Family law in Spain: overview

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JURISDICTION AND CONFLICT OF LAW

Regulatory framework

1. What are the primary sources of law in relation to marriage, marital breakdown and the welfare of children and give a brief overview of which courts will have jurisdiction to hear the dispute?

Sources of law

The sources of law in the Spanish legal system are:

- Legislation.
- Custom.
- General principles of law.

Spain has a civil law system. It is not created by jurisprudence, but rather by legislation and custom, which is applied by judges. However, the jurisprudence of the Spanish Supreme Court is extremely important in relation to the interpretation and application of the laws, customs and general principles of justice, although it never rises to the level of judicial regulation.

Custom applies in the absence of applicable law, as long as it is not contrary to moral or public order. The general principles of law apply in the absence of legislation and custom, without prejudice to their informative nature in respect of the legal order.

The Spanish Civil Code of 1883, as amended and in particular Book I, Title IV, Articles 42 to 107 is the primary source of law in relation to:

- Marriage.
- The breakdown of marriage.
- The welfare of children.

In addition, some of the autonomous communities, into which Spain is divided, have devised their own set of family laws which apply within the boundaries of their territories. The Civil Code applies if there is no specific legislation from any autonomous community.

The Spanish Constitution exclusively reserves for state jurisdiction certain fields of competence relating to questions such as:

- International relations.
- All cases dealing with rules on the application and enforcement of rules of law.
- Legal and civil relations concerning matrimony.
- Public registers and instruments.
- Bases of contractual obligations.
- Rules to solve conflicts between laws.

In relation to other matters, including the financial consequences of marriage, autonomous communities have their own civil law systems covering certain matters, with rules (known as interregional law) determining when the relevant civil law must be applied rather than the national Civil Code.

For this reason, it is vital to ascertain whether the specific autonomous community in question has its own provisions which apply to the matter. For Spanish nationals, the applicable family law is determined by the regional citizenship (vecindad civil) that is, of the persons concerned (relationship between a person and a particular place, which determines the local law applicable, if any).

Court system

There are specialised family courts but only in the main cities of Spain. When the court is not specialised then a court of first instance will hear the proceedings. These courts also deal with civil claims and, in small cities, even with criminal proceedings. Family proceedings are held in private.

Jurisdiction

2. What are the main requirements for local courts to have jurisdiction in relation to divorce, property and children proceedings?

In order to determine the competent jurisdiction, the Spanish court must first identify if there are any international treaties in place between the potential jurisdictions.

International jurisdictional requirements with non-EU member states

As a general rule, Spanish courts have jurisdiction if:

- Both parties have submitted themselves expressly or implicitly to the tribunals of Spain.
- The defendant has his or her residence in Spain.

Specifically, in issues of personal and patrimonial relationships between spouses, matrimonial nullity, separation and divorce, Spanish courts will have jurisdiction when any of the following apply:

- Both spouses are habitually resident in Spain at the time of issuing proceedings.
- The spouses were last habitually resident in Spain and one of them still resides there.
- The defendant has his/her habitual residence in Spain.
- In a joint application, either of the spouses is habitually resident in Spain.
- The applicant has his/her habitual residence in Spain and he/she resided in Spain for at least:
  - one year immediately prior to making the application; or
six months immediately prior to making the application, and is a Spanish national.

- Both spouses are Spanish nationals.

This also applies in matters concerning parent-child relationships when the child has his or her place of habitual residence in Spain at the time of issuing proceedings, or the defendant is a Spanish national or resides habitually in Spain.

**International jurisdictional requirements between EU member states**

Depending on the main subject of the proceedings, different jurisdictional requirements apply as follows.

**Divorce**

Spanish courts have jurisdiction in any of the following circumstances (Article 3, Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II Regulation)).

- The spouses are habitually resident in Spain.
- The spouses were last habitually resident in Spain and one of them still resides there.
- The respondent is habitually resident in Spain.
- In a joint application, either of the spouses is habitually resident in Spain.
- The applicant is habitually resident in Spain and he/she resided there for at least:
  - one year immediately prior to making the application
  - six months immediately prior to making the application and is a Spanish national.
- Both spouses are Spanish nationals.

**Maintenance**

Spanish courts have jurisdiction in any of the following circumstances (Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations) (Maintenance Regulation):

- The defendant is habitually resident in Spain.
- The creditor is habitually resident in Spain.
- Spanish courts, according to their own law, have jurisdiction to hear proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless the jurisdiction of the Spanish courts is based solely on the nationality of one of the parties.
- Spanish courts, according to their own law, have jurisdiction to hear 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.

**Property**

As there is no international treaty or European legislation currently in place on this issue, internal Spanish law applies. As a general rule, Spanish courts have jurisdiction where both parties have submitted themselves expressly or implicitly to the tribunals of Spain, as well as when the defendant has his or her residence in Spain (Article 22, Spanish Organic Act of the Judicial Power 6/1985 of 1 July) (SOJP).

When dealing with the distribution of capital assets between spouses, the Spanish courts will also have jurisdiction if:

- Both spouses are habitually resident in Spain at the time of issuing proceedings.
- The defendant has his/her habitual residence in Spain.
- Both spouses are Spanish nationals, regardless of their place of habitual residence.
- The applicant has his/her habitual residence in Spain for at least a year immediately before issuing proceedings, or for six months prior to issuing proceedings and is a Spanish national.

**Children**

Spanish courts have jurisdiction to deal with matters regarding parental responsibility when the child is habitually resident in Spain at the time the Spanish court is seised (Article 8, Brussels II Regulation).

**Domicile and habitual residence**

3. How do the concepts of domicile and habitual residence apply in relation to divorce, financial arrangements, and children?

The concept of domicile, as understood under English law, does not exist in Spanish Law.

