

# FREE JUSTICE FOR MINORS IN CHILD SUPPORT ACTIONS<sup>1</sup>

## A GRATUIDADE DA JUSTIÇA PARA MENOR DE IDADE EM AÇÃO DE ALIMENTOS

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### Abstract

This article aims to address the issue of free provision of justice for minors in child support cases. The underlying scientific research highlights the need to adjust the criteria for granting legal aid in such judicial matters, ensuring that the financial situation of the beneficiary (children and adolescents) is not confused with that of their legal representative or assistant. Linked to a critical-methodological approach, this article seeks to rethink legal institutions in a contemporary manner and propose solutions for real-life cases. By adopting a legal-dogmatic perspective, it also discusses applicable normative propositions with a focus on society and its conflicts, aiming to ensure that the law achieves social effectiveness.

**Keywords:** Civil procedure; Child support actions; Free justice; Representation and legal aid; Financial status of minors.

### Resumo

Este artigo se propõe a abordar a gratuidade da justiça para menor de idade em ação de alimentos, pois a investigação científica do qual provém indicou a necessidade de adequação dos critérios para sua concessão neste tipo de demanda judicial, a fim de não se confundir a situação financeira do beneficiário (crianças e adolescentes) com a de seu/sua representante/assistente legal. Vinculado à linha crítico-metodológica, este artigo busca repensar os institutos jurídicos de maneira atual e apresentar soluções para os casos concretos, bem como, ao assumir a vertente jurídico-dogmática, discutir as proposições normativas aplicáveis com a atenção voltada para a sociedade e seus conflitos, de modo a permitir que o direito alcance efetividade social.

**Palavras-chave:** Processo civil; Ação de alimentos; Gratuidade da justiça; Representação e assistência legal; Situação financeira do menor de idade.

**Contents:** 1. Introduction. 2. Free legal aid as a tool for ensuring access to justice. 3. Free legal aid for minors in child support actions. 4. Conclusion. 5. References.

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## 1 INTRODUCTION

Contemporary society (or contemporaneity) is commonly referred to as “post-modern”, a term that shows its rupture with modernity. In addition to representing a temporal perspective, the prefix “post” points to the overcoming of the dominance of rationalization and subjectivity, characteristic of modern thought<sup>4</sup>.

There has therefore been a transition from a society based on individualism, reason and certainty, to one marked by pluralism and a high degree of complexity<sup>5</sup>, so that the structures and mechanisms typical of modernity are no longer able to meet its demands.

Referring to the transition that has taken place with the advent of contemporaneity means discussing the need to shift mental models for understanding reality, which, in post-industrial society, have taken on new characteristics<sup>6</sup>. These distinctive features have been reflected in the legal field, because while the system has sought to remain intact, the reality underlying it has changed<sup>7</sup>.

Thus, the influence of contemporaneity on the law may not be ignored, notably a concrete change in the legal discipline of interpersonal relationships. A normativity constructed and sustained from a self-referential system of its abstract dogmatic rationality<sup>8</sup> no longer proves to be adequate, under the risk of the law becoming detached from the evolution of social experience.

In law, there has been a shift from a paradigm grounded in rationalism, individualism, subjectivity, formalism, and (formal) legal certainty, to a paradigm founded on the centrality of the constitution, personalization, problem-oriented thinking, and the mitigation of certainty and (formal) legal security in favor of the primacy of justice<sup>9</sup>.

In this context, the provision of free legal aid for minors in child support actions should be understood in a way that leads to judicial decisions ensuring, at the same time, the application of current normative propositions and justice in the

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<sup>4</sup> AMARAL, Francisco, “O Direito Civil na Pós-Modernidade”, in NAVES, Bruno Torquato de Oliveira, FIUZA, César, SÁ, Maria de Fátima Freire de, coord., *Direito Civil: Atualidades*, Belo Horizonte, Del Rey, 2003, p. 62, 66.

<sup>5</sup> AMARAL, Francisco, “O Direito Civil na Pós-Modernidade”, in NAVES, Bruno Torquato de Oliveira, FIUZA, César, SÁ, Maria de Fátima Freire de, coord., *Direito Civil: Atualidades*, Belo Horizonte, Del Rey, 2003, p. 72-73.

