship can be prejudicial to the minor.⁴⁵

45. Is the right to have contact referred to in Q 43 also a right and/or a duty of the parent or the other persons concerned?

The visitation right is also a duty for the parent, but not for the other relatives. The right of contact is a duty even before it is a right; a duty parents have in order to observe the fundamental moral and material interests of the child. It is only through frequent and continual visits that a caring, personal relationship can be maintained with the non-residential parent. Through these visits, the non-residential parent can observe his obligations to look after the child's education and moral guidance and cooperate in the child's psychological and physical growth (see Q 43). It is a duty which cannot be legally enforced if it is not observed, but its non-observance (such as, for example, the total or the enduring lack of interest with respect to the minor) may result in the reduction of the parental authority pursuant to Art. 333 Italian CC, its forfeiture pursuant to Art. 330 Italian CC, or constitute the behaviour contemplated by the crime 'Breach of duty of family assistance' pursuant to Art. 570 Italian Criminal Code.

⁴³ Court of Appeal of Rome 27.02.95, *Dir. fam. pers.*, 1995, p. 1450. In this case of first instance, the judge disposing the divorce granted the father the right to contact, notwithstanding that he had been discharged of the parental responsibilities before the divorce. The appellate judges decided to grant the father the right to contact only if both the minor and the mother consented.

⁴⁴ Supreme Court, 09.06.90, No. 5636, *Giust. civ.*, 1991, I, p. 1545. In this case, the Court voided the arrangements the parents made during their separation that prohibited all contact between their children and the children's grandparents.

⁴⁵ Court of Rome, 07.02.87, *Dir. fam. pers.*, 1987, p. 739.

46. To what extent, if at all, are the parents free to make contact arrangements? If they can, are these arrangements subject to scrutiny by a competent authority?

Parents are free to make contact arrangements; however, the arrangements made are subject to judicial scrutiny. The law provides this scrutiny (Arts. 158 Italian CC and Art. 4 § 13 Italian Divorce law) to ensure that arrangements made are not prejudicial to the interests of the child. The law attributes broad discretionary powers to the judge, who can void the agreement made by the parents.⁴⁶

47. Can a competent authority exclude, limit or subject to conditions, the exercise of contact? If so, which criteria are decisive?

The parental right to contact is protected so long as it is not prejudicial to the prevailing moral and material interests of the minor. Therefore the judge, within the broad discretionary powers attributed to him by the law, may limit or even exclude the exercise of this right by taking the pre-eminent interests of the child into consideration; for example, if the visit could cause harm to the child's physical or psychological growth. The court decisions underline that this neither constitutes a sanction against the parent nor terminates the parental rights⁴⁷ unless the behaviour is serious enough to create a judicial order of termination of the parental responsibility pursuant to Art. 330 Italian CC (see also Q 44 (b)). Again, the decisive and exclusive criteria is always the moral and material interests of the minor.

48. What if any, are the consequences on the parental responsibilities, if a holder of the parental responsibilities with whom the child is living, disregards the child's right to contact with:

(a) A parent

A parent may petition the judge for a determination of visitation conditions in order to induce the other parent to respect the non-residential parent's rights.⁴⁸ Unjustified opposition to the visiting right by the parent who lives with the child can be regarded as prejudicial behaviour that gives the non-resident parent the

⁴⁶ Supreme Court, 09.06.90, No. 5636, *Giust. civ.*, 1991, I, p. 1545. In this case the Court voided the arrangements the parents made during their separation which prohibited all contact between their children and the children's grandparents.

⁴⁷ Supreme Court, 17.01.1996, No. 364, *Fam. dir.*, 1996, p. 227; Supreme Court 25.09.1998, No. 9606, *Fam. dir.*, 1999, p. 17. In this case, the Court granted the right of contact to a parent addicted to drugs, as this was not considered prejudicial to the minor.