The word “domicile”, when used in certain articles of Spanish legislation, has a different meaning. In most instances where reference is made to a person as domiciled in Spain, this is understood under Spanish law to refer to a person who is habitually resident in Spain.

Under Spanish law, the concept of habitual residence and the factors taken into account to determine it, vary depending on the context in which it is used.

In most cases involving a dispute about habitual residence relating to Article 40 of the Civil Code, the two key questions are the individual:

- Moved to a country for a “settled purpose”.
- Lived in that country for an "appreciable period".

This has been repeatedly made clear by the jurisprudence of the Spanish Supreme court “…For a place to be the domicile of a person it is not sufficient to reside there at a particular moment, it is necessary for that residence to be permanent; that is, it is necessary besides the objective requirement of residence in a place, the subjective aspect that this residence is to have permanent or habitual character as has been established for a long time by the Spanish Supreme Court in judgments such as judgments dated 28 November 1940, (RI 1940/1019) 26 May 1944 (RI 1944/799), 18 September 1947, 25 September 1954 (RI 1954/1049), 21 January 1968, 21 April 1972 (RI 1972/1859), 30 December 1992 (RI 1992/10569) and 13 July 1996 (RI 1996/5583) in accordance with which it is not sufficient to have a place as domicile remaining there more or less continuously but to have the will to effectively and permanently reside in that place”.

When dealing with an appreciable period of time, the Spanish Supreme court has declared “that it is implicit as a fundamental factor of the concept of habitual residence, not the longer or shorter length of time in which a person remains uninterruptedly in a specific place, but the willingness of that person to remain effectively and permanently in that place. STS 28-XI-40, 26-V-44, 27-IX-45, 18-IX-47, 25-IX-54, 21-IV-72”.

As to the evidence of habitual residence, the Spanish Supreme Court has established that the parties may “avail themselves of whatever evidence may be available and is acceptable by Law being the last decision left to the discretion of the judge. In terms of relevant facts that may be indicative of habitual residence, the following evidence is usually mentioned: registration with the local
Town Hall, to operate a business in that particular place, to maintain a property there, to be registered with the electoral census etc.

Important factors to consider are the following:

- Where the family usually or always live, work and/or enjoy leisure time.
- If the person moves out of Spain, whether the move is merely temporary.
- Whether the person intends to move his or her centre of affairs to another country.
- Where the person has retained his or her property and furniture, even if rented out.
- Where the person has registered his or her car.
- The mailing address.
- Place of medical registration.
- Location of financial arrangements, for example, banks accounts, financial advice, tax status and national insurance contributions.
- Electoral registration with the local Town Hall.

The Spanish concept of habitual residence is the same in relation to divorce, finances and children.

The concept of habitual residence faces considerable uncertainty within the EU. In issues regarding parental responsibility, an autonomous concept is being developed by the Court of Justice of the European Union case law.

**Conflict of law**

4. What procedure applies for a party applying to stay proceedings in favour of a foreign jurisdiction? What factors do local courts take into account when determining forum issues?

**Procedure**

Under Spanish law, legal proceedings can be stayed by the declaratory action (Articles 63 and 64, Spanish Civil Procedural Act 1/2000 of 7 January). The defendant and those who may be legally entitled to be a party to the proceedings may claim the court lacks jurisdiction on the grounds that the case is being heard by a foreign court. The declaratory action must be filed in the first ten working days after the date of service of proceedings or within the next five working days from the date the party has been summoned to attend a hearing.

**Factors**

For proceedings taking place between EU member states, the court first seised considers the grounds alleged by the applicant to gain jurisdiction, that is, habitual residence and nationality of the parties in accordance with the Brussels II Regulation. If the grounds alleged comply with the Brussels II Regulation, the court first seised has jurisdiction. The time and date in which the application was lodged at the court office is the determining factor.

Between non-EU members, the court takes into account when deciding forum issues, whether (Article 22, 5OJP):

- The parties have expressly or tacitly submitted themselves to the Spanish courts.
- The defendant has his or her habitual residence in Spain.
- Both spouses have habitual residence in Spain at the time of lodging the petition.
- Spouses were last habitually resident in Spain and one of them still resides there.
- The respondent is habitually resident in Spain.
- In a joint application, either of the spouses is habitually resident in Spain.
- The applicant has his/her habitual residence in Spain and he/she resided in Spain for at least:
  - one year immediately prior to making the application; or
  - six months immediately prior to making the application, and
  - is a Spanish national.
- Both spouses are Spanish nationals.

If none of these factors apply, the Spanish courts would declare themselves non-competent.

**PRE- AND POST-NUPITAL AGREEMENTS**

**Validity of pre- and post-nuptial agreements**

5. To what extent are pre- and post-nuptial agreements binding?

In Spain there is no strict equivalent to pre- and post-nuptial agreements. A clear distinction can be established between:

- Marriage contracts with the main objective to alter the matrimonial economic regime which otherwise would apply by default.
- Agreements providing for the breakdown of the marriage. These are now becoming more common in Spain, and some of the autonomous communities have passed specific laws in this respect.

For the sake of clarity, we will refer to both in this chapter as pre- and post-nuptial agreements. However, practitioners should be aware that there are substantial differences, the main one being that the marriage contract will commence from the moment of marriage, which is clearly different to an agreement that only becomes effective upon breakdown of the marriage.

Pre- and post-nuptial agreements are binding in Spain, with the following restrictions:

- Spouses' compensatory pension and household work compensation. Courts generally consider these provisions valid, provided that they do not imply that any of the spouses renounce their right to receive maintenance and that they are not seriously damaging to one of the spouses. Courts are not bound by such agreements and can either enforce them or merely consider them as one of the relevant circumstances of the case.
- Children's maintenance and parental responsibility. Arrangements regarding children's maintenance and parental responsibility are not enforceable and do not have any significant effect on orders that might be made by a court following the breakdown of a marriage. The interest of the child is paramount when making those orders.
- Occupation of the matrimonial home. Courts enforce agreements relating to occupation of the matrimonial home if, where there are children, an appropriate place of residence is provided for them and the provision is not seriously damaging to one of the spouses.

