

SPAIN



Law and Practice

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Arbáizar Abogados is an independent law boutique focused on the international aspects of family law and law of succession, and it ensures it keeps updated on international legislation, case law and practices. Its lawyers are expert family mediators and collaborate closely with tax advisers, practising civil law, family law, law of succession, criminal law and public law.

The firm operates nationwide through its office in Málaga and its network of collaborating firms and connections spans the globe, allowing it to plan and resolve legal issues in a wide range of different jurisdictions. The personal relationships and trust it has with its clients are critical to the firm.

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Amparo Arbáizar has over 15 years of experience advising international clients and has a significant amount of experience involving all aspects of family law. Amparo is a family mediator and regards mediation as a valuable alternative means of settling disputes. She was awarded the Spanish Association of Family Lawyers Accolade 2018 for the best article on family law and is a frequent lecturer and author on the topic. Amparo is a fellow member of the IAFL (International Academy of Family Lawyers) and several other family law-related committees and associations. She is fluent in English and German.

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

In Spain, a parent's decision-making power is known as *patria potestad* and is defined as "parental responsibility", always exercised in the children's best interest according to their personality and respecting their rights and physical and mental integrity. This function comprises the following duties and rights:

- to take care of them, accompany them, feed them, raise them and provide them with a comprehensive education; and
- represent them and manage their properties.

Parental responsibility is explained in Article 154 of the Civil Code and therefore all main decisions related to the child's life, such as medical and psychological treatments, the school the child is enrolled in, religion issues, etc, must be agreed by both parents.

Article 156 of the Civil Code states that both parents have the same parental responsibility and they must agree on these matters concerning their child. In case of dispute, any parent can issue an urgent proceeding and the judge, after having heard both parents and the child (mandatory for children older than 12 years), will render an order stating which parent can decide in the specific matter. If the parents' disagreements continue, the court can order that one parent will have the decision-making power regarding the child's wellbeing, but not for a period longer than two years. Setting the child's place of residence is a parental responsibility matter under Article 156 of the Civil Code.

The proceeding under Article 156 of the Civil Code on parental responsibility disputes is a

quick and urgent proceeding that will be heard in a couple of months. In some cases the court can consider that international child relocation is a very important matter and will invite both parents to file a child's internal relocation application issuing normal proceedings on family matters that usually take about one year.

It is really exceptional to be deprived of parental responsibility; the common scenario is to stop contact with the children, but in cases of neglecting the care of the children, not fulfilling the duties of Article 154 of the Civil Code, committing domestic abuse upon the spouse or/and children, etc, one parent or both of them can be deprived of parental responsibility by a court order according to Article 170 of the Civil Code.

1.2 Requirements for Birth Mothers

The birth mother does not have to meet any requirement to obtain parental responsibility. She will obtain parental responsibility by operation of law, when her name is inscribed on the child's birth certificate.

1.3 Requirements for Fathers

The father will obtain parental responsibility by operation of law as soon as his name is inscribed on the child's birth certificate. If the parents are not married, the father must complete a form at the Civil Registry requesting to be inscribed as the child's father on the child's birth certificate, with the mother's consent.

In the absence of the mother's consent, the father will have to file at court for parentage proceedings. There is a deadline of one year, since the father knew that the child had been born.

1.4 Requirements for Non-genetic Parents

A non-genetic parent requires a court order in order to obtain parental responsibility.

Surrogacy is illegal in Spain, but the foreign court order that grants parental responsibility to a surrogated father or mother can be recognised by the Spanish courts to protect the best interest of the child that has been born by surrogacy abroad.

If the parents are married and only one of them is the surrogated father or mother recognised in the court order, the other spouse can adopt the child born by surrogacy abroad.

1.5 Relevance of Marriage at Point of Conception or Birth

There is a legal presumption that the husband is the father of the child, according to Article 116 of the Civil Code. Unmarried parents are equally treated as married parents in relation to parental responsibility.

1.6 Same-Sex Relationships

The process of obtaining parental responsibility is not different in circumstances where the parents are in a same-sex relationship. The parents will have to meet the requirements of non-genetic parents or adoptive parents. Spain recognises adoption by same-sex couples.

1.7 Adoption

At least one of the adoptive parents must be older than 25 years of age and the age gap between the adoptive parent and the child must be between 16 years and 45 years. The adoptive parents must obtain a certificate of suitability.

A child older than 12 years must consent to the adoption, as must their genetic parents if they

have not been deprived of parental responsibility for their child.

The court order will grant the adoptive parents parental responsibility in the child's best interest.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

Both parents must consent to the child's international relocation; it is advisable to have written consent.

