

## SPAIN

Prof. Cristina González Beilfuss

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### **A. New Developments in the field of Divorce (since September 2002)**

There have been two important reforms that have substantially changed the grounds for divorce and divorce procedures. In 2005,<sup>1</sup> the Spanish Civil Code (hereinafter CC) and the Law of civil procedure were modified to permit direct access to divorce without a prior period of legal separation and further to liberalize divorce by introducing marriage dissolution based on mutual consent and unilateral demand. Divorce is today seen as part of the right to self-determination (art. 10 of the Spanish Constitution) which implies that nobody should be constrained to stay in a marriage he or she no longer wants. The reasons for wanting divorce or legal separation no longer matter in the light of the law (arts. 81 and 86 Spanish CC).

Legal separation continues to be available under Spanish law and may be resorted to by those spouses who want to discontinue marital life without severing the marital bond. It is, however, no longer required that spouses be legally separated before being able to divorce, which facilitates the dissolution of marriage and reduces costs, since a duplicity of legal procedures is avoided. Therefore, legal separation has become a residual category that is not very often used in practice.

Divorce is granted if a divorce petition is filed by mutual consent or unilaterally by one of the spouses. It is merely required that the marriage has lasted for at least three months. This requirement can be waived in certain cases (see Art. 81 Spanish CC), basically when remaining in the marriage creates a risk or detriment for children or one of the spouses (e.g. domestic violence).

Another aim of the 2005 reform was to promote agreements on ancillary matters related to separation or divorce. If spouses separate or divorce by mutual consent they are expected to also agree on the financial consequences of divorce and on matters of parental responsibility concerning their children (see Art. 90 Spanish CC). It is therefore a misconception to characterize Spanish divorce procedures as 'express' procedures since marriage dissolution cannot be granted until ancillary matters are resolved.

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<sup>1</sup> Ley 15/2005, de 8 de julio, por la que se modifican el Código Civil y la Ley de Enjuiciamiento Civil en materia de separación y divorcio (BOE núm. 163, de 9 de julio de 2005).

Spouses must present an agreement on ancillary matters simultaneously to the joint divorce petition (Art. 81.1 Spanish CC). In the absence of such agreement the divorce procedure becomes contentious. If divorce or separation is filed unilaterally by one spouse, he or she is expected to make a proposal in connection to ancillary matters that will be presented to the other spouse (Art. 81.2 Spanish CC). The aim is to reach agreement. It is only when this cannot be achieved that the decisions will be taken by the competent authority. Amicable solutions are also favoured by establishing that spouses can request that judicial proceedings be suspended to initiate mediation procedures.

In 2015,<sup>2</sup> the Spanish lawmaker further developed this concept of divorce as a remedy and introduced the possibility that a legal separation or divorce petition be filed before a notary or a legal clerk (arts 82 and 87 Spanish CC) who records the agreement to divorce. This possibility is excluded if spouses have minor children or adult disabled dependent children.

Notarial divorce is only possible in cases in which divorce is requested based on mutual consent, which requires that spouses also reach agreement on the financial matters, ancillary to divorce. Agreements need to be approved by adult or emancipated children that live in the household and are dependent on their parents. They are scrutinized by the issuing notary or law clerk. If found detrimental to one of the spouses or adult children living in the household the notary can refuse them and defer decision to the judicial authority.

## **B. New Developments in the field of Maintenance between former spouses (since September 2002)**

There have been some adjustments concerning the **Spanish** rules on maintenance between former spouses. Article 97 of the Spanish CC has been modified to specify that maintenance obligations can be limited in time and paid either periodically or as a lump sum, as agreed or, in the absence of agreement, decided by the judge.

The law has also clarified some other issues in connection to agreements. If spouses reach agreements on ancillary matters such as maintenance between former spouses during divorce or separation procedures, such agreements will in principle be approved unless the judge finds them harmful to the children or seriously detrimental to one of the spouses (art. 90.2 Spanish CC).