For a pre- and post-nuptial agreement to be valid and enforceable in Spain, it must be signed simultaneously by both parties before a notary public.
The pre- or post-nuptial agreement is not valid against third parties acting in good faith until it is registered at the Spanish Civil Registry.

Spouses can stipulate, amend or replace their matrimonial finance regime at any time by executing a pre- or post-nuptial agreement (Article 1325, Civil Code). This can also contain additional provisions on the consequences of the separation or divorce, if it refers to other dispositions due to the marriage.

Spouses can regulate any financial or personal matters not included within the scope of the matrimonial finance regime and general rules of contract law apply. However, provisions will be null and void if they are:

- Unlawful.
- Contrary to custom.
- Contrary to the general principle of equality between the parties to the marriage.

Under the Civil Code, pre- or post-nuptial agreements can be signed any time before, after or on the day of marriage. However, any agreement relating to a future marriage loses its force and effect unless the marriage takes place within a year of the agreement (Article 1334, Civil Code).

Most of the autonomous communities follow the same formal requirements, but sometimes there are differences as to the statutory periods within which marriage must take place after completion of the pre-nuptial agreement. For example, in the autonomous community of Cataluña, the prenuptial agreement must be signed prior to 30 days of the date the marriage will take place. Mutual disclosure of assets is also a requirement.

**DIVORCE, NULLITY AND JUDICIAL SEPARATION**

**Recognition of foreign marriages/divorces**

6. Are foreign marriages/divorces/civil partnerships recognised?

**Marriages**

A foreign marriage is valid if it has taken place in a civil or religious way with the intention that it be legally binding, in accordance with either the:

- Law of the place where the marriage has taken place.
- Law that applies to either of the spouses personally.

In Spanish Private International Law there is no single law that applies to all the requirements of marriage. On the contrary, there are rules of conflict that separately determine the law applicable to:

- Matrimonial capacity. There are no international rules for conflict of law that determines the law applicable to matrimonial capacity. However, case law indicates that matrimonial capacity is a particular aspect of general capacity and therefore Article 9.1 of the Civil Code applies. The law regulating matrimonial capacity is the national law of each of the spouses at the time the marriage was celebrated.
- Matrimonial consent. Consent to the marriage is indicated by the form of the marriage (see below, Form of celebration).
- Form of celebration. Marriages are normally celebrated in a formal way. To determine the law applicable to the form of marriage celebration, it is necessary to consider marriages celebrated:
  - in Spain between a Spanish national and a foreigner. The applicable law is exclusively Spanish law as this is the law of the place where the marriage was celebrated (Article 49, Civil Code);
  - in Spain between foreigners. At least one of the parties must be habitually resident in Spain. The marriage may be performed in Spain in accordance with the form provided for Spanish nationals or in compliance with the form provided in the personal law applicable (Article 50, Civil Code);
  - abroad between a Spanish national and a foreigner or between Spanish nationals. The applicable law will be either the law of the place where the marriage was celebrated or Spanish law (Article 49.1 and 2, Civil Code);
  - abroad between foreigners. There is no specific international conflict of law rule applicable to such a situation. By analogy, Article 50 of the Civil Code can be applied. The marriage is only valid if it has been celebrated in a way which is legally valid in accordance with the law of the place where the marriage was celebrated or the personal law of either of the proposed spouses.

**Divorces/annulment**

**EU member states.** Judgment given in another member state, against which no further appeal lies, is recognised in Spain (Article 21, Brussels II Regulation). A judgment given in a member state must be recognised in the other member states without any special procedure being required.

**Non-EU members.** A special internal procedure called *exequatur* is required. The judgment is recognised by a Spanish court if the following circumstances apply:

- The judgment is not contrary to Spanish public policy.
- It has been issued as a result of exercising a personal action.
- It has not been issued by default.
- The judgment meets the requirements necessary for it to be enforceable in the country of origin.
- The judgement does not refer to an issue for which Spanish courts would have exclusive jurisdiction.
- The judgement is not contrary to a previous judgment issued in a third country, which is also subject to recognition by the Spanish courts.
- Where proceedings between the same parties on the same issue were commenced prior to the foreign proceedings.

Bilateral conventions with third countries such as Switzerland must also be considered.

**Civil partnerships**

Under Spanish law there is no equivalent to the concept of civil partnerships.

**Divorce**

7. What are the grounds for divorce?

**Divorce**

Divorce in Spain does not require any grounds or fault to be established (Law 15/2005 of 8 July amending the Spanish Civil Code and the Spanish Civil Procedural Act on divorce and separation). A minimum term of three months from the date of celebration of the marriage before issuing for divorce is required (unless in exceptional cases).
The marriage certificate must be annexed to the divorce petition, together with all relevant documentation and evidence that the parties wish to rely on in support of their claims.

**Nullity**
A marriage shall be null and void if performed (Article 73, Spanish Civil Code):

- Without matrimonial consent.
- Between:
  - non-emancipated minors;
  - people already joined in marriage;
  - direct line relatives by consanguinity or adoption;
  - collateral relatives by consanguinity up to the third degree;
  - people sentenced as authors of or accomplices in the murder of the spouse of either of them save in the event of waiver.
- Without the presence of a judge, mayor, officer or witnesses.
- As a result of error as to the identity of the other spouse, or such personal qualities that are decisive in the giving of consent.
- Under duress or serious fear.

