

**International
Comparative
Legal Guides**



Practical cross-border insights into family law

**Family Law
2023**

Sixth Edition

Contributing Editor:

**Marcus Dearle
Miles Preston**

ICLG.com

Expert Analysis Chapters

1

The Leading Hong Kong Case of *LCYP v JEK*
 Marcus Dearle, Miles Preston

6

International Child Law: A New Landscape and Lived Reality
 Zoë Fleetwood, Amy Starnes, Rose-Marie Drury & Claire Molyneux, Mills & Reeve LLP

Q&A Chapters

14

Australia
 Mills Oakley: Carly Mirza-Price

22

Canada – Ontario
 Boulby Weinberg LLP: Sarah Boulby, Oren Weinberg & Kenneth Fishman

28

Canada – Québec
 Heyeur Jessop S.E.N.C.R.L.: Sonia Heyeur & Shannon Jessop

35

England & Wales
 McAlister Family Law: Liz Cowell

42

France
 Diane Sussman's Law Office: Diane Sussman & Gaëlle Bonnet

52

Germany
 MEYER-KÖRING: Marie Baronin von Maydell & Sophie Beckers

58

Hong Kong
 Withers: Sharon Ser & Philippa Hewitt

68

Indonesia
 Yunaelish & Associates Law Firm: Ni Luh Yunaelis

75

Isle of Man
 Quinn Legal: James Quinn & John Swanney

82

Italy
 Ceschini & Restignoli: Roberta Ceschini

89

Japan
 Haraguchi International Law Office: Kaoru Haraguchi

98

Scotland
 Turcan Connell: Gillian Crandles & Alex Critchley

105

Singapore
 Chia Wong Chambers LLC: Wong Kai Yun & Darryl Chew Zijie

114

Slovakia
 Law office of JUDr. Daniela Ježová, LL.M., PhD.: Daniela Ježová

121

South Africa
 Clarks Attorneys: Beverley Clark & Anisha Hassen-Ismail

130

Spain
 Arbáizar Abogados: Amparo Arbáizar

139

Switzerland
 OA Legal: Nicolas Mossaz & Sophia Lisa Ouadouri

146

United Arab Emirates
 Al Rowaad Advocates & Legal Consultancy: Dr. Hassan Elhais

153

USA – Florida
 Marks & West, P.A.: Evan R. Marks & Carolyn W. West

160

USA – New York
 Rabin Schumann and Partners LLP: Gretchen Beall Schumann

167

USA – Virginia
 Grenadier, Duffett, Levi, Winkler & Rubin, P.C.: Ilona E. Grenadier & Carolyn Abbate

174

USA – Washington
 The Law Office of Stacy D. Heard, PLLC: Stacy D. Heard & Noemie Piton

Spain

Arbáizar Abogados



Amparo Arbáizar

1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Spain is party to the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, known as “the Brussels IIa Regulation”. This Regulation currently rules the Spanish International Private Law concerning international jurisdiction on divorce and the grounds of jurisdiction set out in article 3 of the Regulation apply. The Spanish Law of the Judicial Power was reformed in 2015, with regard to international jurisdiction, and its article 22 *quáter* c) adopts the very same grounds for jurisdiction as article 3 of the Regulation.

Spain retains the residual jurisdiction on divorce when:

- both parties are habitually resident in Spain at the time the proceedings are issued;
- Spain was the last matrimonial habitual residence and one of the spouses still lives there;
- Spain is the respondent’s habitual residence;
- in the case of uncontested divorce, when one of the spouses is habitually resident in Spain;
- the petitioner is habitually resident in Spain at least one year before proceedings are issued;
- the petitioner is Spanish and has been habitually resident in Spain for at least six months before proceedings are issued; and
- both spouses are of Spanish nationality.

Article 8 of “the Brussels IIa Regulation” rules that the Courts of the Member State where the child is habitually resident at the time the Court is seised, shall have international jurisdiction for parental responsibility and childcare arrangements. The Spanish Law of the Judicial Power has been reformed and its article 22 *quáter* d) meets the grounds for jurisdiction as set out in article 8 of the Regulation.