<sup>6</sup> AMARAL, Francisco, “O Direito Civil na Pós-Modernidade”, in NAVES, Bruno Torquato de Oliveira, FIUZA, César, SÁ, Maria de Fátima Freire de, coord., *Direito Civil: Atualidades*, Belo Horizonte, Del Rey, 2003, p. 63.

<sup>7</sup> FACHIN, Luiz Edson, *Teoria Crítica do Direito Civil*, 3ª ed., Rio de Janeiro, Renovar, 2012, p. 67.

<sup>8</sup> NEVES, A. Castanheira. *Digesta: Escritos Acerca do Direito, do Pensamento Jurídico, da sua Metodologia e Outros*, Coimbra, Coimbra Editora, 2010, v. 3, p. 51.

<sup>9</sup> AMARAL, Francisco, “O Direito Civil na Pós-Modernidade”, in NAVES, Bruno Torquato de Oliveira, FIUZA, César, SÁ, Maria de Fátima Freire de, coord., *Direito Civil: Atualidades*, Belo Horizonte, Del Rey, 2003, p. 76-77.

specific case<sup>10</sup>. It is crucial not to confuse the financial situation of the minor (beneficiary) with that of their legal representative or assistant.

## 2 FREE LEGAL AID AS A TOOL FOR ENSURING ACCESS TO JUSTICE

The judicial procedure imposes its (partial) cost on those who use it, through a system of court fees and procedural expenses. It theoretically requires the advance payment of the costs necessary to operate the judicial apparatus, making the existence of economic resources on the part of the litigant a prerequisite for access to justice<sup>11</sup>. While it establishes the payment of court fees and procedural expenses as an “indispensable prerequisite” for seeking judicial resolution of conflicts, it concurrently deprives those without financial means of receiving adequate legal protection<sup>12</sup>.

However, access to justice is the “touchstone” of contemporary issues in procedural law, as it is an essential guarantee for the protection of fundamental rights<sup>13</sup>. Incidentally, the current constitutional text has itself made access to justice a fundamental right, by providing in Article 5, XXXV, “the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power”<sup>14</sup>.

Based on Article 5, item LXXIV, of the Federal Constitution (FC) and Articles 98 to 102 of the Civil Procedure Code (CPC), free legal aid represents an “individual, unconditional, and non-transferable exemption granted to the party”<sup>15</sup> concerning the obligation to advance expenses necessary for procedural acts. This benefit is granted to those who demonstrate financial need. It should be noted, however, that economic need might not be confused with a state of poverty, as the former is effectively related to party's lack of resources to cover the procedural expenses arising from the desired legal demand<sup>16</sup>.

To request the benefits of free justice, the interested party simply needs to declare themselves unable to afford the court costs, procedural expenses, and attorney's fees (Article 98, caput, of the CPC and Article 1, § 2, of Law 5,478/1968).

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<sup>10</sup> CARVALHO NETTO, Menelick de, SCOTTI, Guilherme, *Os Direitos Fundamentais e a (In)Certeza do Direito: a Produtividade das Tensões Principiológicas e a Superação do Sistema de Regras*, 2ª ed. rev. e atual., Belo Horizonte, Fórum, 2020, p. 44.

<sup>11</sup> ASSIS, Araken de, *Processo Civil Brasileiro: Parte Geral – Institutos Fundamentais*, 2ª ed. rev. e atual., São Paulo, Revista dos Tribunais, 2016, v. 2, p. 537.

<sup>12</sup> THEODORO JÚNIOR, Humberto, *Curso de Direito Processual Civil: Teoria Geral do Direito Processual Civil, Processo de Conhecimento e Procedimento Comum*, 60ª ed., Rio de Janeiro, Forense, 2019, v. 1, p. 336.

<sup>13</sup> GORON, Lívio Goellner, “Acesso à Justiça e Gratuidade: Uma Leitura na Perspectiva dos Direitos Fundamentais”, *Revista de Processo*, vol. 195, maio 2011, pp. 249-277.

<sup>14</sup> RUIZ, Ivan Aparecido, SENGIG, Kenza Borges, “O Acesso à Justiça como Direito e Garantia Fundamental e sua Importância na Constituição da República Federativa de 1988 para a Tutela dos Direitos da Personalidade”, *Revista Jurídica Cesumar – Mestrado*, vol. 13, num. 1, jan./jun. 2013, p. 219, translation mine: “[...] so that it is assumed that everyone, without distinction, has the right to seek appropriate and effective judicial protection before the bodies of the Judiciary, respecting, of course, the guarantees of due legal process and, primarily, its corollary, the principle of adversarial proceedings and the right to a full defense, as well as the procedural rules applicable to the case.”