**Judicial separation**
A minimum term of three months from the date of celebration of the marriage before requesting the judicial separation is required (unless in exceptional cases) (Article 81, Spanish Civil Code).

The same procedural rules for divorce proceedings apply.

**Finances/capital property**

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**8. What powers do the courts have to allocate financial resources and property on the breakdown of marriage?**

It is a peculiarity of the Spanish system that spouses can only apply for maintenance and compensation orders during the divorce proceedings. The allocation of property on the breakdown of a marriage is dealt with by different and separate proceedings.

When considering the parties’ financial resources, the court may also take into account assets the legal title to which is not held by one of the parties when both:

- Sufficient evidence of ultimately ownership by one of the parties is provided.
- The asset in question is relevant to the case.

This will be, for example, in cases were the matrimonial home is owned through a company.

**Allocation of financial resources within divorce proceedings**
The Spanish courts can make two orders within the divorce proceedings (see Question 1):

- **Compensatory pension.** This is granted where the divorce results in an imbalance between one of the spouses in relation to the position of the other, which involves a worsening of the situation that he or she had during the marriage, and which aims to address the financial imbalance in which the claimant spouse may be immediately after the divorce.
- **Household work compensation.** On termination of the separation of assets regime (see below, Allocation of property in separate proceedings), compensation can be granted, calculated on the basis of the contribution to the household by one of the spouses, to be determined by the judge in the absence of an agreement. This right or remedy is compatible with any other economic rights to which the favoured spouse may be entitled, as it aims to redress an imbalance which took place during the marriage. Under Catalan law, specific rules to calculate the amount of household work compensation apply.

Use of the matrimonial home can also be allocated within the divorce proceedings.

**Allocation of property in separate proceedings**
The Spanish courts are bound by the applicable matrimonial economic regime with regards to distribution of the parties’ property, and cannot depart from or override it under any circumstances. While divorce proceedings are ongoing, the parties, or more often separately, can apply to the courts for the liquidation of their matrimonial economic regime of community of assets.

The distribution of marital assets is carried out in accordance with the rules governing the matrimonial economic regime. This is done by either:

- The separation of assets regime.
- The community of joint assets regime

**Separation of assets regime.** In the separation of assets regime, there is no special procedure for its liquidation, as there is no community of assets and therefore separate civil proceedings must be filed for the dissolution of co-ownership.

Separation of assets is the regime applicable by default in the autonomous communities of Catalonia and the Balearic Islands. The property held by each spouse at the start and any which he or she may subsequently acquire pursuant to any title belonging to that spouse. Similarly, each spouse has the administration, enjoyment and free disposal of such property.

**Community of joint assets regime.** In the remaining autonomous communities, including Madrid, the default economic regime is that of a community of joint assets, with the exception of Vizcaya, Navarra and Aragon, which have their own local specific regimes applicable by default.

The community of joint assets regime makes any gains or profits obtained indistinctly by either spouse common to the spouses. It is equally divided between the spouses on dissolution. The community of joint assets begins on either entering:

- The marriage.
- A post-nuptial agreement.

The following property is exclusive to each of the spouses and is not divided between the spouses on dissolution of the community of joint assets:

- The following property and rights, which are considered patrimonial property rights inherent to the person that are not transferable between the spouses:
  - belonging to each spouse at the start of the marriage;
  - acquired subsequently, pursuant to gratuitous title;
  - acquired at the cost of, or as a replacement for, exclusive property;
  - acquired pursuant to a right of pre-emption pertaining to a single spouse.
- Compensation and damages to one of the spouses or to their exclusive property. Property acquired pursuant to a right of pre-emption pertaining to a single spouse and items necessary to conduct their profession or work does not lose its nature as exclusive property if it was acquired with common funds. However, in this case, the community is the creditor of the spouse who owns it to the value paid for it.
- Clothes and objects for personal use which are not of significant value.

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• Items necessary to conduct their profession or work, unless they form an integral part of or are appurtenances of an establishment or undertaking held in common.

The following property is held in common and is divided equally between the spouses on dissolution of the community of joint assets:

• Property obtained pursuant to the work or industry of either spouse.
• Fruits, income or interest generated by exclusive and common property.
• Property acquired for valuable consideration charged to the assets held in common, irrespective of whether the acquisition is made to the community or for only one of the spouses.
• Property acquired pursuant to a right of pre-emption held in common, even if it should have been acquired with funds held on an exclusive basis, in which case the community owes the spouse for the value paid.
• Undertakings and establishments founded during the life of the community by either spouse at the expense of common property. If, at the time of setting up the undertaking or establishment, both exclusive and common capital is used, it must correspond as common ownership to the community of joint assets, and to the spouses in proportion to the value of their respective contributions.

9. What factors are relevant to the exercise of the court’s powers?

The Spanish courts are bound by the matrimonial economic regime. See Question 8.

10. What is the court’s current position on the division of assets?

The Spanish courts are bound by the matrimonial economic regime. See Question 8.

Finances/maintenance

11. How does ongoing spousal maintenance operate following marital breakdown?

Spanish courts have jurisdiction when granting the judicial decree of divorce to make two orders for financial provisions between spouses.

Compensatory pension (pensión compensatoria)

Regardless of the matrimonial economic regime applicable, spouses may be entitled to receive maintenance (see Question 8). When deciding on an application for maintenance, the court must have regard to the following matters in respect of the spouses:

• Any agreements they have reached.
• Age and health.
• Professional qualifications and the probability of their obtaining employment.
• Past and future dedication to the family.
• Contribution with his or her own labour, in the commercial, industrial or professional activities of the other spouse.
• Duration of the marriage and any cohabitation before marriage.
• Eventual loss of a right to a pension by reason of dissolution of the marriage.
• Wealth and property means and needs of the spouses.
• Any other circumstance that the court may consider relevant to the case.