Spain retains the residual jurisdiction on parental responsibility and childcare arrangements when:

- the descendent is habitually resident in Spain at the time the proceedings are issued; and
- the petitioner is Spanish or has been habitually resident in Spain for at least six months before the proceedings are issued.

Regarding article 3 of the Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in

matters relating to maintenance obligations in Member States, jurisdiction shall lie with: a) the Court where the defendant is habitually resident; b) the Court where the creditor is habitually resident; c) the Court that, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties; or d) the Court that, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

Article 22 *quáter* f) of the Spanish Law of the Judicial Power rules the international jurisdiction of the Spanish Courts on maintenance obligations as set out in article 3 of the “Maintenance Regulation”.

Spain retains the residual jurisdiction on maintenance obligations when:

- the petitioner or the respondent is habitually resident in Spain; and
- the Spanish Courts have jurisdiction concerning the status of a person or concerning parental responsibility and the matter relating to maintenance is ancillary to those proceedings.

Spain is party to the Council Regulation (EU) No. 2016/1103 of 24 June 2016, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, which is applicable between Member States as of 29 January 2019.

According to this Regulation, the jurisdiction in matters of the matrimonial property regime in the event of the death of one of the spouses will be retained by the Court of the Member State that is ruling the succession of the spouse pursuant to Regulation (EU) No. 650/2012 on Succession. The jurisdiction in matters of the matrimonial property regime in cases of divorce, legal separation or annulment will be ruled by the Court of the Member State that is seised for the divorce, legal separation or annulment pursuant to Regulation (EU) No. 2201/2003.

Article 22 *quáter* c) of the Spanish Law of the Judicial Power rules the international jurisdiction of the Spanish Courts in matters of matrimonial property regimes.

Spain retains the residual jurisdiction in matters of matrimonial property regimes when:

- both parties are habitually resident in Spain at the time the proceedings are issued;
- Spain was the last matrimonial habitual residence and one of the spouses still lives there;
- Spain is the respondent’s habitual residence;

- in the case of uncontested divorce, when one of the spouses is habitually resident in Spain;
- the petitioner is habitually resident in Spain for at least one year before proceedings are issued;
- the petitioner is Spanish and has been habitually resident in Spain for at least six months before proceedings are issued; and
- both spouses are of Spanish nationality.

Article 769 of the Spanish Law of Civil Procedure rules the competent Court in Spain to make orders in matrimonial and child proceedings:

- First instance Court of the matrimonial residence, last matrimonial residence, respondent's residence and if it cannot be found, the petitioner's residence.
- Agreement on divorce: First instance Court of the last matrimonial residence or residence of any of the petitioners.

Only for childcare arrangement proceedings (custody and maintenance):

- First instance Court of the parents' last residence. If the parents live in different countries, the petitioner can choose between the respondent's residence or the children's residence.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

There are neither grounds for divorce nor a required period of separation. One or both parties can issue separation/divorce proceedings three months after the marriage. These three months will not be required in cases where there is a danger to the petitioner or the children.

Yes, the parties can have an uncontested divorce.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a "private" divorce, i.e. without any court involvement?

Yes, they do if they have minor children together, since only the Courts can make child arrangement orders. They can sign the agreement before a notary public if they do not have any minor children and therefore directly obtain the Divorce Absolute.

1.4 What is the procedure and timescale for a divorce?

It is very different from Court to Court, but in the main cities with specialised Family Courts, the timescale is approximately six months for a first instance Divorce Decree. The appeal may take about six months/one year. In small town Courts, this will usually not be more than one year.

Uncontested divorce proceedings are much quicker: between one month and three months to obtain a Divorce Absolute.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

A divorce cannot be finalised without resolving child arrangements, maintenance and the use of the family home.

The matrimonial property regime will be liquidated in separate Court proceedings (or with a notary public) after the Divorce Decree.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Yes, they are directly recognised by all parties of the Brussels IIa Regulation.