⁴⁸ In this case, the competent authority is the tutelary judge who controls the application of court judgments relating to the exercise of the parental responsibilities and the administration of the minor's property pursuant to Art. 337 Italian CC. Moreover, the tutelary judge has the power to call parents at any time to obtain necessary information. This is normally requested by one of the parents and aims to restore relations between the parent not holding the custody (that is the parent who doesn't live with the child) and the minor and also to ensure that the measures given by the Court have been followed. In these cases the tutelary judge has the difficult task of listening to the complaints of the parents, ensuring that both parents observe the measures imposed by law and the Court and finally ensuring that the parents reach an agreement in order to properly exercise their parental duties. The tutelary judge normally writes notes on the agreement but this record doesn't represent an execution judgment, so the obligations expressed in the agreement can only be applied by petitioning the Court.

right to request the judge to limit the parental responsibilities pursuant to Art. 333 Italian CC.⁴⁹ Although infrequently granted in practice, such limitation can terminate the custody of the minor and consequently entrust the child to the aggrieved parent.⁵⁰ If the parent the child lives with consistently disregards the non-residential parent's visitation rights, the court may award compensation for the damages suffered by the non-residential parent.⁵¹

(b) Other persons

Even in the absence of a specific provision of law, relatives (for example the grandparents) who wish to have a caring relationship with the minor can apply to the judge pursuant to Art. 333 Italian CC. The judge, after ascertaining the interests of the child and the unjustified refusal of the parent, will grant an order limiting parental responsibilities by granting permission for the grandparents to have periodic contacts with the minor.⁵²

F. DELEGATION OF THE PARENTAL RESPONSIBILITIES

49. To what extent, if at all, may the holder(s) of the parental responsibilities delegate its exercise?

In the Italian legal system the exercise of parental responsibilities cannot be delegated or transferred to others except in exceptional circumstances. Due to 'the parent's duty to support, educate and provide moral guidance to the children' (Art. 30 § 1 of the Constitution of the Republic of Italy), and to 'the right of the minor to be brought up and to receive moral guidance in the ambit of his own family' (Art. 1 § 1 the Italian Adoption Law), the Italian system contemplates the possibility to delegate the exercise of parental responsibilities to other persons only in case of a 'disability' or 'impossibility' of the parents.

A kind of delegation is foreseen by Art. 8 § 1 Italian Adoption Law, which excludes the possibility of abandoning of the child when there are relatives within the fourth degree of consanguinity who can attend to the child's moral and material care. In this situation, therefore, the fundamental right of the minor to be brought up in his own family is realised.

Art. 30, § 2 of the Constitution of the Republic of Italy provides that 'in case of the inability of the parents, the law provides for the exercise of such duties.' Therefore, in order to prevent abandonment and in order to facilitate the moral guidance of the minor within his own family, the law states that the Government, the regions and the local agencies must give support in favour of families at risk by

⁴⁹ In this case the competent authority is the Family Proceeding Court.

⁵⁰ In this case the competent authority to change the custody is the judge who previously decided it. If the parents are not married the competent authority is the Family Proceeding Court, but if the parents are married or have been married the competent authority is the Ordinary Court, which is competent *ratione materiae* upon proceedings concerning separation, divorce or annulment of marriage.

⁵¹ Court of Rome, 13.06.2000, *Dir. fam. pers.*, 2001, p. 209, annotated M. DOGLIOTTI, *ivi*, 2002, p. 61.

⁵² Supreme Court, 24.02.1981, No. 1115, *Dir. fam. pers.*, 1981, p. 697; Court of Taranto 19.04.1999, *Fam. dir.*, 1999, p. 373.

appropriate actions that do not prejudice the family's autonomy and are within their financial resources (Art. 1 § 3 Italian Adoption Law).

When the family (the parents and the relatives within the fourth degree of consanguinity) is not in a position to raise and provide moral guidance to the minor, the Italian Adoption Law provisions apply. Among these provisions is the institution of the 'custody of children' that can be regarded as a type of delegation of the parental responsibilities. It consists in the temporary attribution of the task to assist the minor 'who is lacking an appropriate family atmosphere' to another family, a single person or a public or private assistance institution (Art. 2 § 1 and 2 Italian Adoption Law).⁵³ The custody is a remedy designed to protect the minor. It should be used for a limited period to remedy a temporary, difficult situation in the minor's family of origin. Therefore, it neither implies an adoption relationship nor modifies the familial status of the minor.⁵⁴ During the period of custody, the parents continue to hold parental authority unless there is a judicial order terminating it (Art. 330 Italian CC) or requiring the parent to leave the family home (Arts. 342 *bis* and 342 *ter* Italian CC). The custodians must take the guidance of the parents into consideration (or of those of the judicial authority which provided for the custody) and must facilitate their relationship with the minor with the view to help the child's reintegration back into her or his family of origin (Art. 5 § 1 Italian Adoption Law).⁵⁵