The wealth and economic means of both spouses are assessed in order to establish whether an imbalance has occurred and whether the spouse who would have to pay maintenance can actually afford it.

The main aim of spousal maintenance is not to provide the support that the ex-spouse needs to cover his or her needs, but to redress the financial imbalance in which the claimant spouse finds him or herself immediately after the divorce.

Spousal maintenance aims to bridge specifically the worsening in situation of one of the spouses caused by the divorce when it produces an economic imbalance in relation to the position of the other spouse. Setting this imbalance is not a subsidiary aim but the main aim of spousal maintenance.

Depending on the specific circumstances of the case, the court may issue an order for open-ended or fixed-term periodical payments or for a lump sum, although it is common practice that maintenance is usually paid in periodic payments. It is usual to decide on a certain period, after which the debtor is released.

Where an order for periodic payments has been made, its amount can be lowered but not increased at any time by the court, on the party's application, if a substantial alteration in the financial situation of any of the parties to the marriage occurs.

Exceptionally and subject to the condition that the spouses agree, the judicial award can be substituted at any time with an annuity, usufruct of certain property, or the delivery of capital in assets other than in money (Article 99, Civil Code).

The right to receive maintenance is extinguished:

• If the cause justifying it is removed.
• In the event of remarriage or cohabitation of the party receiving maintenance.

The right to receive maintenance is not extinguished by the mere fact of the debtor's death. The debtor's heirs can request that the judge reduce or stop maintenance if the estate cannot satisfy the requirements of the debtor or if it affects their right to a forced share (Article 101, Civil Code).

Household work compensation (compensación por trabajo para la casa)

In the separation of assets regime, since there is no allocation of assets, other rights that the law confers on the spouses are taken into account. For example, household work generates a right to compensation on termination of the matrimonial economic regime (Article 1438, Civil Code).

The aim is to compensate the spouse who has undergone an impoverishment which is correlative to the enrichment of the other spouse for having worked for the household either by looking after the home or caring for the family or other spouse without receiving any or insufficient payment.

In the absence of an agreement, it is left to the court’s discretion to decide on the amount to be awarded and the ways in which this compensation is paid and secured. Under Catalan law, specific rules to calculate the amount are established.

The right or remedy is compatible with any other economic rights to which the favoured spouse may be entitled, as it aims to compensate a situation of imbalance which took place during the marriage. It differs from spousal maintenance which applies to the situation the claimant spouse finds him or herself immediately after the divorce.

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The amount awarded for household work is taken into account when calculating the amount awarded as maintenance.

12. Is it common for maintenance to be awarded on marital breakdown?

This fluctuates widely depending on the specific circumstances of each case. Issues such as the length of marriage qualifications of each spouse, health and employment prospects will determine the amount and length of maintenance.

The general trend in short marriages is that granting a pension is becoming less common, reflecting the fact that nowadays couples tend to marry at a later stage when they both have a professional career.

Lifetime maintenance is rarely granted as legal precedents set up very specific requirements, such as the old age of the spouses or very long marriages meaning that one of the spouses will not recover from the financial imbalance caused by breakdown of the marriage.

13. What is the court’s current position on maintenance on marital breakdown?

Spousal maintenance

There have been a number of cases which reflect the court’s current position on spousal maintenance:

- It is established doctrine that the guiding principle is the inequality between the economic conditions of each spouse before and after the break up. There is no need to prove the existence of need. The spouse most at a disadvantage because of the break up could be entitled to maintenance even if he/she had sufficient means to sustain him/herself. There must be a worsening in his/her situation compared to the position he/she enjoyed during the marriage and which the other spouse enjoys. However, the principle is not about attempting to match wealth (Judgment of the Supreme Court, 10 February 2005).

- The court aims to place the spouse who has suffered disadvantage in a position that enables him/her to sort out his/her own economic problems if, due to the marriage he/she has relinquished his/her professional or working life making the other party economically independent (Judgment of the Court of Appeal of Asturias, Section 7 347/2011 of 13 July).

- The factors to be taken into account to value the grant of compensatory pension are too numerous to list individually. The most relevant include:
  - age;
  - effective duration of the marriage;
  - dedication to the house and the children;
  - continued dependency of the children;
  - health issues;
  - work that the receiving spouse performs or may be able to perform due to his/her professional qualifications;
  - relevant employment market conditions.

Household work compensation

Since household work compensation was first recognised in 1981, the concept has evolved substantially:

- For Article 1438 of the Civil Code to apply, there must be an economic regime of separation of assets and contributions in kind to the financial burdens of the marriage. “This is an exclusive and direct dedication to household work” (Judgment of the Court of Appeal of Madrid 508/2007 17 April 2007).

- “The compensation to which art 1438 refers is not granted in consideration to the future dedication to the family or the economic imbalance produced as a consequence of the divorce to one of the spouses in relation to their previous situation, but exclusively in the objective analysis of the past dedication to the family during the existence of the economic regime of separation of assets” (Judgment of the Court of Appeal of Madrid dated 1 February 2006).

- “The right to obtain compensation for contributing to the burdens of the marriage with household work in the economic regime of separation of assets, requires that having agreed this regime, the contributions to the burdens of the marriage have taken place only with the work carried out for the household. It is not necessary that an increase in the wealth of the other spouse has occurred in order to obtain compensation” (Judgment of the Supreme Court 534/2011).

Lately, the jurisprudence requiring exclusive dedication to the household has been relaxed, allowing for the spouse claiming compensation to combine dedication to the household work with other external works that permit some extra income for the economy of the family. The right to the compensation is not excluded by any other activity outside the home but by the contribution of both spouses equally to household work. This means the non-existence of a larger contribution and participation of the creditor to the household work (Judgment of the Supreme Court of 12 of July 2011 (7362/2011)).

