

## NATIONAL REPORT: SPAIN

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### A. GENERAL

#### 1. Having regard to the concept of parental responsibilities as defined by the Council of Europe (see above), explain the concept or concepts used in your national legal system.

Since Spain's system of law regarding parental responsibility is not uniform, it is necessary to distinguish between the so called common civil law that is the Civil Code regime and the law of Navarra, Aragon and Catalonia. However, there are no marked differences among the regulations of parental responsibility in the different Spanish subsystems of law.<sup>1</sup> This national report will therefore only refer to differences when relevant.

The Spanish CC uses the general concept of *patria potesta'* (Art. 154 Spanish CC), which embraces all issues mentioned in Principle 18 of the Council of Europe's White paper. This concept is also used in the laws of Navarra and Aragon, whereas Catalan law speaks of the *potestad del pare i la mar'* in order to stress that this *potestas* or authority is usually jointly exercised by both father and mother.<sup>2</sup>

It is generally admitted that neither of these terms adequately reflects the contents of the concept. When the Spanish CC was reformed in 1981 to adapt the regulation of *patria potestad* to the 1978 Spanish Constitution (see Q 5), a change of terminology was discussed. It was, however, finally decided to keep the term because it is rooted in society, and was not contradictory with a profound change of the concept.<sup>3</sup>

*Patria potestad* is not defined by the law. The Spanish Supreme Court has defined *Patria potestad* as a function, established in the interests of children, whose contents consist more of duties than rights (*e.g.* STS 31.12.1996). The contents of the concept will be further developed under Q 7.

If parental responsibility is held by persons who are not parents, Spanish law uses the concept of guardianship, or *tutela*, as a surrogate. For differences between *patria potestad* and *tutela* see Q 31.

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1 As regards Catalan Law and the Spanish Civil Code see J. FERRER RIBA, 'Comentari a l'article 132' in: EGEA FERNÁNDEZ-FERRER RIBA, *Comentaris al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mutua*, Madrid, 2000, 610.

2 See Preamble of the Catalan Codi de Família.

3 J. CASTAN VAZQUEZ, *Comentario al Título VII'* and M. ALBADALEJO (Dir.), *Comentarios al Código civil y Compilaciones forales*, Madrid, 1982 66; J. CASTAN PEREZ GOMEZ, 'La patria potestad', in: J.F. DELGADO DE MIGUEL, *Instituciones de Derecho Privado*, T.IV. Familia vol.1º, 2001, 641.

## 2. Explain whether your national concept or concepts encompass:

### (a) Care and protection

Although Spanish law does not use the exact concepts of care and protection, care and protection are implicit in the duties enumerated in Article 154 Spanish CC and Art. 143 Catalan Family Code. The Spanish Constitution refers to care and protection as well; Article 39 establishes that parents must provide assistance of all kinds to their children. See for further explanations Q 8 (a).

### (b) Maintenance of personal relationships

Spanish law refers to a duty of living with the child or having the child in one's company (Art. 154 Spanish CC and Art. 143 Catalan Family Code). This duty does not exclude the children living outside their parents' domicile for justified reasons, such as *e.g.* education.<sup>4</sup> Legal literature therefore equates the duty with an emotional and intellectual communication equivalent to that required to maintain personal relationships.

It should be noted, however, that the maintenance of personal relationships is an effect of parenthood (160 Spanish CC and Art. 135 Catalan Family Code), that is, parents who do not hold parental responsibility also have a duty and a right to maintain personal relationships with the child. The child also has a right to maintain personal relationships with other relatives and persons the child is close to. See Q 44.

### (c) Provision of education

The provision of education is expressly mentioned in Article 154 Spanish CC and Art. 143 Catalan Family Code as one of the duties of parental responsibility. Education is moreover a fundamental right under Article 27 of the Spanish Constitution. See further explanations under Q 8 (b).

### (d) Legal representation;

According to articles 162 Spanish CC and 155 Catalan Family Code, legal representation is part of the content of parental responsibility: Spanish law establishes a general power of representation. See further explanations under Q 8 (f).

### (e) Determination of residence

The determination of residence is not statutorily mentioned as a specific issue among the duties comprised by *patria potestad*. As mentioned under Q 2 (b), the Spanish CC and the Family Code assume that children will live with their parents who jointly hold parental responsibility.

Parental responsibility holders who live together with their child are free to choose where they establish their domicile. If they choose a residence which is damaging to the child however, public bodies will intervene and eventually decree that the child is in a situation of bereavement or abandonment (see Q 32).

The legal concept of living together is not identical to what, in ordinary language, would normally be understood as living together. As has been pointed out, it is

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<sup>4</sup> The Catalan Family code actually clarifies this in Art. 143. 2 Catalan Family Code.

more an intellectual and emotional communication, which is compatible with the situation in which a child that does not physically reside with the parents who hold responsibility. Provided that parents keep this communication (otherwise it would be understood that they abandoned the child, which is a criminal offence) and that there is a justification, parental responsibility holders are free to determine their child's residence outside their domicile; *e.g.* send the child to a boarding school or summer camp, or leave the child with grandparents.

Another issue, dealt with under Q 40, is when parental responsibility is held jointly and there is disagreement as to the determination of the child's residence.

**(f) Administration of property.**

The administration of the child's property is specifically mentioned as part of parental responsibility in Art. 155 Spanish CC and Art. 145 Catalan Family Code. See Q 10-12.