The judicial order providing temporary custody must indicate the reasons for the decision, the duration of the custody, the way in which it must be exercised, the powers conferred upon the custodian and the way in which the parents and the other family members may maintain their relationship with the minor. The judicial order must also mention the public welfare service institution that will be

⁵³ With regard to the institution of custody, see AA.VV., *sub artt. 2-5, Law 28.03.2001, No. 149 which modifies the Law 4 .05.1983, No. 184*, in: C.M. BIANCA and L. ROSSI CARLEO, *Commentario*, in *Nuove leggi civili comm.*, 2002; A. and M. FINOCCHIARO, *Adozione e affidamento dei minori, Commento alla nuova disciplina*, in *Quaderni di diritto e giustizia*, Milan, 2001; L. ROSSI CARLEO, *L'affidamento e le adozioni*, in *Trattato di diritto privato* directed by Rescigno, 4, III, Utet, Turin, 1997, p. 462.

⁵⁴ The discipline concerning custody provided by Art. 2-5 of the Law 184/83 has been partially modified owing to the reform enacted with Law No. 149, dated 28.03.2001. This Law first imposed a maximum period of custody for 24 months. A Family Proceeding Court decision can extend this when the interruption is considered to be prejudicial to the minor (Art. 4 § 4 Italian Adoption Law); second, it imposed custody to an assistance institution as near as possible to the family residence when it is not possible to grant custody of the child to other families or similar communities (Art. 2 § 2 Italian Adoption Law); third, it disposed of the prohibition to admit children above the age of six into institutions and also eliminated every institutional admission by the end of 2006 (Art. 2 § 4 Italian Adoption Law); fourth, it indicated more precisely the powers and faculties of the holders of custody (Art. 5 § 1 Italian Adoption Law); and finally, it ended the extension of all parental rights relating to absence from work, and also leaves for the holders of the custody.

⁵⁵ Parental custody is different from pre-adoption custody, which is the first step towards adoption. It is also different from temporary custody, which can be dispensed by the judge owing to serious reasons in case of separation, divorce or annulment of marriage (Art. 155 § 6 Italian CC and Art. 12 Italian Divorce law) or when the parents' conduct is considered prejudicial for the child (Art. 333 Italian CC).

responsible for the assistance program exercising control, informing the judicial authority of any relevant events and drawing up a semi-annual report on the progress of the program (Art. 4 § 3 Italian Adoption Law).

This custody may be terminated if the momentary difficulties of the family of origin cease, if the continuation of the custody proves prejudicial for the minor or if the duration foreseen for the custody has expired. These circumstances do not automatically determine the termination of custody. A specific judicial order based on the interests of the minor, issued by the Family Proceeding Court that originally provided for the custody, is always necessary. The Family Proceeding Court is supposed to provide for additional measures in the interest of the minor, if advisable (Art. 4 para. 5 and 6 Italian Adoption Law).

50. To what extent, if at all, may a person not holding the parental responsibilities apply to a competent authority for a delegation of the parental responsibilities?

Custody can be requested by parents holding parental responsibilities or by the guardian. In this situation, the local welfare service will make the decision, which must ask for the minor's opinion if the minor is more than twelve years old, or even younger taking the minor's judgement capacity into consideration. The guardianship judge must ratify the decision issued by the public welfare service (Art. 4 § 1 Italian Adoption Law).

In the absence of the consent of the parents holding parental responsibilities or of the guardian, the Family Proceeding Court makes the custody decision upon request of the public prosecutor (Art. 9 Italian Adoption Law). Any person is entitled to inform the competent authorities (police, judicial authority, welfare services) of any serious abandonment situation involving minors, as well as situations involving the lack of an appropriate family atmosphere (Art. 9 Italian Adoption Law). The law requires public officers, those in charge of a public service and those who carry out an activity of public interest that during the course of their activities, who become aware of similar situations to inform the competent officer of the Family Proceeding Court (Art. 9 Italian Adoption Law). The public prosecutor is the main officer in the system of judicial protection of the rights of the minor.⁵⁶ He or she is the person in charge of receiving any notice or complaint issued by public institutions or private citizens, for controlling the public and private assistance institutions and for applying to the Family Proceeding Court (see Q 52).

