

MATRIMONIAL AGREEMENTS AND AGREEMENTS AS TO SUCCESSION IN THE JURISDICTION OF SPAIN

MATRIMONIAL PROPERTY REGIMES AND MARITAL CONTRACTS

Spain comprises 17 Autonomous communities ('Comunidades autónomas'), 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. However, in the absence of an agreement, one of the following matrimonial property regimes 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*".

The matrimonial property regime can be implemented with a prenuptial or postnuptial agreement.

Prenuptial and postnuptial agreements, although not included in the Spanish Civil Code, will be recognised by the Spanish Courts on the basis of the principle of freedom of party autonomy (article 1.255 CC) and the freedom of agreements between the spouses (articles 1323 and 1325 CC).

These marital contracts must meet the requisites of a valid contract such as, in particular, free consent, object and motive (article 1261 CC). Moreover, the principle of 'good will' and the compliance with the "ordre public" have to be observed.

These are some of the Spanish Supreme Court judgments regarding marital contracts: STS 24th of June of 2015; STS 19th of October 2015; STS 30th of May 2018 and STS 15th of October 2018.

Spousal maintenance obligations or financial terms will be binding on divorce. The terms regarding children arrangements and the use of the family home will be taken into account by the court but they will be checked by the judge and the public prosecutor in order to protect the child's best interest.

AGREEMENTS AS TO SUCCESSION

Agreements as to succession are prohibited under the Spanish Civil Code, for example, mutual wills or succession contracts. However, they are regulated under the specific law of some Autonomous communities, namely in Catalonia, Aragon, the Balearic Islands, Galicia, Navarra and the Basque Country.

The Judgment of the European Court of Justice of 9 September 2021, UM, C-277/20 explains the concept of an agreement as to succession, which is governed by the Succession Regulation, and its difference, for instance, with gifts, that are considered contracts and fall under the scope of Rome I and Brussels I Regulations. It is a Judgment similar to the 'Mahnkopf' case C-558/16:

34 In that regard, it should be recalled that although, under Article 1(2)(g) of the Succession Regulation, assets including those transferred otherwise than by succession, for instance by way of gifts, are excluded from its scope, that exclusion must be interpreted strictly.

35 It follows that, where a disposition of property contained in an agreement relating to a succession consists, like a gift within the meaning of Article 1(2)(g) of that regulation, in a donation, but does not take effect until the death of the deceased, it falls within the scope of that regulation.

On those grounds, the European Court of Justice has ruled *that Article 3(1)(b) of Regulation (EU) No 650/2012 must be interpreted as meaning that a contract under which a person provides for the future transfer, on death, of ownership of immovable property belonging to him or her to other parties to the contract is an agreement as to succession within the meaning of that provision.*

Mortis causa gifts are regarded as an agreement as to succession governed by the EU Succession Regulation 650/2012. Article 620 of the Spanish Civil Code rules the “mortis causa” gift, which is quite similar to a legacy.

SUCCESSION RIGHTS OF THE SURVIVING SPOUSE

The surviving spouse inherits on intestacy with children the use of one third of the estate.

Children are forced heirs and their legitimacy consists of two thirds of the estate.

By will the testator can grant the surviving spouse the third of free disposal of the inheritance and the use of another third (whose bare title belongs to the children).

By the most common will in Spain, the testator grants the surviving spouse with the use of all the inheritance assets and the bare title to the children. When the surviving spouse dies the children will get the whole estate. This will is not governed by the Civil Code but it is accepted by the Spanish Supreme Court and it is called the “*Cláusula Socini*”. For example: Supreme Court Judgment number 464/2018, of 19th of July 2018.

As explained above, the children have the right to two thirds of the inheritance, so they can challenge the will and request their legitimacy (2/3 of the inheritance assets). If the children wait until the surviving spouse dies they will inherit all the testator’s estate.

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