**3. In what circumstances (e.g. child reaching majority or marrying) do parental responsibilities automatically come to an end?**

Articles 158 Catalan Family Code and 169 Spanish CC establish that parental responsibility automatically comes to an end in the following cases:

- upon the death or declaration of death of either the child or the parental responsibility holder. It should, however, be considered that if parental responsibility is held jointly by the father and mother of the child, the death of one of the holders does not mean an automatic end of parental responsibility but instead a change in the subject. Jointly held parental responsibility will be held, after the death of one of the holders, by the other holder alone.
- if the child or the parental responsibility holders are declared absent. The former reasoning applies if parental responsibility is held jointly.
- if the child is adopted, except in the case of step-parent adoption. If a child is adopted by the parent's spouse or cohabitee, parental responsibility is not terminated but changes subjectively because both the parent and the adopter will hold it jointly.
- if the child reaches majority (18 years).
- if the child is emancipated. This can occur in three situations:
  - Article 314 Spanish CC<sup>5</sup> establishes that a child becomes emancipated by judicial decision. This can occur if the child is 16 and the child requests it himself or herself (Art. 320 Spanish CC). The parental responsibility holders must be heard and there must be a reason for the emancipation; either that the parental responsibility holder marries or cohabitates with a person who is not a parent, or that the parents live apart, or any other reason which gravely disturbs the exercise of parental responsibility.
  - A child also becomes emancipated if he or she marries. This is possible with parental consent or judicial authorization if the child is older than 16. Children older than 14 and younger than 16 need judicial permission in order to marry, notwithstanding the fact that parental responsibility holders' consented. Younger children cannot marry.

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5 This regulation is applicable in Catalonia as well.

- Emancipation can also be a concession of those exercising paternal responsibility. This requires that the child is older than 16 and consents to the emancipation. This kind of emancipation must be formalised in a public document (notarial deed) or before the Civil Registrar. It has to be registered in the Civil Registry in order to be enforceable *vis a vis* third parties. Such an emancipation is irrevocable.

With emancipation, however, *patria potestad* is not extinguished completely because the child will need the authorization of his or her parents in order to borrow money and sell or burden valuable properties (Art. 323 Spanish CC). This rule is also applicable in the case of married children unless the property is common and the child's spouse is older than 18, in which case his or her consent will suffice.

#### 4. What is the current source of law for parental responsibilities?

There is no single law which contains all the relevant rules. Public and private law rules are embodied in different sources. There is also a jurisdictional division between the Central legislative power and the Autonomous Communities, both in Public and Private law.

Private law rules on parental responsibility are basically contained in:

- In Aragon: Title II of Book I of the *Compilación de Derecho civil de Aragón* (Art. 9-14). These articles were reformed in 1985 (*Ley 3/1985 de 21 de mayo*).
- In Navarra: Title V of Book I of the *Compilación de Derecho civil foral o Fuero Nuevo de Navarra* (*Leyes 63-67 and 72*). These dispositions were modified in 1987 (*Ley foral 5/1987 de 1 de abril*).
- In Catalonia: Title VI of the Catalan Family Code (Art. 132-163) which was introduced in 1998 (*Ley 9/1998 de 15 de julio*).
- The Spanish CC regulates *patria potestad* in Title VII of Book I (Art. 154-171) which was last reformed in general terms in 1981 (*Ley 11/1981, de 13 de marzo*). The Spanish CC also contains rules on parental responsibility in Chapter IX of Title IV of Book one in connection to divorce, annulment and judicial separation. These rules were introduced in 1981 as well, but in a different law: *Ley 30/1981 de 7 de julio*.

According to relevant private international law rules, the applicability of these rules depends on a personal quality: the child's *vecindad civil* (Art. 9.4 Spanish CC). Every Spanish national and only Spanish nationals have a *vecindad civil* which is acquired at birth.

Public law rules:

There are general laws on the protection of children and the exercise of children's rights, such as the *Ley Orgánica de Protección Jurídica del Menor* of 15 January 1996 or the Catalan *Llei d'atenció i protecció dels infants i dels adolescents* dating from 1995.<sup>6</sup> These laws developed the rights of the children recognised in the Spanish Constitution and in the UN Convention on the rights of the child which was ratified by Spain in 1990. There are also public law rules dealing with public

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<sup>6</sup> For other Autonomous Communities see - LEY 14/2002, de 25 de julio, de Promoción, Atención y Protección a la Infancia en Castilla y León. ; LEY 12/2001, de 2 de julio, de la Infancia y la Adolescencia en Aragón.

intervention in the legislation of the 17 *Comunidades Autónomas* into which Spain is divided.

**5. Give a brief history of the main developments of the law concerning parental responsibilities.**

The current regulation of parental responsibilities is mainly a consequence of the Spanish 1978 Constitution. However, legislation was also strongly influenced by developments in other European countries, particularly France, Germany and Italy. The ratification of the UN Convention on the rights of the child in 1990 gave further impulse for reform.

The main points of reform during these years were:

- to establish that *patria potestad* is a function (an *officium*).  
The concept of *patria potestad* was historically understood to be a power of the father. It gradually evolved in case-law as an institution aiming to protect the child. In the reforms after 1978 it was established as a function by statute.
- to establish that *patria potestad* is to be exercised in accordance with the child's best interests and according to the child's personality.
- to establish a possibility of intervention by public authorities if *patria potestad* is not properly exercised.
- to ensure the observation of the non discrimination principle both in regard to the powers and duties of fathers and mothers and in regard to children born in and out of wedlock.

**6. Are there any recent proposals for reform in this area?**

As concerns the Civil Code regime, the main reforms envisaged are in connection to the regulation of marriage and divorce. The present Government has announced a reform of divorce law which seeks to facilitate divorce. In connection to that there will be reforms to promote joint or shared custody after divorce. As will be seen when dealing with Q 41, although joint custody is not statutorily ruled out, it is very rare in practice. Children normally live with their mothers after divorce, while their fathers have rather reduced contact rights.