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<sup>2</sup> Ley 15/2015, de 2 de julio, de la Jurisdicción Voluntaria, Disposición Final Primera (BOE núm. 158, de 03/07/2015).

In connection to notarial divorce, it has further been clarified that notaries are expected to scrutinize agreements on financial matters and can refuse them if they are detrimental to one spouse or to the adult or emancipated children that live in the household. In this event, the decision on ancillary matters is deferred to the competent judge (Art. 90.2 Spanish CC).

Article 97 Spanish CC further specifies that prior agreements made by the spouses before or during the marriage need to be considered when the competent authority is called upon to decide about maintenance between former spouses.

**Catalan** family law was reformed in 2010 when Book II of the Catalan Civil Code (hereinafter Catalan CC) was enacted. In connection to maintenance between former spouses there are new rules on agreements reached in the period between *de facto* separation and the commencement of legal separation or divorce proceedings. Article 233-5 Catalan CC provides that such agreements are binding between the spouses. If they were, however, concluded without parties having received independent legal advice, any spouse may require that they be set aside.

In 2020 the role of mediation was reinforced. Article 233-6 of the Catalan Civil Code establishes that during the marriage spouses can enter an agreement stipulating that mediation is the dispute settlement method in case of disputes related to their marriage. Article 233-6 also stipulates that the judge can refer spouses to an informative session on mediation at the commencement of divorce or legal separation procedures. If spouses voluntarily decide to opt for mediation the judicial procedures will be suspended.

### **C. New Developments in the field of Parental Responsibilities (since December 2004)**

There have been some reforms in the **Spanish** regulation of parental responsibility. In 2005, when marriage was opened to same-sex partners the law-maker substituted terms such as husband and wife and father or mother by gender-neutral language in provisions such as article 154 Spanish CC.<sup>3</sup>

A further reform was undertaken in 2007<sup>4</sup> to respond to the requirements of the UN Committee on the Rights of the Child. Parental responsibility no longer encompasses

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<sup>3</sup> Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio (BOE núm. 157, de 2 de julio de 2005).

<sup>4</sup> See Disposición Final 1.2. of the Ley 54/2007, de 28 de diciembre, de Adopción internacional (BOE núm. 312, de 29 de diciembre de 2007).

a reference to the possibility to resort to reasonable punishment which could be interpreted to refer to corporal punishment (see Art. 154 Spanish CC).

In 2015, a further reform of the Child protection system specified how the best interests of the child should be determined.<sup>5</sup> The best interests of the child are the primary consideration, when taking decisions concerning children, and prevail over any other concurring legitimate interest. Article 2 of the Statute on the system of child protection also provides some guidelines to assist in the determination of the best interests.

The most important changes in matters reported relate to shared custody after divorce. In 2005, the Spanish Civil Code was reformed to establish that parental responsibility holders can agree that they will share custody over their children after divorce or legal separation (Art. 92.5 Spanish CC). The agreement will in principle hold unless the judge finds it inadequate. The judge must request a report by the Public Prosecutor, who acts in the interest of the children, and can request expert reports. Children can be heard, provided they have reached an appropriate age and degree of maturity.

Article 92.8 Spanish CC also provides that the judge can decree a regime of shared custody in the absence of an agreement between parental responsibility holders, if this is the only regime that adequately protects the best interests of the child. This provision has been very controversial and has given rise to substantial case-law. There has been disagreement as to whether shared custody should or should not be the preferred custody solution.

Courts have struggled with the effects of shared custody on the attribution of the use of the family home, which in principle is granted to the custodial parent, or the consequences of shared custody on maintenance obligations. There is also case-law on the interpretation of the best interests of the child as a criterion to approve an agreed shared custody or decree shared custody in the absence of such agreement. In a landmark decision rendered in 2013,<sup>6</sup> the Supreme Court listed the factors to be considered, namely: the prior conduct of the parents, their personal abilities, the number of children, their wishes, the fulfilment of parental duties towards children, the personal relationship of parental responsibility holders as well as the content of expert reports. The list is open-ended.