<sup>15</sup> ASSIS, Araken de, *Processo Civil Brasileiro: Parte Geral – Institutos Fundamentais*, 2ª ed. rev. e atual., São Paulo, Revista dos Tribunais, 2016, v. 2, p. 539-540.

<sup>16</sup> ASSIS, Araken de, *Processo Civil Brasileiro: Parte Geral – Institutos Fundamentais*, 2ª ed. rev. e atual., São Paulo, Revista dos Tribunais, 2016, v. 2, p. 556.

In this regard, it should be noted that if a natural person applies for free justice, the declaration of hypo-sufficiency on which the application is based is presumed to be true<sup>17</sup>.

Law establishes this presumption in order to prioritize access to justice, since “any procedural delays prior to the granting of free aid by the judge” would be incompatible with this constitutional guarantee<sup>18</sup>. However, this is a presumption of truth *iuris tantum* (Article 1, § 3, of Law 5,478/1968), meaning that it is the opposing party’s discretion to present evidence capable of refuting the claim of insufficient resources made by the requesting party<sup>19</sup>.

Thus, the importance of free justice and its proper interpretation and application may not be disregarded, as it pertains to the constitutional guarantee of access to justice. Despite its difficult definition, this guarantee points to two essential purposes: “first, the system must be equally accessible to all; second, it must produce results that are individually and socially just”<sup>20</sup>.

The essential nature of the right to child support in enabling a dignified life for those who, on their own, are unable to meet their existential needs, and the frequent need for children and adolescents to resort to the courts to claim support, necessitate a rethinking of free legal aid in Brazilian civil procedure. Questions should also be raised as to what should be considered for granting the benefit in child support actions where the plaintiff is a minor.

### 3 FREE LEGAL AID FOR MINORS IN CHILD SUPPORT ACTIONS

Given the requirement for a minor plaintiff to be represented or assisted in court to defend their claims, the following question arises: should the analysis of insufficient resources for the granting of free legal aid in a child support action be based on the financial situation of the minor (child or adolescent) or that of their legal representative/assistant, most often the mother?

The understanding sought to be established, based on research into the proposed issue, aims at promoting the dignity of children and adolescents through access to justice, in order to meet their material needs and, consequently, ensure the full development of their personalities and psychophysical potential.

The right to child support is highly relevant, especially considering that it is not an isolated legal phenomenon but part of a set of interactions that typically occur within families in dispute<sup>21</sup>, which demands even more from (procedural) law to ensure its effectiveness.

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<sup>17</sup> BUENO, Cassio Scarpinella, *Curso Sistematizado de Direito Processual Civil*, 9ª ed., São Paulo, Saraiva, 2018, v. 1, p. 505.

<sup>18</sup> DINAMARCO, Cândido Rangel, *Instituições de Direito Processual Civil*, 7ª ed. rev. e atual., São Paulo, Malheiros, 2017, v. 2, p. 798.

<sup>19</sup> ASSIS, Araken de, *Processo Civil Brasileiro: Parte Geral – Institutos Fundamentais*, 2ª ed. rev. e atual., São Paulo, Revista dos Tribunais, 2016, v. 2, p. 561-562.

<sup>20</sup> CAPPELLETTI, Mauro, GARTH, Bryant, *Acesso à Justiça*, Porto Alegre, Fabris, 1988, Trad. Ellen Gracie Northfleet, p. 8.

<sup>21</sup> *Vide* HUSNI, Alicia, RIVAS, Maria Fernanda, *Famílias em Litigio: Perspectiva Psicossocial*, 2ª ed. atual. e ampl., Buenos Aires, Abeledo Perrot, 2013.

However, there is clearly insufficient treatment of the sequence child support – procedural capacity – and free legal aid, both in legislation and in legal scholarship. In this sense, it is important, first, to identify the plaintiff in a child support action. According to Cândido Rangel Dinamarco, the claimant (plaintiff in the knowledge phase or creditor in the enforcement of a judgment) is the one who “expresses their dual claim to the state-judge,” so that (i) the judge provides judicial services, and through this service, (ii) fulfills their interest in obtaining a particular legal asset<sup>22</sup>. Based on this understanding, it is inferred that in child support claims by children and adolescents, it is they, as subjects of rights, who undoubtedly assume the position of plaintiffs in the case.