The introduction of shared or joint custody after divorce is one of the most contested parts of the envisaged reform. Although it is conceded that shared custody improves the possibility that children will maintain a personal relationship with both parents, it is argued that it is very difficult to implement in practice and even damaging to the child because it deprives him or her of a stable environment.

There are no proposals for reforms in Catalan law, which has a quite recent Family law (1995).

**7. Describe what the contents of parental responsibilities are according to your national law including case law.**

As mentioned under Q 1, parental responsibility is not defined in Spanish law. It is described in legal writing and case law as a collection of powers and duties over a child and the child's property child, vested equally with the child's father and

mother. It's exercise is compulsory; no reason justifies the non-exercise of parental responsibility. It must be exercised in the interests of the child, respecting the child's personality. Children have a right to be informed and listened to, according to their degree of maturity.

As to the contents, Article 154 Spanish CC and Catalan Family Code enumerate certain specific functions. The statutory functions are personal duties, such as the duty to care for, maintain and educate children. There is also a duty to represent and administer the property of the child. See also Q 8.

## **8. What is the position taken in your national law with respect to**

### **(a) Care**

Both the Spanish CC and Catalan law establish a very widely construed maintenance obligation. This obligation is imposed on parents by reason of parenthood; it does not disappear even if a parent never acquires or is discharged of his or her parental responsibilities. A child's maintenance by his or her parents is not dependent on the child's need, and a parent's inability to pay does not extinguish the obligation. Once a child reaches majority the maintenance obligation is transformed into an ordinary maintenance obligation.

The contents of maintenance depend on the financial abilities of the parents. Maintenance can include not only food, clothes, shelter, medical care and education, but also spare time activities, vacations, etc. Some authors include moral assistance as well.

Besides the maintenance obligation there is also a duty of care that is generally described as an attitude which informs the implementation of all other more specific obligations that are inherent to parental responsibility. It certainly includes a duty to keep children away from danger and to impede the damage they may cause.

### **(b) Education**

Education is not only a content of parental responsibility but also a fundamental right of the child requiring the possibility of intervention by the Administration. Conflicts between these two aspects of education do not often reach the courts. It is generally understood that it is preferable to be flexible than to risk that children belonging to certain minority groups (Gypsies or children of the Islamic religion) cease attending school.

There is case law on two issues that derive from the right of the child to education relating to possible limitations of parental responsibility in the area of education. The first is whether home schooling is admissible as an alternative to attendance at school. The matter was dealt with by the Constitutional Court in STC 260/1994. Although this Judgment is complicated on grounds of procedure and because the parents belonged to a destructive sect, it can still be concluded that in Spanish law the right of parents to educate their children according to their religious and moral convictions is derivatively limited by the right of the child to attend school. The State must ensure that this right is not infringed by parents. There is even an obligation imposed on school teachers and directors to notify public child

protection bodies if a child does not habitually attend school (Art. 13.2 LO 1/1996, *de protección jurídica del menor*). School non-attendance justifies intervention by public child protection bodies (see Q 32).

Another issue courts have dealt with is whether parental responsibility holders can object to their children attending certain classes; for example, classes on sexual education. In a judgment delivered by the Superior Court of Cantabria it was concluded that parents can choose whether they send their child to a State or a private school (which may be religious), but they have no right to object to their child receiving education in a certain subject if they choose a state school (STS Cantabria 23-3-98).

### **(c) Religious upbringing**

A decision by the Spanish Constitutional Court<sup>7</sup> expressly recognised children's right to freedom of conscience and religion; however, the exercise of this right requires for the child to have attained a sufficient degree of maturity.

If the child has attained a sufficient degree of maturity (there is a tendency to assume that children older than twelve are sufficiently mature; see Q 62) and there is a conflict between the parents and the child, the child's opinion will prevail. If the child has not attained a sufficient degree of maturity, Article 27. 3 of the Spanish Constitution recognises the right of the parents to educate their child according to their religious convictions and moral beliefs.

On the possible conflict with the child's right to receive an education, see Q 8 (b). See also Q 8 (e) on the refusal of medical treatments on grounds of religion.

### **(d) Disciplinary measures and corporal punishment**

Art. 154 Spanish CC establishes that parental responsibility holders can correct their children moderately and within reason. Catalan law uses more restrictive wording, establishing that sanctions cannot be humiliating or contrary to a child's rights (Art. 143 Catalan Family Code).

Although some authors have tried to argue that corporal punishment is irreconcilable with the child's right to physical integrity, it is generally admitted that corporal punishment is included in the faculties inherent to paternal responsibility. It is even admitted that the faculty to correct a child may serve as a cause of justification in the area of Criminal law. The Spanish Criminal Code distinguishes between *delict* and fault. The right to correct one's child serves as a cause of justification as regards the faults regulated in Articles 617.2 and 620 of the Spanish Criminal Code, which refer to the act of beating or mistreating someone without causing a physical or psychological injury.

### **(e) Medical treatment**

In Catalonia some of the issues were dealt with in the *Ley 21/2000, de 29 de diciembre, sobre los derechos de información concernientes a la salud y la autonomía del paciente, y la documentación clínica*. Article 7 of that law establishes that parental responsibility holders will give their consent to a medical treatment if their child is intellectually

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<sup>7</sup> STC 141/2000, de 29 de mayo.

or emotionally unable to understand its consequences. However, the child must be heard in all cases if he or she is older than twelve and, if younger than twelve, if he or she has attained a sufficient degree of maturity. This implies a right of the child to be informed in a manner according to his or her age and maturity.

Children who are emotionally and intellectually able must give their own consent. This is presumed to be the case if the child is emancipated (See Q 3) or older than sixteen. There are, however, certain exceptions regarding abortion, medical research, etc., in which it seems to be necessary to obtain the parental responsibility holder's consent as well. This regulation was adopted throughout Spain in the *Ley 41/2002, de 14 de noviembre, básica reguladora de la autonomía del paciente y de derechos y obligaciones en materia de información y documentación clínica*.