In case of disagreement, the court of the child's habitual residence must render a court order authorising the international child's relocation.

2.2 Relocation Without Full Consent

The requesting parent must lodge a petition to obtain the child's international relocation authorisation by the court. Parental responsibility and child custody proceedings will be issued and the relocation will be resolved by a court order. Relocation will be heard in a modification of children's arrangement proceedings, if an order on parental responsibility has already been rendered by the court.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

The child's best interest is paramount. The age of the children, wider family support in the new country, better education opportunities and whether there will be a better standard of living in the new country will be taken into account. The relocating parent's application must be fair, well grounded and not based on selfish reasons. The left-behind parent and child contact must be

protected. The Supreme Court Judgment (*Sentencia del Tribunal Supremo* (Civil), sección 1ª, 20.10.2014, No 563/2014) set a new case law precedent: “the international relocation of the custodian parent can be ordered only in the best interest of the minor child under his/her custody, whom the child will relocate with”.

2.3.2 Wishes and Feelings of the Child

Children are heard by the judge according to their age and maturity and it is mandatory for children older than 12 years old. The Judgment of *Tribunal Supremo* (Civil), sección 1ª, 19.10.2021, No 705/2021 authorises the international relocation of two teenage siblings, based on the fact that, when they were heard by the court, they expressed their will to move to Varese, Italy, with their father.

2.3.3 Age/Maturity of the Child

The wishes and feelings of the child can be a determining factor when the children are older than 12. It is also important that the child's answers shows maturity and independence, free of any parental influence.

2.3.4 Importance of Keeping Children Together

Keeping the children together is paramount in Spanish Supreme Court case law. The general rule is to keep siblings together; it is exceptional and must be very well legally grounded to separate the children between the father's and the mother's custody. The children must be heard according to their age and maturity and it is mandatory when they are older than 12 years old.

2.3.5 Loss of Contact

Relocation will not be granted if the court realises that its purpose is the loss of contact between the child and the left-behind parent. A

lot of weight is placed on the fact that relocation would mean a loss of contact between the child/children and the left-behind parent. The main factor is the left-behind parent's behaviour with the children prior to the application. If the left-behind parent had a very close relationship with their children, it will be difficult to obtain the international relocation. If the left-behind parent was not involved in bringing up the child and taking care of them, spending time together, etc, it will be easier. It is also important to take into account the distance and connections between the left-behind parent's place of residence and the child's relocation place.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

The best interest of the child is paramount; taking into consideration the wishes and feelings of the child according to their age and maturity. The reasons for relocation should be fairly grounded and not selfish, and wider family support in the new country should be considered. There should be fair contact between the child and the left-behind parent and it should be considered whether there are bonds and ties with the new country, such as: parent's nationality, child's nationality, whether they speak the language of the country, enjoy its culture, etc. Better job prospects for the relocating parent should also be considered.

2.3.7 Grounds for Opposition to Relocation

The court will be sympathetic to the non-applicant parent when the court realises that the relocation's purpose is the loss of contact with the left-behind parent, or when the relocation application is not based on the child's best interest. Other considerations are if the relocation petition is based in selfish and capricious motives; if the child will be relocated to a new country without any bonds to the child, that is without a wider

family support; if the child does not speak the language; or neither the relocating parent or the child are nationals, etc.

2.3.8 Costs of an Application for Relocation

The costs will be the attorney and the *procurador* fees. The *procurador* is a private court's clerk that must represent the party at court by law. In respect of private reports, the courts have forensic psychologists that can produce a report on the suitability of the child's relocation abroad. This forensic report, which is ordered by the court, is free.

2.3.9 Time Taken by an Application for Relocation

It is difficult to estimate the time taken by an application for relocation because it differs from court to court, but it would generally be about one year. In a case where the forensic report is requested by any parent, it will take much longer because the forensic psychologists are overloaded with family cases. A private psychological report can be obtained quite quickly. If a party is not happy with the court order, they can appeal to the Higher Court. The appeal will take another year.

2.3.10 Primary Caregivers Versus Left-Behind Parents

The court is more sympathetic to the primary caregiver.

The Supreme Court Judgment (*Sentencia del Tribunal Supremo* (Civil), sección 1ª, 20.10.2014, No 563/2014) argues that: "The question is the suitability for the child to relocate abroad, which may entail a radical change in his social and parental environment, with adjustment problems. If the international relocation affects the best interest of the child, it might bring a change of the child's parental custody. The best interest

of the child is paramount in relocation cases, of a perfectly specific child, and not of a Spanish national, as a factor to be protected to dismiss the child's relocation. It is important to check if the child is better under the mother's or the father's custody. The security and stability that the mother provides to the child is not guaranteed with the mother's and child's stay in Spain. It is not possible to oblige the mother to live in a country which is not hers, and in a family environment which is neither the child's (...); the protection of the children's right does not necessarily imply to be detrimental to the parent's right."