Otherwise, a foreign divorce will be recognised in "*Exequatur*" proceedings on grounds of international/bilateral conventions or on a mutual recognition basis.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Yes, they do.

Separation proceedings are treated like divorce proceedings.

The grounds for nullity are different and it is much more difficult to obtain than a divorce or separation.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes, they can.

Article 19 of the Brussels IIa Regulation is applicable between parties of EU Member States.

Otherwise, the "*Declinatoria*" proceedings, due to a lack of international jurisdiction, are provided by articles 63–66 of the Spanish Law of Civil Procedure (LEC1/2000) and article 39 of the Law of judicial international cooperation on civil matters (29/2015).

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

Spousal and children maintenance orders and the use of the matrimonial home in the child's best interest.

In the case of the **separation of assets** matrimonial regime, a compensation order to the spouse for his/her dedication to the family that has produced a corresponding loss of professional opportunities, as well as a financial order to put an end to the joint properties of the spouses, can both be made on divorce.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Yes, they do. The matrimonial property regime will finish "*ope legis*" at the Divorce Decree date. After the Divorce Decree, the parties can issue the specific liquidation of the matrimonial property regime and proceed to distribute the assets and liabilities between them.

They can also have an out-of-court agreement and liquidate the matrimonial property regime in a notary public Deed.

Spain comprises several territorial units, some of which have their own rules of law in respect of family and succession. The common point is that in all of them you can choose your matrimonial property regime in a notary public Deed. But, in the absence of an agreement, a matrimonial property regime will apply by default:

- Civil Code: Joint ownership of assets (*Régimen de gananciales*).
- Catalonia, Aragón and the Balearic Islands: Separate ownership of assets.

- Galicia: Joint ownership of assets.
- Basque Country (differences between the counties): Joint ownership of assets/universal community of assets.
- Navarra: Matrimonial company of conquests (*Sociedad conyugal de conquistas*).
- Parts of Extremadura: Community of assets (*Fuero del Baylío*).

2.3 How does the court decide what financial orders to make? What factors are taken into account?

The choice of orders on divorce is ruled in the Spanish Civil Code and the Spanish Law of Civil Procedure rules on how to obtain them from the Court.

The Divorce Court Order must rule parental responsibility and all the child arrangement issues including, but not limited to: maintenance; custody; right of access; and use of the matrimonial home.

The Court will only order spousal maintenance obligations if it is requested in the divorce petition.

After the Divorce Decree, any ex-spouse can issue Court proceedings to liquidate the matrimonial property regime.

Interim measures orders on maintenance, custody, rights of access and use of the family home during the divorce proceedings must also be requested by any party to the divorce petition and not more than 30 days before the divorce petition is lodged.

2.4 Is the position different between capital and maintenance orders? If so, how?

The position of the Court is a little bit different. The aim of maintenance orders is to redistribute the family incomes in order to minimise the effects of the divorce mainly upon the children's costs and expenses and, secondarily, upon the spouses. The spouse with the larger income must pay more child maintenance and, eventually, maintenance to the other spouse. Maintenance obligations between spouses are not commonplace. Please see question 2.6 below.

Capital orders are made regarding the rules of the liquidation of the matrimonial property regimes of the Spanish Civil Code. The assets and liabilities of the marriage will be split between the spouses following these articles in quite an impartial manner.

The exception is the matrimonial property regime of the separation of assets. If there is no matrimonial property, on divorce, the Court can issue an order to compensate one of the spouses for his/her dedication to the family that has produced a corresponding loss of professional opportunities.

We must take into account whether the couple has children and whether they have entered into a matrimonial property regime other than the separate ownership of assets.

If the couple has children, maintenance orders must be made by the Court on divorce, regardless of whether there is an agreement or not. If there is an agreement, the Judge and the "*Ministerio Fiscal*" (see question 6.4 below) must approve the settlement protecting the child's best interest.