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<sup>5</sup> Art. 2 de la Ley Orgánica 8/2015, de 22 de julio, de modificación del sistema de protección a la infancia y a la adolescencia (BOE núm. 175, de 23/07/2015).

<sup>6</sup> STS 257/2013, 29 de abril de 2013, (RJ 2013\3269).

**Catalan** law was reformed in 2010, when Book II of the Catalan CC replacing the Family Code was enacted. Two particularly important changes concern parental responsibility after divorce or legal separation. Divorce or legal separation do not change the obligations of parental responsibility holders towards their children. Obligations continue to be joint obligations that must be exercised jointly. In such a circumstance or when they no longer live together, parental responsibility holders need to elaborate a parenting plan providing details as to how they will perform their obligations concerning the care and education of their children.

Article 233-9 Catalan CC deals with the content of the parenting plan and establishes that it must include details about the habitual residence of the child, the respective obligations of parental responsibility holders as regards the every-day life of the child, how custody is to be interchanged between parental responsibility holders and who bears the associated costs, the regime applying to access and communication between parental responsibility holders and their children, details about how the child will spend holidays and festivities, education and free time activities, communication of information about education, health and well-being. The parenting plan also needs to specify methods to take decisions about the habitual residence and other important matters concerning the child.

Another substantial change in Catalan law is that shared custody has become the preferred custody system in case parental responsibility holders live apart. It can be agreed on by parental responsibility holders or imposed by the competent authority. Article 233-11 Catalan CC enumerates a list of factors that need to be considered besides the parenting plan. These are:

- (a) the emotional bond between the children and each parent, and the relations with the other persons living in the respective homes;
- (b) the ability of the parents to ensure the welfare of the children and the possibility to give them a suitable environment, according to their age;
- (c) the attitude of each parent to cooperate with each other to ensure maximum stability to the children, particularly to adequately ensure the relations of the children with both parents;
- (d) the time devoted by each parent to the care of the children before the breakdown and the tasks which were effectively exercised by them to ensure the welfare of the children;
- (e) the opinion expressed by the children;
- (f) the agreements in anticipation of the breakdown or those entered into outside the separation agreement before commencing the proceedings;
- (g) the location of the homes of the parents and the schedules and activities for children and parents.

It is further stipulated that siblings should not be separated unless circumstances so require.

Paragraph 3 of Art. 233-11 Catalan CC clarifies that custody cannot be awarded to the parent against whom a final judgment has been pronounced for acts of domestic or sexist violence suffered directly or indirectly, actually or potentially, by the children. In the interest of the children, custody can also not be awarded to a parent while there is a grounded suspicion that such parent may have committed acts of domestic or sexist violence suffered directly or indirectly by the children.

After 2010, there have been two further reforms of Book II of the Catalan Civil Code that impact on parental responsibility. In 2017 on occasion of the enactment of a statute dealing with digitalisation<sup>7</sup> it was established that parental responsibility holders must ensure that the digital activity of their children is age-appropriate. In 2020, several provisions were modified to strengthen recourse to mediation as a dispute resolution method.<sup>8</sup>

#### **D. New Developments in the field of Property relations between spouses (since August 2008)**

There have been no substantial reforms in **Spanish** statutory law. The most important development in case law is that the Supreme Court has accepted agreements entered by spouses for the event of a future relationship break-down.<sup>9</sup>

In 2018, the Spanish Association of Civil Law Teachers issued an academic proposal for a new Civil Code. In connection to matrimonial property the most important innovation proposed is to require that spouses select their matrimonial property regime before marriage celebration. This would encourage them to reflect on their property relations. Their choice would be recorded in the Civil Registry, which would substantially improve publicity for third parties.

In the chapter on general rights and duties the Proposal contains a provision establishing the duty of information of each spouse as regards his or her financial situation, which can now only be inferred.