If the Family Proceeding Court provides for the child's custody without the consent of the parents, they are deprived of their parental authority pursuant to Art. 330 Italian CC (Art. 4 § 2 Italian Adoption Law).

⁵⁶ P. VERCELLONE, *Il controllo giudiziario sull'esercizio della potestà*, in *Trattato di diritto di famiglia* directed by P. ZATTI, II, *Filiazione* by G. COLLURA, L. LENTI and M. MANTOVANI, Giuffrè: Milan, 2002, p. 1033.

G. DISCHARGE OF THE PARENTAL RESPONSIBILITIES

51. Under what circumstances, if at all, should the competent authorities in your legal system discharge the holder(s) of his or her/their the parental responsibilities for reasons such as maltreatment, negligence or abuse of the child, mental illness of the holder of the parental responsibilities, etc.? To what extent, if at all, should the competent authority take into account a parent's violent behaviour towards the other parent?

The judge can decree termination of the parental responsibilities when the parent either does not observe or neglects the duties connected with her or his parental authority, or abuses her or his powers by causing serious prejudice to the child (Art. 330 Italian CC). In general, the termination of parental responsibilities is a remedy against the failure to comply with the duties connected to child. The failure to observe the duties relating to the management of the child's property implies (Art. 334 Italian CC) the termination of the management powers (see Q 13). Therefore, not only are actions relevant for the termination of parental responsibilities, but also omissions (such as the continuous and total lack of interest towards the child). A single event can be relevant, such as the non-observance of parental duties, if the harm to the child caused by the event is very serious. Prejudicial behaviour of the parents that is not so serious but is constantly repeated can also be relevant. Voluntary prejudicial behaviour is not a requirement since the termination can also be decreed if the holder's mental incompetence causes serious damages to the child.

The Italian legal system, therefore, does not determine *a priori*, in detail, the events that justify the termination of the parental authority, leaving broad discretion to the judge. The facts of each given case are numerous and very different in nature.⁵⁷ Instances of 'indirect' abuse or mistreatment, such as the mistreatment of the minor's close relatives (for example, against the other parent) that may prejudice the harmonious psychological and physical growth of the child can be included by analogy in Art. 330 and 333 Italian CC.⁵⁸

The parent whose forfeiture has been decreed because the parent is 'incapable to act as parent', is deprived of all parental rights and duties, with the exception of the obligation to support. If one or of both parent's behaviour is serious enough to justify a decree of termination of parental authority pursuant to Art. 330 Italian CC, but to do so would nonetheless be deemed prejudicial for the child, the judge may grant a decision that is deemed appropriate under the circumstances (Art. 333

⁵⁷ For example, cases of discharge of parental responsibilities due to drugs addiction are numerous. In these cases the discharge is not due simply to drug addiction but is dispensed when the parent addicted to drugs is negligent to his children and doesn't seem to be able to rehabilitate (Court of Appeal of Bologna 11.05.1980, *Dir. fam. pers.*, 1989, p. 602). Moreover the discharge is also dispensed when the parent has been convicted of incest, to life sentence (Art. 564 of the Criminal Code), or in case of forgery and concealment of personal status by way of altering public birth registers, etc. (Art. 566-568 Italian Criminal Code), sexual crimes (Art. 609 *bis*, 609 *ter*, 609 *quater*, 609 *quinquies*, 609 *octies* of the Criminal Code) or in case of children involved in begging activities (Art. 671 Italian Criminal Code).

⁵⁸ Family Proceeding Court of L'aquila 19.07.2002, *Fam. dir.*, 2003, p. 482.

Italian CC). In both cases, the judge, for serious reasons, may also decide to remove the child from the family or order to the abusing parent to leave the family home.

52. Who, in the circumstances referred to in Q 51, has the right or the duty to request the discharge of the parental responsibilities?

The termination or the limitation decrees pursuant to Arts. 330 and 333 Italian CC may be requested by the other parent, by relatives or by the public prosecutor (Art. 336 § 1 Italian CC). Nobody else is entitled to act; neither the child, nor social services nor the Family Proceeding Court (except on its own initiative or for temporary measures in case of urgent needs) (Art. 336 § 3 Italian CC). Anyone aware of prejudicial facts can inform the competent authorities (police, judicial authority, welfare services), not only in the most serious situations of abandonment of the minors, but also in situations deemed prejudicial to the minors (Art. 9 Italian Adoption Law).