If the couple lived under a separate ownership of assets, on divorce, the Court can issue an order to put an end to the joint properties of the spouses and to compensate one of the spouses for his/her dedication to the family that has produced a corresponding loss of professional opportunities.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

A couple without minor children that agrees on financial matters can sign an agreement in a Deed in front of a Spanish notary public on divorce regarding spousal maintenance obligation and liquidation of matrimonial property regime.

A couple with minor children must always issue divorce proceedings before the Court to obtain maintenance orders and the use of the family home.

After the divorce, a couple that agrees on financial/capital matters can sign, in front of a Spanish notary public, a Deed of liquidation of the matrimonial property regime. They do not need to have a Court Order or to attend Court. The Deed of liquidation of the matrimonial property regime can be directly enforced by the Courts in Spain as a Court Order.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

After a divorce, it is normally expected that each spouse supports him or herself.

The main aim of these orders is to help the ex-husband or ex-wife maintain the same "standard of living as during the marriage". The main criteria for spousal maintenance are: if the divorce produces an adverse economic imbalance to one of the spouses; and if there has been a loss of professional opportunities because of the marriage. The age, health, duration of the marriage and the spouse's career prospects and ability to earn a living are also taken into account.

The compensation usually consists of temporary maintenance payments for a couple of years but a single payment can also be taken into account.

Lifelong spousal maintenance orders are rare and only apply in cases in which the marriage was very long and the spouse is of an age with no prospects to earn a living after having invested his/her life in the family's welfare.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, it is. There are three matrimonial property regimes recognised in the Spanish Civil Code: joint ownership of assets; separation of assets; and participation in acquisitions.

Joint ownership of assets: the acquisitions obtained by each of the spouses during the marriage are common and divided equally when the matrimonial property is liquidated. The assets that each spouse brought into the marriage and those inherited or acquired gratuitously afterwards are considered the personal property of each spouse.

Separation of assets: each spouse retains what he/she brought into the marriage and becomes the sole owner of the property acquired during the marriage. Where it cannot be established to whom the property belongs, there is a presumption of an equal division between each spouse.

Participation in acquisitions: each spouse retains what he/she brought into the marriage and becomes the sole owner of property he/she acquired during the marriage. At the end of the marriage, the acquisitions made will be calculated and each spouse is entitled to a share of the acquisitions made by the other spouse during the marriage. This regime is rather unusual in Spain.

There are other matrimonial property regimes recognised under the family law of some autonomous communities, as explained in question 2.2.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Spain is a party to the Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, known as the “Rome III Regulation”. This Regulation shall apply in conflicts of law on divorce between participating Member States.

Article 107.2 of the Spanish Civil Code rules the applicable law on divorce for foreign nationals and it has been reformed to converge with the grounds as set out in “Rome III Regulation”.

Spain has opted into the 2007 Hague Protocol of the EC Regulation No. 4/2009 in relation to maintenance as set out in article 15. The general rule (article 3) on applicable law in accordance with the 2007 Hague Protocol on the law applicable to maintenance obligations shall be the law of the State of the habitual residence of the creditor. According to articles 7 and 9 of the Spanish Civil Code, the law applicable to maintenance obligations shall be ruled by the 2007 Hague Protocol.

Spain is a party to the Council Regulation (EU) No. 2016/1103 of 24 June 2016, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the Council Regulation (EU) No. 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships. These Regulations apply in conflicts of law between participating members to marriages or civil partnerships performed after 29 January 2019.

Otherwise, the Spanish Civil Code rules in its articles 2–3 and 9, that the applicable law to the matrimonial regimes is determined by:

- Common nationality when they got married.
- Public Deed choosing between the national law/habitual residence of any spouse.
- First common habitual residence after the marriage.
- Country where the marriage took place.

Foreign Law can be applied by the Spanish Courts, subject to the proof of the Foreign Law by the party who seeks its application.