Child support

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

Parents can always apply on behalf of children within or outside of the marriage for child maintenance. A claim for child maintenance or payment of extraordinary expenses of the child is the only financial claim that can be made before the Spanish courts. Claims for capital (such as a transfer of a property in favour of a child) are not available under Spanish law.

15. On what basis is child maintenance calculated?

The amount of the support must be proportional to the estate or resources of the person who provides it and the needs of the person receiving it (Article 146, Civil Code).

When calculating maintenance, the judge takes into account the:

- Income and liabilities of the creditor.
- Needs of the child.

The amount ordered as maintenance covers ordinary expenses, such as schooling, clothes, food and shelter. Extraordinary expenses are paid equally by both parties unless otherwise established.

Child maintenance can be reduced proportionally or increased in accordance with an increase or reduction in the needs of the child and the wealth of the person obliged to satisfy it. There are tables and percentages that apply for the calculation of child maintenance, but these are not binding on the judge and may just be used for reference. However, certain judges do apply such tariffs for calculating maintenance in their own courts.
16. What is the duration of a child maintenance order (up to the age of 18 years or otherwise)?

The Spanish Civil Code provides that child maintenance will cease when the creditor is able to carry out a trade or profession or has obtained a position or improved his or her wealth, so that the support allowance is no longer necessary for his/her subsistence or when the creditor’s needs arise from his/her bad conduct or lack of application at work (Article 152). Therefore, a child maintenance order will not stop automatically when the child reaches 18 years of age.

In summary, the debtor can apply to the court for child maintenance payments to be stopped upon the child being financially independent, unless his/her situation can only be attributed to his/her bad conduct. In most cases, child maintenance extends to a child’s tertiary education.

17. Can a child make a claim direct against their parents?

A child of legal age (that is, 18 years old) can make a direct claim for financial support against one or both of his/her parents. Spanish law also allows the person obliged to provide support to satisfy it either by paying the allowance set or by keeping the child in his/her own home, unless this would be contrary to a child care arrangements order.

Reciprocal enforcement of financial orders

18. What is the legal position on the reciprocal enforcement of financial orders?

Financial orders relating to maintenance for a spouse or children who live in EU member states are enforced in accordance with the Maintenance Regulation.

For non-EU member states, the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations applies or any applicable bilateral treaty to which Spain is a party, such as that between Spain and Uruguay of 4 November 1987.

Any other financial order which does not relate to maintenance falls outside the scope of European legislation and must follow the special procedure contained in the internal Spanish legislation known as exequatur (see Question 6, Divorces/annulment).

In Spain, the following means of execution are available:

- Attachment of earnings.
- Withholding of tax rebates.
- Seizure of bank accounts.
- Withholding of social security benefits.
- Seizure of goods and public sale of them.
- Imprisonment in certain cases.

Financial relief after foreign divorce proceedings

19. What powers are available to the court to make orders following a foreign divorce?

Spanish procedural law differentiates between divorce proceedings where maintenance is decided and proceedings for the dissolution of matrimonial economic regimes (see Question 8).

Spanish courts can vary a maintenance order on the grounds that the circumstances of the spouse or the child have changed from the date the order was given by the foreign court.

Separate proceedings to deal with the dissolution of the Spanish matrimonial economic regime can be dealt with by the Spanish courts if they have been left unresolved by the foreign divorce proceedings.

CHILDREN Custody/parental responsibility

20. What is the legal position in relation to custody/parental responsibility following the breakdown of a relationship or marriage?

Article 108 of the Spanish Civil Code establishes that filiation (that is, the fact of being a child of a certain parent) can be both matrimonial and non-matrimonial and produces the same effects. For a parent to have parental responsibility or rights of custody over a child, filiation must have previously been established, otherwise the parent will have no legal rights or duties towards the child. Therefore, whether the parents are married or unmarried makes no difference in relation to the custody rights that the parents will have.

The breakdown of a relationship or marriage does not release parents from their obligations towards their children (Article 92, Civil Code).

Both parents have parental authority over their children and therefore share the ability to decide and resolve all matters that affect a minor, even though only one of them has been awarded custody.

However, the parents can agree or the judge can decide that parental authority is exercised in whole or part by one of the parents.

The judge must make an order in respect of the child that establishes:

- The status in relation to parental responsibility, which will always be shared between both parents except in very exceptional circumstances.
- Custody of the child, and whether it is to be shared or held by one of the parents.
- The contact arrangements.

Shared care and custody of the children is ordered where the parents request it in the settlement agreement proposal or where both of them agree on this during the proceedings (Article 92.5, Civil Code).

Additionally, even in the absence of the above circumstances, the judge, at the request of one of the parties, with the favourable report of the Public Prosecutor, can order shared care and custody on the basis that this is the only way to suitably protect the minor’s higher interest (Article 92.8, Civil Code).

The current trend followed by the courts in Spain is towards granting shared custody, as long as it is considered to be in the best interests of the children.

21. What is the legal position in relation to access/contact/visitation following the breakdown of a relationship or marriage?

The parent who does not live with the children has the right to (Article 94, Civil Code).

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• Visit them.
• Communicate with the children.
• Have the children in his/her company.

If no agreement is reached between the parties the judge determines the time, manner and place in which visitation rights can be exercised.

In addition, the public prosecutor will always be a party to the proceedings when children are involved, to protect the best interests of the children. However, separate representation for children is not contemplated under Spanish procedural law.

The interest of the child is paramount. This is the main issue taken into account when granting custody and or visiting rights. The court when making such orders can apply the following criteria:

• Dedication of the parents towards the daily care of the child.
• The parents' personal aptitudes.
• The wishes of the child.
• The number of children.
• Compliance by the parents of their duties towards the children.