The law obligates public officers, persons entrusted with a public service and those who carry out a public service to reveal any serious situations concerning abandonment of minors to the public prosecutor before the Family Proceeding Court (Art. 9 Italian Adoption Law). The public prosecutor is therefore at the centre of the system of judicial protection of the minor's rights.⁵⁹ He or she is the person in charge of receiving any notice or complaint issued by public institutions or by private citizens, for controlling the public and private assistance institutions and for applying to the Family Proceeding Court

53. To what extent, if at all, are rights of contact permitted between the child and the previous holder of the parental responsibilities after the latter has been discharged of his or her the parental responsibilities?

Termination of parental responsibilities does not automatically imply the loss of every visiting right. Indeed, the right of visitation is not necessarily connected to parental responsibilities, so persons who do not hold parental authority can also exercise it. The judge has wide discretionary powers, used exclusively in the best interests of the minor, to determine the conditions, limitations and exclusion of the visiting right. In case of termination of the parental responsibilities the judge may, for serious reasons, decide to remove the child from the family or may order to the abusive parent to leave the family home (Art. 330 § 2 Italian CC). In general, if the termination decree is due to abuse or maltreatment, the parent is deprived of visiting rights; if the termination decree is due to negligence the parent can exercise his visiting right even though the right can be subject to limitations and cautionary measures exclusively aimed at the protection of the minor's interest.⁶⁰

⁵⁹ P. VERCELLONE, *Il controllo giudiziario sull'esercizio della potestà*, in *Trattato di diritto di famiglia* directed by P. ZATTI, II, *Filiazione* by G. COLLURA, L. LENTI and M. MANTOVANI, Giuffrè: Milan, 2002, p. 1033.

⁶⁰ Court of Appeal of Rome 27.02.95, *Dir. fam. pers.*, 1995, p. 1450. In this case of first instance, the divorce judge granted the father the right to contact notwithstanding that he had been discharged of parental responsibilities before the divorce. The appellate judges decided to grant the father the right to contact only with the consent both of the minor and the mother.

54. To what extent, if at all, can the previous holder(s) of the parental responsibilities, who has been discharged of his or her the parental responsibilities, regain them?

The judge may reinstate parental responsibilities to a parent who had been deprived of them (Art. 330 Italian CC) when the reasons for the termination of the parental responsibilities cease and there is no risk of further prejudice to the child (Art. 332 Italian CC). The reinstatement request can also be filed by an interested parent. Reinstatement involves the reacquisition of all rights and duties connected with parental responsibilities.

H. PROCEDURAL ISSUES

55. Who is the competent authority to decide disputes concerning the parental responsibilities, questions of residence of the child or contact? Who is the competent authority to carry out an investigation relating to the circumstances of the child in a dispute on parental responsibility, residence or contact?

Judicial protection of minors in the Italian legal system contemplates an irrational partition of tasks between three different judicial authorities: the Family Proceeding Court, the Ordinary Court and the Guardianship Judge. As a consequence, determining the competent judge may prove very complex and controversial due to the absence of certain and reliable criteria. For this reason, reform projects are currently under discussion (see Q 6) to reduce, if not to eliminate, this excessive fragmentation.

In general, the supervision and power to issue decisions that affect the exercise of parental responsibilities for both married and unmarried parents is exclusively entrusted to the Family Proceeding Court. This Court is competent, pursuant to Art. 316 Italian CC, to settle disagreements between parents on important issues or when orders limiting or terminating parental responsibilities have been requested pursuant to Art. 330 and 333 Italian CC.