How to give evidence of the Foreign Law before the Spanish Court:

- (1) Content and validity of the Foreign Law: by a public document issued by the Embassy in Madrid or the Spanish Embassy in the foreign country.
- (2) Application of the Foreign Law to the specific case: two different expert reports (foreign lawyers) explaining to the Spanish Judge how the Foreign Law would be applied to this case by the foreign Court.

There is the risk that, if the Judge considers that the Foreign Law was not sufficiently proved, Spanish law will be directly applied.

2.9 How is the matrimonial home treated on divorce?

The children remain in the matrimonial home with the spouse who has custody of them.

In the case of shared custody, the children remain in the matrimonial home with the spouse who has more difficulty in earning a living and the spouse whose financial situation is better must find a new home. When both spouses are in a similar financial

position, the children will live each period of shared custody in each parent's new home. The parents can then put an end to the matrimonial joint property.

If there are no children, the spouse who is in a weaker financial position remains in the matrimonial home until he/she can have access to another home. The Divorce Decree can determine how long this spouse might remain in the matrimonial home.

2.10 Is the concept of “trusts” recognised in your jurisdiction? If so, how?

No, it is not. Spain is not party to the Hague Convention of 1985.

A foreign trust can be recognised by the Spanish Court subject to strong evidence of Foreign Law (as explained in question 2.8) so that the Spanish Judge can understand the content, legal nature, instrumentality, purpose, etc. of the trust in this specific case.

There are some Spanish legal instruments similar to trusts, such as investments funds, pension funds, protected properties for the disabled, etc.

The Spanish foundation (“*fundación*”) must have a general interest purpose but its legal frame is similar to a trust.

In the Spanish Law of Succession, the “*fideicomiso*” is similar to a trustee as outlined in article 781 of the Spanish Civil Code and article 426 of the Catalan Civil Code. Law 293 of the Navarra New Regional Code contains the rules of the “*fiducia continuada*”, which is quite similar to the trust.

There are different civil law contracts that can be selected on a case-by-case basis to obtain the same purpose as with a trust: donation; agency; company; mortgage; foundation; mandate; protected properties for the disabled, etc.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

The foreign divorce must be recognised by the Spanish Courts.

The financial claim must be related to immovable assets situated within the Spanish jurisdiction upon which the foreign Judge did not have jurisdiction to rule.

It might also consist of liquidating a Spanish property regime before the Spanish Courts if it was not decided in the foreign Divorce Decree.

This is not commonplace.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Court and mediation are the most common, whilst arbitration and collaborative law are not as common.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

The marital agreements are recognised as private contracts under Spanish law and are therefore binding for the contracting parties if they are not against the child's best interest and the Spanish “*ordre public*”. The marital agreement will be enforceable when included in a Court Order after the divorce proceedings.

The foreign marital agreement can also be recognised as a private contract subject to evidence of the Foreign Law before

the Court. It can be enforced if the Court recognises its terms and conditions and includes them in the Court Order.

The marital agreement can be directly enforceable if it is granted in a Deed in front of a Spanish notary public.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

The marital agreement must first be approved by the Court on divorce and included in the Divorce Decree, which can be enforced afterwards.

The marital agreement could be directly enforced on divorce if it was granted in a Deed in front of a Spanish notary public and the couple does not have minor children.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Marital agreements can cover a spouse's financial claims on divorce, e.g. maintenance. Compensation can be agreed in cases where couples choose the separation of assets matrimonial property regime.

The election of the matrimonial property regime must be granted in a Deed in front of a Spanish notary public.

They cannot deal with child maintenance or other claims regarding children, which must be approved by the Judge and the *Ministerio Fiscal*, who protects the child's best interest. See question 6.4 below.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

The grounds for a financial claim are to prove that the couple had joint properties, joint bank accounts, etc. The grounds to make a financial claim are the intention and existence of shared estates between the cohabitants.

4.2 What financial orders can a cohabitant obtain?

In the absence of children, they can claim for compensation and an order to sell the joint properties. The claim must be lodged in the Civil Courts; they are not under the family law jurisdiction.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

The formal partnership status for cohabitants is not regulated in the Spanish Civil Code or at a national level.