Due to the lack of procedural capacity of children and adolescents, it is necessary for them to be represented or assisted, according to Article 71 of the CPC: “The incapable shall be represented or assisted by their parents, guardian or curator, in accordance with the law”.

It follows that the representative and the assistant *are not parties* to the case. The rules of substantive and procedural law determine, in specific situations, that the rights and interests of one person are defended by or alongside another, as is the case with incapacitated persons, who are necessarily represented or assisted<sup>23</sup>, and who nevertheless remain parties to the proceedings.

This is exactly the case with a minor in a child support action. As Fredie Didier Jr. notes, “in a child support action brought by an incapacitated child, the father or mother may be their legal representative. The party is the incapacitated person; the father or mother may only be representatives, and not procedural substitutes”<sup>24</sup>. Therefore, there is no doubt that the party in a child support action is the child or adolescent, and not the legal representative or assistant, and there is no need to consider procedural substitution.

Thus, any reasoning that links free legal aid to the financial situation or personal assets of the representative or assistant of the person receiving maintenance (a minor) must not be sustained. This is because such aid is a personal benefit (art. 99, § 6, of the CPC) granted to the party who lacks the means to bear the costs, the expenses of the proceedings and attorney’s fees<sup>25</sup>, and not to the person who complements their procedural capacity. Indeed, it follows that the benefit is granted to the recipient of child support, who has no income or assets; otherwise, there would be no need to pursue the claim judicially.

As well noted by Maria Berenice Dias, it is clear that the granting of free legal aid is independent of the financial situation or personal assets of the legal representative/assistant of the minor (child). Instead, the assessment of the

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<sup>22</sup> DINAMARCO, Cândido Rangel, *Instituições de Direito Processual Civil*, 7ª ed. rev. e atual., São Paulo, Malheiros, 2017, v. 2, p. 137.

<sup>23</sup> DINAMARCO, Cândido Rangel, *Instituições de Direito Processual Civil*, 7ª ed. rev. e atual., São Paulo, Malheiros, 2017, v. 2, p. 138-139.

<sup>24</sup> DIDIER JUNIOR, Fredie, *Curso de Direito Processual Civil: Introdução ao Direito Processual Civil, Parte Geral e Processo de Conhecimento*, 19ª ed., Salvador, Jus Podivm, 2017, v. 1, p. 401.

<sup>25</sup> ASSIS, Araken de, *Processo Civil Brasileiro: Parte Geral – Institutos Fundamentais*, 2ª ed. rev. e atual., São Paulo, Revista dos Tribunais, 2016, v. 2, p. 539.

recipient's (minor's) financial situation will support the benefits derived from free justice<sup>26</sup>.

Nevertheless, the prevailing jurisprudence is not generally oriented towards considering the financial situation of the minor (child) when analyzing the granting of free legal aid in child support actions brought by children or adolescents. There is often a requirement to prove the insufficiency of income or assets of the legal representative/assistant of the child support recipient (minor) for the granting of free justice. This may go as far as denying the benefit simply due to the residential address of the minor and their legal representative, most often their mother.

As things stand, legal practice tends to deviate from the correct decision regarding the issue at hand. This is because, considering that the child support recipient (minor) typically does not have their own income or assets, it is evident that they, lacking the necessary resources to cover the costs of the process, are necessarily entitled to free justice.

By linking the assessment of the request for free justice to the financial situation of the legal representative/assistant of children or adolescents seeking their right to support in court, the focus is placed on covering the economic costs associated with the functioning of the state apparatus for judicial services. This occurs to the detriment of protecting the rights that ensure at least a minimally dignified survival for those who are unable to meet their most basic material needs on their own.

An environment of insecurity has been created for the child support recipient (the minor) who, in this scenario, shifts from being a subject of rights to a *potential* subject of rights<sup>27</sup>. Minors may find themselves deprived of the benefits reserved for them by law, with the costs of the process being borne by others, or they may face the abandonment of the legal action due to the inability of the legal representative/assistant to cover these costs.

Furthermore, an examination of decisions on the topic highlights the need for clear articulation of the criteria used for granting or denying free legal aid in everyday judicial practice. In general, decisions rely on generic expressions, with a complete lack of consideration of the elements of the case, making it impossible to identify the factual and legal grounds assumed by the judge.