There is a possibility of direct intervention without the patient's informed consent or consent by parental responsibility holders in cases in which there is a risk to the public or an immediate risk for the patient's health.

There have been quite a number of cases dealing with the refusal of medical treatment by parental responsibility holders and children on grounds of belief. In cases of urgency it is possible for doctors to intervene directly; otherwise, a court order is needed. However, these orders are sometimes not complied with. STC 154/2002 dealt with a case in which parental responsibility holders and a child of 13 refused a blood transfusion. The family were Jehovah's witnesses. The court ordered the blood transfusion should be carried out, but the parents did not collaborate in getting the order enforced. The Supreme Court conferred criminal responsibility on the parental responsibility holders. This was denied by the Constitutional Courts because there was no active refusal or obstruction of the court order by the parents.

**(f) and legal representation**

Articles 162 Spanish CC and 155 Catalan Family Code establish that parental responsibility holders are the legal representatives of non-emancipated children. There are however four exceptions:

- acts relating to personal rights (see 8 (b), (c) and (e)).
- acts which by law children can carry out for themselves. Children can marry with judicial authorisation from the age of 14 (Art. 46.1 and 48.2 Spanish CC), they can exercise parental responsibility as regards their own children (Art. 121 Spanish CC and Art. 141 Catalan Family Code), they can dispose of their property *mortis causa* in a will from the age of 14 (Art. 663.1 Spanish CC) and accept donations (Art. 625 Spanish CC).
- acts in which there is a conflict of interests between parents and children. If the conflict is with one of the parental responsibility holders, the other will represent the child alone (Art. 162 Spanish CC and Art. 157 Catalan Family Code). If there is a conflict of interests with both parental responsibility holders, a third person will be named to defend the child (*defensor*, if it is in a court proceeding it will be a *defensor judicial*); see Art. 163 Spanish CC). There is no statutory definition of conflict of interests; in case law a conflict of interests is nearly always a conflict of economic interests in connection to the administration of the child's property or the succession of a deceased person. The majority position in legal literature



also conceives a conflict of interests to be a conflict of economic interests. There is statutory indication of who become legal representatives in this extraordinary situation: it is the same circle of relatives that can become guardians of the child, in the same order (see Q 31), provided that these people have no interest conflicts with the child. If there are conflicts, the judge can depart from this circle and name an unrelated person. The *defensor judicial* is named for a specific issue.

- acts that relate to goods excluded from the administration of property carried out by parental responsibility holders (see Q 10-12)

**9. What is the position taken in respect of the child’s right to be heard with regard to the issues mentioned under Q 8 ((a)-(f)). What relevance is given to the age and maturity of the child?**

Children have a right to be informed, with regard to their age and degree of maturity, and a right to express their opinion freely on all matters affecting them.<sup>8</sup> There is a corresponding duty for parental responsibility holders to inform the children adequately and to listen to them before making any decision affecting them (Art. 133.2 Catalan Family Code and Art. 154 Spanish CC). A breach of these obligations will not invalidate an act taken; however it will be understood that parental responsibility has not been properly exercised.

Catalan law establishes that children 12 or older must be heard in all cases; younger children will be heard if they have attained a sufficient degree of maturity. The twelve year old age limit also appears in the Spanish CC for specific issues such as the attribution of custody when parents do not live together (Art. 159 Spanish CC) or the regulation of parental responsibility after divorce (Art. 92 Spanish CC), although there is no general rule.

**10. Do(es) the holder(s) of parental responsibilities has(have) the right to administer the child’s property?**

The general rule is that the holder(s) of parental responsibility administer the child’s property (Art. 154 Spanish CC and Art. 145 Catalan Family Code). The administration of the child’s property is an inexcusable duty of parental responsibility holders.

**11. If yes, explain the content of this right.**

Administration has to be understood in a broad sense. Parents have the ability to take any action which benefits the child. There are, however, some exceptions or limitations concerning certain goods or transactions, which will be developed under Q 12.

Catalan law’s degree of diligence is stricter than the Civil Code’s. The Spanish CC establishes that parents are to administer their child’s property as if it were their own (Art. 164 Spanish CC); the Catalan Family Code requires the administration to be carried out as it would be by a good administrator (Art. 145 Catalan Family

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<sup>8</sup> As for Catalan law 11.1 and 2 Llei d’atenció i protecció dels infants i adolescents; Art. 9 Ley Orgánica de Protección Jurídica del Menor.

Code), although certain duties, like that of keeping a record of the property, are exempted since it is understood that the basis of administration by the parental responsibility holder is trust and good will. If the child is subject to guardianship instead of parental responsibility there is a much stricter control of the administration (see Q 31).

Administration of the child's property by parental responsibility holders is not remunerated although there is a right to compensate necessary expenses. If children own property they are expected to participate in household expenses.

Upon termination of parental responsibility parental responsibility holders will be held accountable, at the request of the child and for a limited time period (three years in the Spanish CC and two years in the Catalan Family Code).

## **12. Are there restrictions with respect to:**

### **(a) Certain goods and/or values (inherited property, gift...)**

Gifts and inherited goods are excluded from the parental responsibility holder's administration if the deceased person or the donor expressly provided that they were not to be administered by the holder and established who should carry out the administration. It is also permissible to specify rules of administration.

Inherited property is excluded from administration by the parental responsibility holder if the child inherited the goods because the parental responsibility holder was excluded from succession for reasons such as indignity.

### **(b) Salary of the child**

The salary of a child older than sixteen is also exempted from ordinary administration by the parental responsibility holder because the child will carry it out himself or herself. However, for acts that go beyond ordinary administration (e.g. acts of disposal and long-term engagements) the child will need the parental responsibility holder's consent.