Some autonomous communities have produced their specific laws on partnership with legal provisions for the existence of a partnership register: Andalucía; Aragón; Asturias; the Balearic Islands; Basque Country; Canary Islands; Castilla-La Mancha; Castilla y León; Extremadura; Galicia; Madrid; and Valencia.

Catalonia only provides for municipal registers. The existence of a partnership is proved by means of an authentic/notarial Deed.

Each autonomous community regulates the register in a different way, and the effects of registration range from being simply declarative to having practical equivalence with marriage. Some autonomous communities do not provide for such a regional register.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Yes, they can marry and adopt children or adopt a civil partnership.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Child maintenance and use of the matrimonial home are available. There is no difference within or outside of marriage.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child maintenance can only be calculated and administered by the Court.

The costs and expenses of the child, such as upbringing, clothing, education, healthcare, etc. must be estimated.

The incomes of each parent are also taken into account when considering maintenance and which spouse remains in the matrimonial home.

The Spanish General Council of Justice has produced an illustrative table of child maintenance calculation for the Courts, lawyers, parents, etc. The main aim is to facilitate the estimation of child maintenance nationwide to encourage agreements between the parents.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

The parent is required to pay child maintenance until he/she can obtain financial support for themselves. That is at least until he/she is 18 years old and can therefore apply for a job. The child can seek maintenance during university.

5.4 Can capital or property orders be made to or for the benefit of a child?

No, they cannot be made on divorce.

They can, however, be made in inheritance proceedings and some other cases, such as to protect disabled children.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

An adult can make a claim for financial support directly against their parents when he/she is older than 18 and the child maintenance obligation has ended.

The Court will take into account the reasons and circumstances that force the adult to make a financial claim, for example unemployment, etc. and the parent's resources.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

In Spain, “rights of custody” actually refers to “parental responsibility”, which is for both parents. When they cannot agree on an issue, they must take the matter to a Court, which will issue an order stating which parent decides this specific matter.

Parental responsibility will not be affected by a divorce. The Court must decide at the time of the divorce which parent the child lives with (custody) and which parent has the “right of access”. However, it should be noted that the usual order is one of “shared custody”.

There is no difference between married or unmarried parents to exercise the rights of custody.

6.2 At what age are children considered adults by the court?

Children are considered adults by the Court when they are 18 years old. Under the Spanish Law of Civil Procedure, a child must be heard at Court when they are 12 years old or older. The child might be heard before if he/she shows enough maturity.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Children orders can be made until the children are 18 years old. Normally, however, they stop at the age of 16, because at this age it is purposeless and counterproductive to oblige a child to visit or live with a parent if he/she does not want to.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

Maintenance orders, parental responsibility orders, custody orders, right of access orders, national and international relocation orders and payment orders of reimbursement of extra costs and expenses made on the child’s behalf and not included in the maintenance obligation.

If the parents must make a decision concerning the child and they cannot agree, they must issue proceedings and the Court will issue an order stating which parent can decide in this specific matter (for example, religious issues, medical treatments, surgery, choice of school, etc.).

Yes, the Court must automatically make a child arrangements order on divorce. The *Ministerio Fiscal* must be invited to the divorce proceedings to protect the child’s best interest. They represent the Spanish Authorities’ protection of the child’s best interest. The *Ministerio Fiscal* cooperates closely with the Court and has a similar education and professional background as a Judge; however, they are not independent because they are Spanish Government Civil Servants.

A parent can also request the Court to order interim measures regarding maintenance, custody, rights of access and use of the family home until the Divorce Decree is produced.

6.5 What factors does the court consider when making orders in relation to children?

The main factor is the child’s best interest. The Court also takes into account the child’s opinion when he/she is older than 12 years and also the welfare report.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Both parents almost always have the children’s parental responsibility; therefore, they must agree in almost every important decision relating to their children’s welfare.