When examining the common bases used to assess free legal aid in cases exclusively concerning the right to child support, where children or adolescents occupy the active party, it is often impossible to determine which financial situation was considered in the analysis for granting free justice—whether that of the minor or the legal representative/assistant.

It is thus pertinent to question whether such decisions satisfactorily comply with the constitutional command to justify judgments (Article 93, IX), which is also present in civil procedural law (Article 489, II, and § 1). When it comes to the fundamental right to reasoning, such must be expressed, clear, coherent, and

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<sup>26</sup> DIAS, Maria Berenice, *Alimentos aos Bocados*, São Paulo, Revista dos Tribunais, 2014.

<sup>27</sup> FACHIN, Luiz Edson, *Teoria Crítica do Direito Civil*, 3ª ed., Rio de Janeiro, Renovar, 2012, p. 40.

logical<sup>28</sup>. By knowing the reasons for the decision, the parties are enabled to adequately challenge the ruling that is unfavorable to them, if they so wish<sup>29</sup>.

An adequate justification makes it possible to recognize the criteria of the decision and to criticize them. Therefore, the inadequacy of judicial rulings on this revisited topic, commonly observed in child support cases brought by minors, lies not only in criteria that do not prioritize the effectiveness of the right to support but, more importantly, in the scant reasoning, which does not even allow one to discern the decision-making patterns that influenced the judge's conviction.

In the analysis of rulings from Appellate Courts, it was found that specific treatment of the topic is scarce. However, it is worth noting that the rulings that articulated the criteria applied in the assessment of free legal aid in child support cases with a minor as the plaintiff followed the guidance proposed in this article.

In this regard, as examples, the Interlocutory Appeals No. 70010148724/RS, 70077207249/RS and 20150020183896/DF:

#### **LEGAL AID.**

*In the case of a child support action brought by a minor and an incapable person, the granting of free legal aid is mandatory, as attention must be paid to the economic condition of the party and not of the legal representative<sup>30</sup>.*

#### **INTERLOCUTORY APPEAL. CHILD SUPPORT ENFORCEMENT ACTION. FREE LEGAL AID. REINSTATEMENT.**

*Due to the presumption of economic insufficiency (Article 1, § 3, of the Child Support Law) and the principle of comprehensive protection, which recommends allowing minors to litigate without cost to ensure their rights, the benefit of free legal aid should be reinstated. Interlocutory appeal granted, by single-judge decision<sup>31</sup>.*

**CIVIL. CIVIL PROCEDURE. INTERLOCUTORY APPEAL. CHILD SUPPORT ACTION. REQUEST FOR FREE LEGAL AID. DECLARATION OF ECONOMIC INSUFFICIENCY. PROOF OF POVERTY STATUS. NOT REQUIRED. MINOR WHO DOES NOT WORK. NO INCOME. CHILD SUPPORT LAW. PRESUMPTION OF INDIGENCE. POSSIBILITY. APPEAL GRANTED. DECISION REVERSED.**

*1. According to Article 1 of Law No. 5,478/68, a simple statement by the minor regarding inability to cover the court costs without jeopardizing his/her own livelihood and that of his/her family is sufficient for granting the benefit.*

*2. If the plaintiff submits documents showing that he/she is a minor and unemployed, a decision denying free legal aid based on the monthly income of the plaintiff's legal representative is unreasonable.*

*3. In this case, the benefit of free legal aid is applicable with the simple demonstration in the case files that the plaintiff in the child support action is a minor and does not work, having no income to cover the court costs. The financial situation of the minor*

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<sup>28</sup> ASSIS, Araken de, *Processo Civil Brasileiro: Parte Geral – Institutos Fundamentais*, 2ª ed. rev. e atual., São Paulo, Revista dos Tribunais, 2016, v. 1, p. 441.

<sup>29</sup> ASSIS, Araken de, *Processo Civil Brasileiro: Parte Geral – Institutos Fundamentais*, 2ª ed. rev. e atual., São Paulo, Revista dos Tribunais, 2016, v. 1, p. 444.

<sup>30</sup> RIO GRANDE DO SUL, Court of Justice, 7<sup>th</sup> Civil Chamber, Interlocutory Appeal No. 70010148724, Rapporteur Maria Berenice Dias, judged on 11/01/2004, *Court Gazette*, Porto Alegre, Nov. 1, 2004, translation mine.