### **(c) Certain transactions**

Certain transactions require judicial authorization. The general purpose of this rule is to protect the child's property. Catalan law is more precise in its enumeration of the acts requiring authorization, but the Spanish CC and the Catalan Family Code both basically coincide in requiring authorization for acts disposing of the child's property, long term engagements like leases of immovable property for more than 15 years, borrowing money or renouncing an inheritance or donation, etc., for acts that go beyond the ordinary administration of property and that can substantially affect the child's property.

Authorization must be requested beforehand. If authorization is not requested or the transaction is carried out although authorization was not granted, it is possible to annul the transaction (Art. 154 Catalan Family Code). Catalan law expressly provides that authorization can refer to a plurality of transactions, whereas the Civil Code regime an authorization is required for each single transaction.

There is no discretion in the granting of this authorization. If the parental responsibility holder proves that such a transaction is useful or necessary the judge

must grant the authorization, notwithstanding the fact that there might be a more useful or advantageous course of action. In order to evaluate whether the transaction is useful or necessary the Judge will hear the *Ministerio Fiscal*, a public body similar to the French *Ministère Public*, which usually acts in judicial proceedings representing the child's interests.

The law of Catalonia and Aragon allow for alternative authorizations which can substitute the authorization of the Judge. The Catalan Family Code, for example, establishes that the child can give the authorization himself or herself if the child is older than sixteen; or the judge's authorization can be substituted by the authorization of two other relatives, one from each branch of the family.

**13. Are there special rules protecting children from indebtedness caused by the holder(s) of parental responsibilities?**

If the administration by parental responsibility holders endangers the child's property the judge, at the request of the child, the *Ministerio Fiscal* or any of the child's relatives, can adopt any measure he thinks necessary. This may include naming an administrator (Art. 167 Spanish CC).

**14. Do the contents of parental responsibilities differ according to the holder(s) of parental responsibilities (e.g. married, unmarried, parents not living together, stepparents, foster parents or other persons). If so, describe in some detail how it differs.**

As will be seen under Q 31, Spanish law grants parental responsibilities to persons who are not parents in the framework of guardianships (*tutela*). Guardianship comprises the duty to care for the child, provide education, administer the child's property and represent the child legally. This differs from *patria potestad* mostly in that the exercise of guardianship is subject to the control and supervision of the judge, especially regarding the administration of property. There is an obligation to inventory the child's property and a general obligation to present the accounts for judicial approval after the termination of guardianship. The judge can intervene at any time and request the guardian to provide information on the child's situation.

The contents of parental responsibilities do not differ based on the parents' marital status. The content of parental responsibilities does not differ if the parents live apart, although in this situation there certain measures must be established concerning the exercise of parental responsibility. Being a step-parent (a parent, through adoption, of a partner's child) does not affect the rights or duties towards the child. Foster parents do not hold parental responsibilities (See Q 32).

**15. Who has parental responsibilities when the parents are:**

**(a) Married at the time of the child's birth**

Parental responsibility is a consequence of parenthood. Whether the parents are married is therefore irrelevant; what matters is whether parenthood is determined. For married parents, a presumption of parenthood establishes that a child born to a woman after the celebration of marriage or 300 days after legal or factual separation is the common child of both the husband and wife.

**(b) Not married at that time but marry later**

*Patria potestad* is vested on both father and mother as a consequence of parenthood regardless of civil status. If parents are not married at the time of the child's birth, the father will have to recognise the child regardless of whether the parents later marry.

**16. How, if at all, is the attribution of parental responsibilities affected by:**

**(a) Divorce**

The attribution of *patria potestad* is unaffected by divorce. However, divorce usually means that the parental responsibility holders do not live together. It is this fact, regardless of whether there was previous cohabitation, that renders certain measures necessary. These measures affect the exercise of parental responsibility. See Q 18.

**(b) Legal separation**

The attribution of *patria potestad* is unaffected by legal separation. However, legal separation usually means the parental responsibility holders do not live together. It is this fact, regardless of whether there was previous cohabitation, that renders certain measures necessary. These measures affect the exercise of parental responsibility. See Q 18.

**(c) Annulment of the marriage**

The attribution of *patria potestad* is unaffected by annulment of the marriage of the child's parents. Annulment however usually means that the parental responsibility holders do not live together. It is this fact, regardless of whether there was previous cohabitation, that renders certain measures necessary. These measures affect the exercise of parental responsibility. See Q 18.

**(d) Factual separation**

The attribution of parental responsibility is a consequence of parenthood and not of civil status nor even of cohabitation. If parents do not live together, regardless of whether they have never lived together or have separated, it will certain measures must be adopted. These measures will not affect parental responsibility as such, but its exercise. See Q 18.

**17. To what extent, if at all, are the parents free to agree upon the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage? If they are, are these agreements subject to scrutiny by a competent authority.**

Agreements on the attribution of parental responsibility are not permissible because parental responsibility is not disposable. It is only possible to reach agreements on the exercise of parental responsibility. The Spanish CC contemplates agreements in the framework of divorce, annulment and legal separation. Catalan law contains a very similar regulation.

Agreements are presented to the judge, who will approve them unless they are damaging to the child or detrimental to one of the spouses (Art. 90 Spanish CC). The judge will have to justify why agreements are disregarded; there is the possibility to submit new agreements. If the agreements are not approved, the

judge will make the decision on the exercise of parental responsibility. It should be kept in mind that the judge will not get any information on the family's situation, nor will he get an explanation about why the agreements were made. He can theoretically ask for evidence in order to carry out the scrutiny according to Art. 777.4 of the Law of civil procedure, but in the ordinary case this will not be done. It has therefore been contended that scrutiny is rather formal and does not take sufficient account of the uniqueness of the case.<sup>9</sup>

Agreements which have not been court approved are not enforceable and do not produce any effect *vis a vis* third parties. In practical terms this means that if one of the parties does not comply with the agreement, the other party will have to ask the court to adopt measures for the exercise of parental responsibility. The agreement will be just one of the elements taken into account in order to adopt these measures.