A parent can take a child abroad on holidays unilaterally and must inform the other parent; however, his/her permission is not required.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

The tendency now is to grant shared custody to both parents if at least one of them applies for it and it is in the child’s best interests.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

They are equally treated in relation to parental responsibility, child arrangements and use of the family home.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the judge alone? If so, does the child meet the judge?

Most Family Courts have a psychologist and a social worker that prepare a welfare report upon the request of the parents, the *Ministerio Fiscal* or the Judge.

The Judge will meet the child if he/she is 12 years old or older. If the child is much younger, the Judge will only take into account the welfare report to avoid disturbing the children too much with the divorce proceedings.

The Judge will ensure that his decision meets the *Ministerio Fiscal* report.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

The *Ministerio Fiscal* must always be invited by the Court to proceedings relating to children, to defend the child’s best interest. The *Ministerio Fiscal* cooperates closely with the Court and has a similar education and professional background to a Judge but they are not independent because they are Spanish Government Civil Servants. They represent the Spanish Authorities’ protection of the child’s best interest.

Otherwise, the children are represented by their parents until they are 18 years old.

6.11 Do any other adults have a say in relation to the arrangements for the children, e.g. step-parents or grandparents or siblings? What methods of dispute resolution are available to resolve disputes relating to children?

Grandparents, siblings and other close relatives (also step-parents) have the right to be in contact (right of access) with the children, according to article 160.2 of the Civil Code.

At present, the principal method is mediation. There are also collaborative lawyers.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

No, he/she cannot do so in any event.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

No, he/she cannot do so in any event.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

The child's best interest is taken into account, as well as the age of the children, wider family support in the new country, better education opportunities and whether there will eventually be a better standard of living in the new country.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

The child's best interest is taken into account, as is the distance between the former and new residence, which would facilitate the other parent to meet with the child. Better employment opportunities for the parent who wants to move, as well as wider family support in the new location are also taken into account.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

If both parents are foreigners, it is easier to relocate internationally. If one parent is Spanish, and therefore the child is too, it is more difficult.

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 for 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.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Spain is a party of the Hague Convention and of the Brussels IIa Regulation.

Articles 778 *quáter*–778 *sexies* of the Spanish Law of Civil Procedure rule the return proceedings in Spain between party States in cases of the wrongful removal or retention of the child.

The Spanish Central Authority is the Ministerio de Justicia – Servicio de Convenios.

Address: Calle San Bernardo, nº 62 – E- 28071, Madrid

Tel: +34 91 390 4437

Email: sustraccionmenores@mjusticia.es

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

Law 17/2021 has amended several articles of the Spanish Civil Code and Civil Procedure to pay regard to the welfare requirements of animals. The new Law 17/2021 takes into account that animals are sentient beings and have a special relationship with man. In divorce or children's arrangements, the Court must rule on the custody of pet animals taking into account the family members' best interests and the welfare requirements of the animals. The Court must also rule the right of access to pets and the payments of their maintenance costs.

Law 8/2021, of 2 June, on civil law and procedural law to support persons with disabilities, is another significant development. The aim of this new Law 8/2021 is to meet the standards of the New York Convention on the Rights of Persons with Disabilities (CRPD) of 13 December 2006.

Article 94 of the Civil Code prohibits a parent from having custody or access to his/her children if he/she is being investigated by the criminal court in domestic abuse proceedings against the other spouse and/or common children.

The most significant development is the Spanish High Court of Justice (*Tribunal Supremo*) case law establishing shared custody as most beneficial for the child's best interest.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

Digital technology was introduced in the Spanish Civil Procedure Act 2000, and since then all cases have been recorded. Live evidence between the Courts was possible if the witness was in another Court. Filing petitions and lodging documents are carried out electronically, through the platform Lexnet, since 2011. We already have paperless processes. Access to Court is still required to be in person in most cases.

Due to COVID-19, Royal Decree 16/20 implemented virtual hearings and remote access. Court hearings will return to being in-person, but it will be easier than before to obtain remote access and virtual hearings under certain circumstances.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

- We need a nationwide Registered Civil Partnership Law (PACS) (please see question 4.3).
- Family law jurisdiction is not yet recognised, which means that specialised Family Courts with expert judges can only be found in main cities (but not in towns or villages).