In this case, the non-custodian father was not involved in raising his son, and neither was his family; that is the reason why the court decided that it was not fair not to let the mother relocate to Brazil with the child, where the child and herself would have wider family support than in Spain.

The Supreme Court ordered the child relocation to Brazil based on the following.

- "The mother has all her family in Brazil, not only parents and siblings, but also another son, 17 years old.
- The father has a bad relationship with his family in Spain, therefore his family and close friends environment is not sufficient to take care of the child if he finds a job.
- The father and child contact is protected with a fair and balanced share of the journey's costs."

The Supreme Court set a new case law precedent: "the international relocation of the custodial parent can be ordered only in the best interest of the minor child under his/her custody, whom the child will relocate with".

2.4 Relocation Within a Jurisdiction

Internal relocation orders are more common. The factors taken into account by the court to make a decision on a child moving to a different part of Spain are: the child's best interest; the distance between the former and new residence which would facilitate the other parent to meet the child; better employment opportunities for the parent who wants to move, as well as wider family support in the new place.

The main ground to allow relocation in Spain is a better job with better financial prospects for the custodial parent when the earnings of the left-behind parent are not relevant and it would provide a better standard of living to the children.

Other factors are the distance between the left-behind parent and the new home, the existence of wider family support in the new residence, etc.

3. Child Abduction

3.1 Legality

It is unlawful to take a child out of Spain without both parents' consent. The left-behind parent can issue Hague Convention proceedings to request the return of the child to Spain at the family court of the country where the child has been abducted.

Spanish criminal courts usually request that, if a child was abducted in breach of parental responsibility through a court order, the removal from the jurisdiction be considered a crime in terms of Article 225 bis *Código Penal*.

If there is a real a risk that the common child can be abducted out of Spain, it is advisable to apply for the very urgent measure proceedings of Article 158 of the Civil Code to forbid the child

to leave Spain, without the judge's authorisation, and to retain the child's passport at court. The court will order the Spanish police to check that the child does not leave Spain and that the child cannot get a passport.

3.2 Steps Taken to Return Abducted Children

If a child has been removed from Spain without the relevant consent, the left-behind parent must immediately inform the Spanish Ministry of Justice to issue a return application proceeding of the Hague Convention. The Spanish Ministry of Justice is the Spanish Central Authority, which is located in Calle San Bernardo, 62 in Madrid (E-28071), email: sustraccionmenores@mjustica.es, telephone: +34 91 837 22 95.

A child's return application must be also lodged in the country where the child has been abducted. In case the child has been taken to a country which is signatory to the Hague Convention, the Central Authority of the country must be engaged to co-operate in returning the child to their habitual residence.

It is also recommended to file a petition to formally declare the unlawful removal of the child at the Spanish court of the child's habitual residence. The proceeding to declare the unlawful removal of the child from Spain is explained in Article 778 quáter of the Law of Civil Procedure.

If the child was abducted in breach of a court order on parental responsibility, a criminal complaint can be filed at the Spanish police to obtain Interpol co-operation in the country where the child has been abducted, in accordance with Article 225bis of the Criminal Code.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

Spain is signatory to the 1980 Hague Convention.

- The Spanish Central Authority will provide free legal advice to the parent of the abducted child. The parent of the abducted child will be legally represented at court by a civil servant lawyer appointed by the Central Authority. The public prosecutor (*Ministerio Fiscal*) will be part of the proceedings to defend the child's best interest.
- The rule is that Spain applies the underlying principle of the Hague Convention of the immediate return of the child. Children's return applications are dealt with quite efficiently by the Spanish courts. The family court of the child's residence will have jurisdiction.
- If the child has been abducted to a non-Convention country, the left-behind parent must immediately inform the Spanish Ministry of Foreign Affairs and the Spanish Embassy in that country. A child's return application must be lodged in that country according to its law. A local lawyer in the non-Convention country must be engaged to represent the left-behind parent at the court of the country where the child has been abducted. If a criminal complaint has been filed in Spain, Interpol cooperation must be engaged.
- The parent of the abducted child will be represented at the Spanish court by a civil servant lawyer and therefore will not have to pay any expenses. The average time scale for applications under the Hague is about three months, with the appeal to the Higher Court (*Audiencia Provincial*) included.

3.4 Non-Hague Convention Countries

Not applicable as Spain is a signatory to the Hague Convention.