**18. May the competent authority attribute joint parental responsibilities to the parents of the child even against the wish of both parents/one of the parents? To what extent, if at all, should the competent authority take account of a parent's violent behaviour towards the other parent?**

Parental responsibility is an effect of parenthood. It is held jointly by the father and mother regardless of their civil status.

If the parents do not live together, as is normally the case upon divorce, legal separation or annulment, it is necessary to adopt measures for the exercise of parental responsibility. Here there are substantial differences between the Civil Code regime and Catalan law.

The Spanish CC establishes that the parent the child lives with will exercise *patria potestad* (Art. 156 Spanish CC). On the request of the other parent and in the interests of the child, the judge can either establish that *patria potestad* is to be jointly exercised by both parents or distribute its functions among them. Statute does not require that the other parent agrees to this measure. In practice it is not common for parents to share the exercise of parental responsibility after separation. It is even less common for judges to order the joint exercise against the will of one of the parties; it is assumed that then a joint exercise of parental responsibility would, in practical terms, become impossible. It is not possible to decree that parental responsibilities are to be exercised jointly if there is not a request for it by at least one of the parental responsibility holders.

Catalan law, on the contrary, establishes that after the parent's relationship ends, parental responsibility generally continues to be exercised jointly. Parents can agree that only one of them is to exercise parental responsibility. This agreement may be disregarded by the judge, who can theoretically re-establish the joint exercise of parental responsibility if he or she thinks the agreement is detrimental to the child's best interests. In practice this should be very rare unless one of the parents renounces his or her parental responsibility rights and duties in the agreement. If one of the parents objects to the joint exercise of parental responsibility he or she

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9 I. LAZARO GONZALO, *Los menores en el Derecho español*, Madrid, 2002, 218-219.

may go to court. The judge can decide either to maintain the joint exercise or to disregard the legal regime if it is contrary to the child's best interests.

Parliament is currently working on more comprehensive protection for victims of domestic violence. From this will probably come the ability to suspend the exercise of parental responsibility and even contact rights, if the judge decides it to be necessary.<sup>10</sup> See Q 36.

**19. Provide statistical information on the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage.**

This information is not available.

**II. Unmarried parents**

**20. Who has parental responsibilities when the parents are not married?**

Parental responsibility is not dependent on the nature of the parent-child relationship. It is therefore irrelevant whether the parents are married; what matters is that parenthood has been established. If both parents have established parenthood, parental responsibility is vested equally on both father and mother. The main difference is a presumption which establishes that a child born in wedlock is the child of both husband and wife, whereas in the case of an unmarried couple the father will have to recognise the child.

**21. Does it make a difference if the parents have formalised their mutual relationship in some way (registered partnership, civil union, pacte civil de solidarité...).**

No, as long as both parents have established parenthood, both will jointly hold parental responsibilities. There is no presumption that a child born to one of the members of a registered partnership is the child of the other partner. The father will have to recognise the child in exactly the same way he would have had to if the parents had not formalised their relationship.

**22. Under what condition, if at all, can**

**(a) The unmarried mother obtain parental responsibilities**

Parental responsibility is imposed on the mother of a child, regardless of her marital status, as an effect of the birth of the child. Maternity cannot be hidden or kept secret by the mother's request.

**(b) The unmarried father obtain parental responsibilities.**

If paternity is established, the unmarried father generally obtains parental responsibility on exactly the same terms as the married father. However, there are however two exceptions. Parental responsibility does not arise if the child was conceived as a consequence of a sexual crime, established by a final judgment, or if

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<sup>10</sup> Arts. 63 and 64 Proyecto de Ley Orgánica de medidas de protección integral contra la violencia de género.

paternity is established after an investigation of paternity carried out in the framework of a judicial proceeding and the father opposed paternity (Art. 111 Spanish CC). Still, this does not mean that the father has no duties towards the child; the duties to take care of and maintain the child subsist.

**23. How, if at all, is the attribution of parental responsibilities affected by the ending of the unmarried parents' relationship?**

As with married couples, paternal responsibility is not affected by the end of a relationship; but since the end of the relationship usually means that parents cease to live together, there will be consequences in regard to the exercise of parental responsibility. See Q 18.

**24. May the competent authority attribute joint parental responsibilities to the parents also against the wish of both parents/one of the parents? To what extent, if at all, may the competent authority take into account a parent's violent behaviour towards the other parent?**

See Q 18.

**25. To what extent, if at all, are unmarried parents free to agree upon the attribution of parental responsibilities after the ending of their relationship?**

Parental responsibility is non-disposable, which means that the possibility to agree on the attribution of parental responsibility does not exist. It is however possible to agree on the exercise of parental responsibility.

Spanish courts apply the regulation on agreements established in connection to divorce, annulment and legal separation as well to unmarried couples. See Q 17. However, it should be noted that since ending an informal relationship does not require a judicial procedure, these agreements often do not reach the courts and are neither scrutinised nor judicially approved. If these agreements are not complied with voluntarily they cannot be enforced through the court system.

**26. Provide statistical information available regarding the attribution of parental responsibilities for unmarried parents.**

Statistics are not available.

**III. Other persons**

**27. Under what conditions, if at all, can the partner of a parent holding parental responsibilities obtain parental responsibilities, when, he/she is:**

**(a) Married to that parent**

If parental responsibility vests with both the father and mother, the husband or wife of either can not acquire parental responsibility unless one parental responsibility holder consents to adoption by the other parental responsibility holder's spouse.