- I am in favour of regulating surrogacy in Spain, which is currently prohibited.
- Family law experts request a better ruling on the use of the family home upon divorce and separation in the Civil Code articles.
- Spain comprises several territorial units, some of which have their own rules of law in respect of family and succession. Please see question 2.2. This situation affects the applicable law regarding the “EU Regulation on Succession” and the “EU Regulation on Matrimonial Property Regime” and treats Spanish nationals and other Member States nationals differently.
- Training for Judges, *Ministerio Fiscal*, psychologists and social workers to identify emotional abuse and manipulative behaviour toward spouses and/or children.



Amparo Arbáizar holds a law degree from the University of Málaga, Spain, and an LL.M. from the University of Trier, Germany. She has over 15 years of experience advising international clients in international family law, law of succession and cross-border estate planning. She is a litigation expert in the Spanish jurisdiction and has acted as a Spanish legal expert before the Courts of the United Kingdom, Canada, USA, etc.

She has a significant amount of experience involving all aspects of family law covering divorce, financial settlements, liquidation of matrimonial property regimes, arrangements for children, international child abduction cases, maintenance obligation enforcements, civil partnership matters, unmarried couples, same-sex marriages, etc.

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. She is fluent in English and German.

Amparo is a member of the International Academy of Family Lawyers (IAFL) and is listed as a lawyer by the German General Consulate in Spain. She is a member of the Spanish Association of Family Lawyers (AEAFA), a member of Lawyers in Europe focusing on international Parental Child Abduction (LEPCA), a member of ASIME, a member of the British Spanish Lawyers Association (BSLA), and a member of the German Spanish Lawyers Association (AHAJ-DSJV).

Arbáizar Abogados
 Avenida Maisonnave, 41 – 7º H, E-03003 Alicante
 Paseo Salvador Rueda, 47 – 3-2º B, E-29016 Málaga
 Spain

Tel: +34 678 50 88 91
 Email: amparo@arbaizar.de
 URL: www.arbaizarabogados.com

Arbáizar Abogados is an independent law boutique focused on the international aspects of family law and law of succession. We are sure to keep ourselves up to date on international legislation, case law and practices. We are expert family mediators and also collaborate closely with tax advisers. The firm operates nationwide through offices in Alicante and Málaga. Our network of collaborating firms and connections spans the globe and allows us to plan and resolve legal issues in a wide range of different jurisdictions. The personal relationship and trust that we have with our clients is crucial for us.

www.arbaizarabogados.com



ICLG.com



Current titles in the ICLG series

Alternative Investment Funds	Franchise
Anti-Money Laundering	Gambling
Aviation Finance & Leasing	Insurance & Reinsurance
Aviation Law	International Arbitration
Business Crime	Investor-State Arbitration
Cartels & Leniency	Lending & Secured Finance
Class & Group Actions	Litigation & Dispute Resolution
Competition Litigation	Merger Control
Construction & Engineering Law	Mergers & Acquisitions
Consumer Protection	Mining Law
Copyright	Oil & Gas Regulation
Corporate Governance	Patents
Corporate Immigration	Pharmaceutical Advertising
Corporate Investigations	Private Client
Corporate Tax	Private Equity
Cybersecurity	Product Liability
Data Protection	Project Finance
Derivatives	Public Investment Funds
Designs	Public Procurement
Digital Business	Real Estate
Digital Health	Renewable Energy
Drug & Medical Device Litigation	Restructuring & Insolvency
Employment & Labour Law	Sanctions
Enforcement of Foreign Judgments	Securitisation
Environment & Climate Change Law	Shipping Law
Environmental, Social & Governance Law	Technology Sourcing
Family Law	Telecoms, Media & Internet
Fintech	Trade Marks
Foreign Direct Investment Regimes	Vertical Agreements and Dominant Firms