The situation is complicated for married parents when a separation, divorce or an annulment decision has been entered. In such cases, the Family Proceeding Court may be asked to issue decisions in connection with the separation, divorce or annulment of the marriage that will modify a situation established by the Ordinary Court. The Ordinary Court is empowered, pursuant to Art. 155 Italian CC, to issue 'any order relating to the children' (therefore also relating to a change custody decision) and to issue new decisions upon the application of the non-residential parent who believes that the previous decisions were prejudicial to the interest of the child. It is clearly difficult to establish between the prejudicial conduct mentioned in Art. 333 Italian CC, which implies the jurisdiction of the Family Proceeding Court, and the prejudicial decision mentioned in Art. 155 Italian CC, which implies the jurisdiction of the Ordinary Court.⁶¹

⁶¹ In practice, the parent not holding parental responsibilities often decides to petition the Family Proceeding Court to request the child's separation from the parent holding the parental responsibilities because of behaviours prejudicial to the minor, pursuant to Art. 333 of the Civil Code, instead of modifying the decision concerning the custody and

It is also disputed whether jurisdiction in disagreements on issues of major interest pertains to the Family Proceeding Court pursuant to Art. 316 Italian CC, or if instead it pertains to the Ordinary Court that decided custody following the separation, divorce or annulment of the marriage pursuant to Art. 155 Italian CC.⁶² In practice the Ordinary Court has prevailed: the Supreme Court has established, after a number of conflicting decisions, that the Ordinary Court is entitled to modify any order issued concerning the children in connection with the separation, divorce or annulment of marriage decisions while the Family Proceeding Court has jurisdiction only in connection with the termination or the limitation of the parental responsibilities pursuant to Art. 330 and 333 Italian CC.⁶³

Recently an additional solution has been adopted: the Family Proceeding Court has jurisdiction with regard to both unmarried and married parents but with married parents, Art. 333 Italian CC may be applied only if a decision on the separation, divorce or annulment has not been issued. If a proceeding on the separation, on the divorce or on the annulment is pending or has been decided, Art. 317 § 2 Italian CC and Art. 155 Italian CC should apply and the jurisdiction of the Ordinary Court should be recognised.⁶⁴

The following pattern prevailed with regard to conflicts between separated or divorced parents concerning decisions of minor importance relating to the children (for example the exercise of the visiting right), parents not cohabiting (whether they hold the custody or not) must apply to the guardianship judge who, pursuant to Art. 337 Italian CC, has the task of supervising the conditions established by the Court in connection with the exercise of parental responsibilities and management

consequently petitioning the competent ordinary Court which first disposed custody pursuant to Art. 155 of the Civil Code.

⁶² It is stated that Art. 316 of the Civil Code can be applied even in difficult situations between parents (separated or divorced) if there is a joint exercise of the custody (M. GIORGIANNI, *Della potestà dei genitori*, in *Commentario al diritto italiano della famiglia* by G. CIAN, G. OPPO and A. TRABUCCHI, IV, Cedam, Padova, 1992, p. 336-337; M. MANTOVANI, headword *Separazione personale dei coniugi, I) Disciplina sostanziale*, in *Enc. giur. Treccani*, XXVIII, Foro Italiano, Roma, 1992, p. 24; in case law see Supreme Court 07.02.94, No. 1401, *Dir. fam. pers.*, 1994, p. 1383). A different point of view states that Article 316 of the Civil Code can be applied only in case of cohabitation. In this case, the authority competent to decide disagreements between separated or divorced parents is the Ordinary Court, as separation or divorce provokes a loss of the family unity (C. GRASSETTI, in: G. CIAN, G. OPPO and A. TRABUCCHI, *Commentario al diritto italiano della famiglia*, II, Cedam, Padova, 1992, p. 699; N. SCANNICCHIO, sub art. 6, in *Commentario alla l. 6 marzo 1987*, No. 74 by N. LIPARI, in *Nuove leggi civ. comm.*, 1987, p. 949; in case law see Supreme Court 03.11.2000, No. 14360, in *Fam. dir.*, 2001, p. 38 and following, annotated by F. TOMMASEO).

⁶³ Supreme Court, full bench, 02.03.1983, No. 1151, *Dir. fam. pers.*, 1983, p. 38 and Supreme Court 02.03.1983, No. 1152, in *Foro it.*, 1983, I, p. 826).