<sup>31</sup> RIO GRANDE DO SUL, Court of Justice, 8<sup>th</sup> Civil Chamber, Interlocutory Appeal No. 70077207249, Rapporteur Ricardo Moreira Lins Pastl, judged on 04/03/2018, *Electronic Court Gazette*, Porto Alegre, Apr. 4 2018, translation mine.

*should not be confused with that of the legal representative. Furthermore, since the plaintiff is a minor dependent on parental support, it is clear that they are entitled to the claimed right.*

*4. Appeal acknowledged and upheld. Decision reversed*<sup>32</sup>.

Within the scope of the Superior Court of Justice (SCJ), the judgment of Special Appeal No. 1807216/SP in 2020 is certainly worth mentioning. In it, the Third Panel of the SCJ concluded that it is improper to link the financial situation of a person other than the party when analyzing the application of free justice. Thus, since the plaintiff is a minor, the financial situation of their legal assistant/representative should not be taken into account.

If the Court of Citizenship's judgments did not previously specifically deal with the issue, the ruling of this Special Appeal shows that there is a possibility of overcoming the imprecise understanding that currently permeates the day-to-day life of family courts nationwide. That is because the discrepancies commonly found in lower courts practice were duly ruled out by the judgment of the Third Panel of the SCJ.

In this case, it is important to note that the ruling in question arose from a dispute during the enforcement phase of a child support judgment, in which the request for free legal aid made by the debtor's children, represented by their mother, was denied. The denial at the first instance was based on the lack of proof regarding the unfavorable financial situation of the plaintiffs' mother. In the same vein, the Court of Justice of the State of São Paulo, stemming from a clear confusion between the parties and their legal representative, argued that there were indications of the plaintiffs' ability to bear the court costs, based on the profession of their mother.

Dismissing the above reasoning, Justice Nancy Andrighi, rapporteur of the Special Appeal, stated that, due to the very personal nature of the right to free legal aid, the conditions required for it to be granted must be met by the party – the maintenance recipient (the minor) – and not by the legal assistant/representative. Furthermore, the rapporteur rightly pointed out that it was undue to impose unjustified restrictions on the right to action, especially considering the maintenance nature of the obligation under discussion.

Adopting this understanding, the Third Panel of the SCJ concluded that:

*CIVIL CASE. CIVIL PROCEDURE. ENFORCEMENT OF A CHILD SUPPORT JUDGMENT. RIGHT TO LEGAL AID. INDIVIDUAL AND PERSONAL NATURE. EXTENSION TO THIRD PARTIES. IMPOSSIBILITY. EVALUATION OF THE FULFILLMENT OF REQUIREMENTS BASED ON THE ECONOMIC SITUATION OF A PERSON OTHER THAN THE PARTY, SUCH AS THE LEGAL REPRESENTATIVE OF A MINOR. STRONG LINK BETWEEN DIFFERENT SUBJECTS OF RIGHTS AND OBLIGATIONS. ECONOMIC DEPENDENCE OF THE MINOR. AUTOMATIC EXAMINATION OF THE MINOR'S RIGHT TO FREE LEGAL AID IN THE LIGHT OF THE PARENTS' ECONOMIC SITUATION. IMPOSSIBILITY. CRITERIA. TENSION BETWEEN THE VERY PERSONAL NATURE OF THE RIGHT AND THE ECONOMIC INCAPACITY OF THE MINOR.*

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<sup>32</sup> DISTRITO FEDERAL E DOS TERRITÓRIOS, Court of Justice, 1<sup>st</sup> Civil Panel, Interlocutory Appeal No. 20150020183896, Rapporteur Alfeu Machado, judged on 10/21/2015, *Electronic Court Gazette*, Brasília, Nov. 6 2015, translation mine.



PREVALENCE OF THE RULE IN ART. 99, §3, OF THE NEW CPC. STRONG PRESUMPTION OF INSUFFICIENCY OF THE MINOR. SUBSEQUENT JUDICIAL REVIEW. POSSIBILITY. PRESERVATION OF ACCESS TO JUSTICE AND ADVERSARIAL PROCEEDINGS. RELEVANCE OF THE SUBSTANTIVE LAW. MAINTENANCE. INDISPENSABILITY OF SATISFYING THE DEBT. SERIOUS AND IMMINENT RISK TO MINOR CREDITORS. IMPOSSIBILITY OF UNJUSTIFIED RESTRICTION ON THE EXERCISE OF THE RIGHT TO ACTION. LEGAL REPRESENTATIVE ENGAGED IN PROFESSIONAL ACTIVITY. AMOUNT OF MAINTENANCE OBLIGATION. IRRELEVANCE.