If parental responsibility is held individually by the father or mother, parental responsibility can be acquired by either the husband or wife through adoption. There is a simplified procedure for step-parent adoption. The husband or wife might also acquire parental responsibility upon the death of the parent, if he or she is appointed guardian of the child (see Q 34), although the judge is free to disregard this appointment if it is not in the child's best interests.

**(b) Living with that parent in a formalised relationship (registered partnership, civil union, pacte civil de solidarité...)**

The situation is basically the same as under a). The registered partner of a parent cannot acquire parental responsibility if it is jointly held by both parents unless the parent who is not his or her partner consents and relinquishes parental responsibility.

If there is only one holder of parental responsibility, his or her partner can adopt the child. Step-parent adoption is not confined to the spouse of a parent but also possible for a different-sex cohabitant, regardless of whether they are registered partners (Art. 115 Catalan Family Code). For same-sex partners see Q 28.

The parent's partner may also acquire parental responsibility upon the death of the parent if he is appointed by that parent as a guardian of the child (see Q 34), although the judge is free to disregard this agreement in consideration of the child's best interests.

**(c) or living with that parent in a non formalised relationship**

See above under Q 27 (b).

**28. Does it make any difference if the partner of the parent holding parental responsibilities is of the same sex?**

For the moment, adoption by same-sex partners is only possible in the Basque Country, Navarra and Aragón. Catalonia will introduce this possibility before the end of 2004. Same-sex adoption will also be possible under the Civil Code regime if an announced reform is carried out. It will then make no difference, at least in written law.

**29. How, if at all, is the attribution of parental responsibilities in the partner affected by the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.**

Since the acquisition of parental responsibilities by the parental responsibility holder's partner requires the adoption of the child by that partner, the situation basically equates to that of the end of the parent's relationship, which has been discussed under Q 18. The attribution of parental responsibility is unaffected although it will be necessary to adopt measures that reflect that the parental responsibility holders do not live together anymore.

No differences derive from the fact that the relationship which ended was a marriage, a formal or registered partnership or a factual cohabitation if there has been an adoption of the child by the parental responsibility holder's partner.



In most cases, the father's or mother's spouse or partner will not have acquired parental responsibility through adoption. Notwithstanding this fact he or she has a right to maintain a personal relationship with the child after the relationship ends, which will be further discussed under Q 44.

**30. To what extent, if at all, is the parent holding parental responsibilities and his/her partner free to agree upon the attribution of parental responsibilities after the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Q 27 and Q 28.**

If the parent's partner has acquired parental responsibilities through the adoption of his or her partner's child, the freedom to make agreements is exactly the same as that described under Q 17 and Q 25. There are no differences depending on whether this relationship is a marriage, a registered partnership or cohabitation.

**31. Under what conditions, if at all, can other persons not being a parent or a partner of a parent holding parental responsibilities, obtain parental responsibilities (e.g. members of the child's family, close friends, foster parent...)? Specify, where such other persons may obtain parental responsibilities, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.**

Non-parents can obtain parental responsibilities in the framework of '*tutela*' or guardianship. A guardian will be named if the child is not subject to *patria potestad* (for example because both parents died). The guardian therefore substitutes any other parental responsibility holder.

There is an obligation to request the naming of a guardian by those relatives that are called upon in order to become guardians as well as by any person in whose company a child has been left. If this obligation is not complied with these people will be jointly held responsible to pay damages (229 Spanish CC). Other persons are obliged to communicate the situation to the *Ministerio Fiscal* or the judge with jurisdiction in the territory where the child is (230 Spanish CC).

The *Ministerio Fiscal*, a special body acting in the interests of children, must promote guardianship and Judges must establish guardianship on their own motion if they discover children residing in their jurisdiction who are not subject to *patria potestad* (228 Spanish CC).

Guardianship is established by the judge after hearing the child (if he or she is older than twelve or, if younger, if the child has attained a sufficient degree of maturity), the relatives of the child and any other person the judge determines to be helpful.

The judge supervises and controls the exercise of guardianship in a way he or she does not with parents holding parental responsibility. A judge can, for example, request the guardian to provide information on the child's situation at any time. Upon the termination of guardianship, the guardian must give an accounting of his or her administration of the child's property to the judge for approval, whereas in

the case of administration by parents who hold parental responsibility, judicial control will only proceed on the request of the child who has reached majority.

The judge can name one or more guardians, although the latter is the exception. Guardians can be actual or legal persons (e.g. charities); However, there is a preference for choosing an actual person as a guardian, if such persons are available.

In the case of actual persons, the judge is obliged to choose among certain predetermined people. The Spanish CC names the child's spouse, the child's parents, persons named by the child's parents in their will (see Q 34) and relatives in the ascending line. The judge is allowed to alter the order, or even choose someone other than the listed persons if it is in the child's interests. The judge will, however, have to justify the choice if this is done. It is statutorily preferable to name as guardian a person with whom the child can actually live.

The named guardian is obliged to accept the judge's designation; there are only a limited number of permissible reasons for rejecting the post.

As seen under Q 3, emancipated children still need their parents' consent for certain acts if their capacity is not complete. If the parents are missing, a curator will be named. The rules for constituting a curatorship and the persons who can become curator are basically the same as those who can become guardians.

**32. Under what conditions, if at all, can a public body obtain parental responsibilities? Specify, where it is so obtained, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.**

If a child is declared to be bereaved or abandoned, the public child-protection organization will automatically assume parental responsibilities over the child (an administrative guardianship). This will suspend the *patria potestad* or ordinary guardianship held by the child's parents or other persons according to the rules of Civil Law. The declaration of bereavement will specify the protection measures decreed by the public authority (e.g. whether the child is taken in by a foster family or should live in an institution, and any other educational or therapeutic measures considered necessary).