A child arrangements order will terminate upon the child being of age (18 years old).

Certain autonomous communities have established their own regulations with regards to shared custody. Currently, more courts tend to grant generous contact time to the parent with whom the children do not live.

Even if there is an agreement between the parties, it is necessary to set up the basic arrangements for contact (that is, days, times and place), for the judge and the public prosecutor to consider the suitability of the arrangements, taking into account the child's interests.

International abduction

22. What is the legal position on international abduction?

The HCCH Convention on the Civil Aspects of International Child Abduction 1980 (Hague Child Abduction Convention) applies in Spain. For cases between EU countries, the Brussels II Regulation is also applicable.

International child abduction proceedings are now specifically regulated by Law 15/2015 de Jurisdicción Voluntaria of 2 July, which entered into force on 23 July 2015. This law contains a new and faster procedure for international child abduction cases. However, the new law makes it clear its procedures will not apply to wrongful retentions or removals where the abduction involves jurisdictions that are not EU member states, or signatories to the Hague Child Abduction Convention or similar bilateral instrument with Spain.

The receiving agency or central authority for international child abduction cases is the Ministry of Justice, which will both:

• Make an initial assessment as to whether there are sufficient grounds to process the request.
• Refer the matter to the State Attorney, who will act representing the Spanish Central Authority in applying the terms of the Hague Child Abduction Convention.

The applicant, however, may also instruct a lawyer privately, in which case the central authority will decline any responsibility in respect of the outcome.

The State Attorney will make the application to the court for the return of the child. Since the entry into force of Law 15/2015, child abduction cases are now heard only by family judges from the court of the capital city of the province. The court will serve the respondent with the application and will summon him/her to appear before the court on a specific date and to bring the child. At that audience, the respondent will have to confirm if he/she will return the child voluntarily or contest the proceedings. If the latter, he/she must indicate the grounds on which the return is being contested under the Hague Child Abduction Convention or Brussels II Regulation. If the respondent does not appear on the date summoned, the court will declare him/her in contempt of court and will list the application for a hearing. If the respondent appears and states that he/she will return the child, the court will establish the arrangements for the effective return of the child and is most likely to make an order for costs against the respondent. If the respondent contests the application, a final hearing will be listed. The judge is likely to want to hear the parties at that hearing. If the respondent does not appear, it will be considered that the defence has been withdrawn and the hearing will continue.

The child's views on the matter must always be heard.

The judge will decide whether or not the removal or retention is illicit and if so, will establish the arrangements for the effective return of the child.

The decision of the court of first instance can be appealed within the statutory period of three working days. The appeal proceedings will stay the enforceability of the return order pending its resolution, which must be dealt with within a period of 20 days.

In cases where a child with his/her habitual residence in Spain has been illicitly removed or retained in a foreign country, in addition to the application for his/her return submitted in accordance with the international regulations applicable, an interested party can make an application to the Spanish local competent court for a decision specifying that the removal or retention is unlawful, which can then be used in support of the application for the child’s return.

Leave to remove/applications to take a child out of the jurisdiction

23. What is the legal position on leave to remove/applications to take a child out of the jurisdiction? Under what circumstances can a parent apply to remove their child from the jurisdiction against the wishes of the other parent?

The place where the child lives is an issue that falls within the scope of parental responsibility and therefore a parent needs the consent of the other to remove the child from the jurisdiction. A change to the child’s place of habitual residence can never be a unilateral decision made by one of the parents, even if that parent holds custody of the child. If there is disagreement, the parent intending to relocate must seek and obtain authorisation from the court.

It depends on the local court, but generally, such authorisation can be requested during the divorce proceedings or afterwards in proceedings related to parental responsibility.

When deciding, the court takes into account the specific circumstances of the case, such as the:

• Place where one of the parents intends to relocate.
• The reasons given to seek relocation.
• The country of origin of the family.
• The child’s relationship with both parents.
• The relationship between the parents, and their ability to communicate and co-operate and their willingness to put the interests of the child first, above their individual interests and whether the parent seeking to relocate will encourage frequent and continuing contact with the other parent.

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• Possibility of access.
• Interests of the child.

After hearing both parents and the child (if old enough), without further recourse the judge attributes the power to decide to the father or mother. If the disagreements are repeated or some other cause arises that seriously impedes the exercise of parental authority, the judge may assign totally or partially to one of the parents the ability to decide, including sharing their functions between them.

In respect of an application to remove a child against the wishes of the other parent, different circumstances apply to different situations. Leave to remove may be granted, for example:
• To be reunited with siblings or close family.
• To receive specific medical treatment.
• To enjoy a scholarship.
• For any other reason based on the health of the child.

The interests of the child are always paramount. In general, relocation due to the specific circumstances of one parent is more difficult to obtain as there is a general trend not to alter the child’s environment if this is suitable to him or her. However, the impossibility of earning a living and/or support for bringing up the child from close family can also justify relocation. The distance between the current and the new location is always relevant and removing the child to a new country located far away such as Australia, New Zealand or South America will be extremely difficult.

The views of the child will be heard if the child is of a sufficient level of maturity. There was a well established trend by the courts of allowing mothers to relocate with the children on the grounds of freedom of movement granted under EU law but there are growing calls to reverse this pattern. The situation is uncertain since cases are dealt with on a case-by-case basis.

SURROGACY AND ADOPTION
Surrogacy agreements

24. What is the legal position on surrogacy agreements?

A contract in which a woman who agrees to be a surrogate (with or without receiving consideration) renounces her maternal relationship in favour of the person entering the contract or a third party is null and void under the legislation on human assisted reproduction techniques (Article 10.1, Law 14/2006 of 26 May).

Filiation of children born by surrogacy must be determined by parturition (Article 10.1(2)).