1. *Special appeal filed on May 18, 2018, and assigned to the Rapporteur on February 13, 2019.*

2. *The purpose of the appeal is to determine whether, in a legal action regarding child support initiated by a minor, the granting of free justice may be conditioned on the demonstration of financial insufficiency of the legal representative.*

3. *The right to legal aid is individual and personal, and may not be automatically extended to those who do not meet the legal requirements for its granting. For the same reason, it is not permissible to require that the legal conditions for granting the benefit be fulfilled by someone other than the party, such as their legal representative.*

4. *In cases involving minors represented by their parents, there will always be a strong link between the situation of these two different subjects of rights and obligations, particularly due to the minor's civil and economic incapacity. However, this does not mean that the minor's right to legal aid should be automatically assessed based on the financial situation of their parents.*

5. *The interpretation that best balances the tension between the personal nature of the right to legal aid and the minor's evident economic incapacity is to initially apply the rule of Article 99, §3 of the new CPC, granting the benefit to the minor based on the presumption of their lack of resources. This is subject to the possibility of the defendant demonstrating, pursuant to Article 99, §2 of the new CPC, that the legal requirements for granting the aid are not met, which simultaneously upholds the principles of access to justice and adversarial system*

6. *It is also essential to consider the nature of the material right at stake in the action seeking legal aid. In this context, there is no doubt that there may not be any unjustified restriction on the right to take legal action in pursuit of the fulfillment of a maintenance obligation.*

7. *The fact that the legal representative of the parties has a paid occupation and the high amount of the maintenance obligation being executed may not, on their own, serve as a barrier to granting legal aid to minor beneficiaries of the support.*

8. *Special appeal acknowledged and granted<sup>33</sup>.*

The data collected in this study, along with its comparison with constitutional and infraconstitutional normative statements on the subject, as well as specialized literature, affirm the urgent need for legal practice to analyze the insufficiency of resources and the related declaration of financial incapacity when granting legal aid to minor plaintiffs in maintenance cases. This analysis should effectively focus on the financial situation of the child or adolescent seeking support.

This is not to say that all children and/or adolescents should be provided with free legal services, thus undermining the meaning of free justice. Instead, this should be granted correctly and appropriately to prevent the costs of the proceedings from

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<sup>33</sup> BRAZIL, Superior Court of Justice, 3<sup>rd</sup> Panel, Special Appeal No. 1807216/SP, Rapporteur Justice Nancy Andrighi, judged on 04/02/2020, *Electronic Justice Gazette*, Brasília, Feb. 6 2020, translation mine.

hindering the exercise of rights<sup>34</sup>, especially the right to maintenance, which is essential to promoting a (minimally) dignified life.

#### 4 CONCLUSION

Based on a critical and constitutional interpretation of the legal categories involved, this article has set out to rethink these concepts in a contemporary manner, propose solutions for real-life cases, and derive meanings from substantive and procedural law, focusing on the human person and democratic values, in order to enable the law to achieve social effectiveness.

From this perspective, the right to maintenance, access to justice, procedural capacity, the fundamental right to a reasoned decision, and the right to legal aid in the Brazilian legal system were revisited, with a focus on family and its conflicts. The conclusion reached emphasizes the crucial role of the judicial process in safeguarding child support, in order to ensure a minimally dignified existence for the recipient (minor).

From judicial practice, some urgent adjustments are required. Firstly, because many decisions were found with scant reasoning regarding the request for free legal aid, which makes it impossible to: (i) recognize the criteria that influenced the construction of the judicial pronouncement, and (ii) challenge its terms. Secondly, judicial decisions that tie the granting of legal aid to the financial resources and assets of the legal representative/assistant of the maintenance creditor (the minor) still remain a reality in the courts.

The provision of free justice in cases involving child and/or adolescent support is an essential tool to ensure effective access to justice. This study concludes by advocating for the necessary adjustment of current judicial decision-making standards to focus on the financial situation of the maintenance creditor (the minor). The assessment should verify whether the minor has the means to independently cover legal costs, court fees, and attorney's fees, which, as a rule, is not the case.

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