⁶⁴ Supreme Court, 11.04.1997, No. 3159, in *Fam. dir.*, 1997, p. 431. Such a drastic solution, which understandably has not been followed by subsequent decisions, is not convincing since it excludes the possibility for the separated or divorced parents, or for the spouse in case of annulment of the marriage, to request the Judge (of the Family Proceeding Court) to reduce the powers conferred upon the parent which holds the custody pursuant to Art. 333 Italian CC whenever it is deemed in the interest of the child.

of the minor's properties. In the most serious cases, when conduct caused a serious prejudice to the minor pursuant to Art. 330 Italian CC or in case of a conduct that is in prejudicial pursuant to Art. 333 Italian CC, the Family Proceeding Court has jurisdiction provided that the separation proceeding has already been already completed; otherwise the jurisdiction of the Ordinary Court should be recognised. Finally, with regard to the decisions ordering a parent to leave the family home, pursuant to Art. 342 *bis* and 342 *ter* Italian CC, the Ordinary Court has jurisdiction unless the above-mentioned order was issued during a proceeding terminating or limiting the parental authority pursuant to Art. 330 and 333 Italian CC.

Usually, the competent judicial authority requires psychological and pedagogical experts to perform comprehensive inquiries on the family situation and propose possible solutions, taking into consideration the fundamental moral and material interests of the minor.

56. Under what conditions, if any, may a legally effective decision or agreement on the parental responsibilities, the child's residence or contact, be reviewed by a competent authority? Is it, e.g., required that the circumstances have changed after the decision or agreement was made and/or that a certain period of time has time has passed since the decision or agreement?

A court decision or an agreement between the parents confirmed during the course of a judicial proceeding can be reviewed only if the circumstances which were the basis of the decision have subsequently changed, unless the law expressly provides for a specific duration (such as, for example, in case of the judicial order to the parent to leave the family home pursuant to Arts. 342 *bis* and 342 *ter* Italian CC; in this case the duration can be extended in case of serious reasons). Also, the interests of the minor must be taken into consideration.

57. What alternative disputes solving mechanisms, if any, e.g. mediation or counselling, are offered in your legal system? Are such mechanisms also available at the stage of enforcement of a decision/agreement concerning the parental responsibilities, the child's residence or contact?

The Italian legal system doesn't foresee the possibility of family mediation for alternative dispute resolution, except in situations provided for by Art. 342 *bis* and 342 *ter* Italian CC (which state that the judge, to end prejudicial conduct by ordering a parent to leave the family home, may also order the intervention of the welfare services operating in the territory or the intervention of a family mediation centre). In practice, judges normally suggest that the parties contact the family mediation centres in order to ensure the observation of the provisions concerning the parental responsibilities.

58. To what extent, if at all, is an order or an agreement on the parental responsibilities, the child's residence or contact enforceable and in practice enforced? Describe the system of enforcement followed in your national legal system. Under what conditions, if at all, may enforcement be refused?

The Court decisions or the agreements confirmed in a judicial proceeding can be enforced through the intervention of the guardianship judge (see footnote to Q 48a) of welfare services (both of them perform very valuable services and mediation activities) or by the police. The Court orders must be observed and cannot be refused so long as they are not modified or revoked.

59. To what extent, if at all, are children heard when a competent authority decides upon the parental responsibilities, the child's residence or contact, e.g., upon a dispute, when scrutinising an agreement, when appointing or discharging holder(s) of the parental responsibilities, upon enforcement of a decision or agreement?

A minor with the ability to maturely judge has the right to be heard in all proceedings that can affect his or her life and growth, according to the principles established by the Convention of New York of 1989 dealing with the rights of the child.

60. How will the child be heard (e.g. directly by the competent authority, a specially appointed expert or social worker)?

The minor can be heard either directly by the judge or by an expert appointed by the judge.

61. How, if at all, is the child legally represented in disputes concerning:

- (a) The parental responsibilities**
- (b) The child's residence**
- (c) Contact**

Despite ratification of the 1996 Strasbourg Convention on the rights of the child by means of the Law No. 77 of 20 March 2003, in the Italian legal system the complete implementation of the minor's rights to participate in legal proceedings that affect her or him (namely the right to request to be assisted, the right to appoint her or his own representative, if appropriate a lawyer, to exercise the rights of a party as well the power of the judge to appoint a representative for the minor) requires our legislature to adopt a number of internal instruments which at the moment have not yet been organised (see also third footnote to Q 1). Therefore, Italian law totally ignores rights that, even if formally recognised, lack the instruments necessary for their implementation.

62. What relevance is given in your national legal system to the age and maturity of the child in respect of Q 59-61?

They are criteria which are regarded as relevant to ascertain the minor's ability to judge and therefore are relevant as to whether the child is entitled to be heard in all the proceedings that affect him or her.