It remains possible for the biological father to claim paternity in accordance with the general rules of Spanish legislation. In this case, where the birth of a child born abroad using a surrogate mother must be registered at the Spanish Civil Registry, the registration is necessary to produce a resolution which clearly establishes filiation or alternatively to obtain the recognition of the order in Spain by means of an exequatur (see Question 6, Divorces/annulments).

Adoption

25. What is the legal position in relation to adoption? Is adoption available to individuals and cohabiting couples (both heterosexual and same-sex)?

Adoption requires that the prospective adoptive parent is older than 25 years old. In an adoption by both spouses, it is sufficient for one spouse to have reached the age of 25. In addition, the prospective adoptive parents must be at least 14 years older than the adoptee.

Only non-emancipated minors can be adopted. As an exception, it is possible to adopt a person of legal age or an emancipated minor when, immediately before emancipation, there was an uninterrupted situation of foster care or cohabitation, beginning before the prospective adoptee turned 14 years old.

A person cannot adopt a descendant, that is, a relative in the second degree in the collateral line by consanguinity or affinity. A ward cannot be adopted by his or her guardian until final approval of the account of the guardianship.

A person cannot be adopted by more than one person, unless the adoption is performed jointly or successively by both spouses. Marriage performed after the adoption allows the spouse to adopt the children of his or her spouse.

Spanish legislation allows adoption by same sex couples both as spouses or individually. Some autonomous communities such as Catalonia have passed legislation permitting same sex and heterosexual cohabiting couples to adopt.

COHABITATION
Cohabitation

26. What legislation (if any) governs division of property for unmarried couples on the breakdown of the relationship?

Neither the Spanish Constitution nor the Civil Code refers to cohabitation.

The autonomous communities (such as Andalucía, Aragon, Asturias, Balears, Canarias, Cantabria, Castilla La Mancha, Castilla León, Cataluña, Extremadura, Galicia, Madrid, Navarra, País Vasco and Valencia) have produced legislation relating to cohabitation that includes:
• Rights and obligations of the parties towards themselves and their children.
• Inheritance rights.
• Maintenance and/or compensation rights.

However, there are no measures dealing with the distribution of assets for unmarried couples.

FAMILY DISPUTE RESOLUTION
Mediation, collaborative law and arbitration

27. What non-court-based processes exist to resolve disputes? What is the current status of agreements reached through mediation, collaborative law and arbitration?

The courts promote the resolution of conflicts in separation and divorce procedures by mutual agreement between the parties. Contentious proceedings can be settled at any time on a non-contentious basis.

Mediation is available for the resolution of conflicts within proceedings. When an agreement is reached by mediation it must be filed at court for the judge’s approval and issued as a judgment, otherwise it is not binding or enforceable.

Collaborative law is not yet available in Spain.

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28. What is the statutory basis (if any), for mediation, collaborative law and arbitration?

Mediation is a voluntary alternative for resolution in family disputes using an impartial and neutral mediator (Law 15/2005 of 8 Jul). Parties can stay separation or divorce proceedings to try to reach an agreement. There are no other general provisions regulating family mediation at a national level. However, most autonomous communities have set up specific rules on family mediation such as Andalucia, Aragon, Asturias, Canarias, Cantabria, Castilla la Mancha, Castilla y Leon, Cataluña, Comunidad Valenciana, Galicia, Islas Baleares, Madrid, Navarra and País Vasco.

CIVIL PARTNERSHIP/SAME-SEX MARRIAGE

29. What is the status of civil partnership/same-sex marriage? What legislation governs civil partnership/same-sex marriage?

Same-sex marriage is contemplated and regulated in Spain. Same-sex spouses have exactly the same rights and obligations as heterosexual spouses. There is no legal equivalent under Spanish law to the concept of civil partnership as understood under English law.

Men and women have the right to marry in accordance with the provisions contained in Article 44 of the Spanish Civil Code. Article 44 specifically establishes that marriage has the same requirements and effect whether both spouses are the same sex or opposite sexes.

MEDIA ACCESS AND TRANSPARENCY

30. What is the position regarding media access to and press reporting of family law cases?

The general principle established under Spanish law is that court hearings are heard in public. However, Article 754 of the Spanish Civil Procedural Act provides that in family law cases, the court can decide on its own accord, or at the request of either party, that the hearing should take place in private and proceedings should be reserved, if advisable in view of the particular circumstances of the case.

In practice, family cases are mostly heard in private, particularly where there are minors involved, to protect their best interests. It is also for the court to decide which information is or is not disclosed.

The above applies to both third parties and members of the press. However, once judgement is issued, it can be made public though a specific body of the General Council of the Judiciary (Consejo General del Poder Judicial). This is due to the legal requirement to comply with the relevant data protection laws to which members of the public and the press will have access.

CONTROVERSIAL AREAS AND REFORM

31. What areas of the law (if any) are currently undergoing major change? Which areas of law are considered to be particularly controversial?

Not applicable.

ONLINE RESOURCES

Official State Gazette (Boletín Oficial del Estado) (BOE)

W www.boe.es/legislacion/legislacion.php


Ministry of Justice

W www.mjusticia.gob.es/cs/Satellite/es/1288774502225/ListasPublicaciones.html

Description. The website of the Spanish Ministry of Justice (provides translations for guidance only of Spanish law however some may be out of date).
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**Languages.** English, Spanish

**Professional associations/memberships**
- Reunite International (leading UK charity specialising in international parental child abduction).
- Resolution.
- International Academy of Family Lawyers (IAFL).
- Spanish Association of Family Lawyers (Asociación Española de Abogados de Familia) (AEFA).
- British Spanish Law Association (BSLA).
- International Bar Association (IBA).

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- Member of the Family Law commission of the Barcelona Bar Association.
- British Spanish Law Association (BSLA).