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<sup>7</sup> Ley 10/2017, de 27 de junio, de las voluntades digitales y de modificación de los libros segundo y cuarto del Código civil de Cataluña, (BOE núm. 173, de 21 de julio de 2017).

<sup>8</sup> Ley 9/2020, de 31 de julio, de modificación del libro segundo del Código civil de Cataluña, relativo a la persona y la familia, y de la Ley 15/2009, de mediación en el ámbito del derecho privado (BOE núm. 220, de 15 de agosto de 2020).

<sup>9</sup> STS 392/2015 de 24 junio (RJ 2015, 2657) and STS 315/2018 de 30 mayo (RJ 2018, 2358), among other decisions.

The matrimonial property regime of community of acquisitions, which is the legal regime under existing law, would apply in the rare cases in which the matrimonial property regime had not been selected, which is justified on grounds that this is the regime that better protects the more vulnerable family member. The Proposal does not contain substantial changes as regards its structure and functioning, whereas the separation of property regime is modified by introducing a compensation claim for the spouse who has done house and care work.

The enactment of Book II of the **Catalan** Civil Code in 2010 has implied a complete revision of the law on property relations between spouses. In connection to general rights and duties explicit reference is made to the duty of both spouses to contribute to household responsibilities, including the care for other dependent family members living in the household (Art. 231-2 Catalan CC). The rules on family expenses have been clarified (Art. 231-5 Catalan CC). The acquisition and improvement of the family dwelling is excluded from such expenses, as these are investment expenditures connected to the ownership of the immovable property.

The Catalan Civil Code has also developed the regulation of agreements in anticipation of a future breakdown (Art. 231-20). A key role is given to the notary performing the deed, who is required to ensure that the agreements, particularly agreement waiving rights, were preceded by adequate information and a disclosure of the respective assets and financial situation of each spouse. These agreements can be set aside if changes of circumstances have arisen that were unforeseen or could not reasonably be foreseen at the time of execution of the agreement (hardship clause).

In connection to the legal matrimonial property regime of separation of property there are also some noteworthy changes. A new feature is that movable assets for family use, such as vehicles, furniture, household appliances or other household items are presumed to belong jointly and equally to both spouses, unless proven to the contrary (Art. 232-4 Catalan CC). The financial compensation by reason of work carried out for the household or for the other spouse which is conceived as a corrective to the unwelcome effects sometimes produced by the legal separation of property regime is revised to reduce judicial discretion. Article 232-5 Catalan CC provides clearer guidelines together with rules clarifying whether compensation is to be paid and for which amount. The amount of compensation is limited to one fourth of the difference in the accrual of assets obtained by the spouses while the matrimonial regime was in force. A higher compensation can be granted if the creditor spouse can prove that the impact of his or her work in the other spouse's accrual of assets has been significantly higher.

### **E. New Developments in the field of De Facto Partnerships (since February 2015)**

In 2018 the Spanish Supreme Court rendered an important decision that is applicable to partners whose relationship is governed by the Spanish Civil Code.<sup>10</sup> This decision confirms that de facto partners can enter agreements about their relationship under the general rules of private autonomy contained in Article 1255 Spanish CC. In the absence of such agreements, the Supreme Court denies that the rules on maintenance between former spouses (the so called 'pension compensatoria') can apply by analogy since this would infringe the right to self-determination and impose on partners that chose not to marry the rules about the financial consequences of marriage break-up.<sup>11</sup> The Supreme Court establishes that compensation can be granted under the grounds for unjust enrichment.

There are no relevant changes as regards Catalan law.

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<sup>10</sup> STS 37/2018 - ECLI: ES:TS:2018:37

<sup>11</sup> The Supreme Court decision takes up the arguments of a decision by the Spanish Constitutional Court that in 2013 declared that the law on unmarried couples enacted by the Autonomous Community of Navarra infringed art. 10 of the Spanish Constitution. This decision (STC 93/2013) is dealt with in the report that covered the law as it stood until February 2015.