The concept of bereavement or *desamparo* differs according to the legislation in force in each of the 17 Autonomous Communities into which Spain is divided. A child will be declared to be bereaved if parental responsibilities are not properly exercised because of the following:<sup>11</sup>

- if the child has been voluntarily abandoned by his or her family,
- if the child does not habitually attend school,
- in cases of ill-treatment (physical or psychological) by the parental responsibility holder, or by a third person with the parental responsibility holder's consent or acquiescence,
- economic exploitation of the child, or

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11 I. LAZARO GONZALO, *Los menores en el Derecho español*, Madrid, 2002, 355

- mental disorders, alcoholism or drug addiction of the parental responsibility holder which do not allow a proper exercise of parental responsibilities.

The declaration of abandonment or bereavement is the result of an administrative procedure which is regulated differently throughout the Autonomous Communities. However, it is generally initiated by the public authority on its own motion after receiving notice of the situation. The parental responsibility holders and the child should be allowed to participate in this administrative procedure. Reports drawn up by social workers, psychologists, etc. are given a decisive role, although it is sometimes not expressly provided in the regulation itself.<sup>12</sup>

The declaration of bereavement can be challenged before court in a judicial proceeding.

### **33. To whom are the parental responsibilities attributed in the case of:**

#### **(a) The death of a parent holding parental responsibilities**

If parental responsibility was held jointly with another person, this person will become the sole holder of parental responsibility. If parental responsibility was held solely by the deceased parent, parental responsibility is extinguished and it will become necessary to name a guardian as described under Q 31.

#### **(b) The death of both parents of whom at least one was holding parental responsibilities at the time of the death**

Parental responsibility is extinguished in this case. It will therefore become necessary to name a guardian as described under Q 31.

### **34. To what extent, if at all, may the holder(s) of parental responsibilities appoint a new holder(s) upon his/her/their death? If such an appointment is permitted, must it take place in a special form, e.g., will?**

The child's parents, provided they hold parental responsibility, can appoint the person they wish to become a guardian if they die, or specify the persons they wish to exclude as guardians of their children. It is possible to appoint supervisory bodies, to specify who is to become a member of such a supervisory body and to give instructions as concerning the children and the children's property. This has to be done in either a will or a public document (Art. 223 Spanish CC and Art. 173-176 Catalan Family Code).

The judge will follow the parents' appointments and or instructions, unless he or she considers them contrary to the child's best interest. In this case there is an obligation to depart from the parents' wishes.

There are rules that deal with contradictory appointments and/or instructions. The Civil Code establishes that the Judge must try to reconcile them; if this is impossible he may select those that are more appropriate to the best interests of the child. Catalan law provides a different criterion in that it establishes that the more recent appointment or instruction is to be given higher consideration.

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<sup>12</sup> I. LAZARO GONZALO, *Los menores en el Derecho español*, Madrid, 2002, 357.

## D. THE EXERCISE OF PARENTAL RESPONSIBILITIES

### I. Interests of the child

#### 35. In exercising parental responsibilities, how are the interests of the child defined in your national legal system?

Spanish law does not provide a list of legal criteria in order to determine the best interests of the child but instead operates with a general clause. There is an exception in the framework of the divorce, annulment and separation procedure. Here, the one criterion mentioned is that siblings should not be separated (Art. 92 Spanish CC)

In legal writing the best interests of the child are often equated to his or her fundamental rights, but this is not a sufficient criterion to make choices if, as often happens, all the alternatives are in compliance with the child's rights. In practice, the determination of the best interests of children poses difficulties, especially if there is disagreement between the father and mother. Judges usually tend to ratify technical reports provided by psychologists, social workers, etc., or apply criteria which are shared by the majority of the population.<sup>13</sup>

#### 36. If parental responsibilities are held jointly by two or more persons, are they held equally?

If parenthood is established for both the father and mother, parental responsibility vests equally on both of them.

Parental responsibilities are not exercised equally if the parents do not live together. The Spanish CC and the Catalan Family Code differ in their exercise of joint parental responsibilities in the case of separation. Art. 156 Spanish CC establishes that if parents live separately, parental responsibility is exercised by the parent with whom the child lives unless the non-resident parent requests a joint exercise or a distribution of functions between parental responsibility holders. The judge will decide the issue in view of the best interests of the child. In practice this is not granted frequently unless there is agreement between the parties.

Catalan law, on the contrary, establishes a preference for a joint exercise of parental responsibility if the parents are separated or have never lived together. Each of the parents will care and protect the child when the child is with him or her, either because the child lives with that parental responsibility holder or because the child is visiting the non-resident parent. Certain important decisions regarding the choice of education, a change of domicile or acts concerning the disposal of the child's property must be taken jointly. Catalan law guides situations in which communication between parental responsibility holders is difficult by providing that once a parent is informed that the other parent intends to make a decision, he or she has the right to veto the decision. If he or she does not exercise the veto right

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13 J. FERRER RIBA, 'Comentari a l'article 133', in: EGEA FERNANDEZ-FERRER RIBA, *Comentaris al Codi de Família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mutua*, Madrid, 2000, 615.

within thirty days of having been informed, the other parent will be allowed to proceed (Art. 139 Catalan Family Code). Parents objecting to this regulation can agree on a different type of exercise of parental responsibilities. The agreement will only become enforceable through the court system if it is approved by the judge, which requires that the agreement is not contrary to the child's best interests. If one parent objects to the joint exercise of parental responsibilities after separation, he or she may request another type of exercise of parental responsibilities in a judicial proceeding.

**37. If parental responsibilities holders cannot agree on an issue, how is the dispute resolved? For example does the holder of parental responsibilities have the authority to act alone? In this respect is a distinction made between important decisions and decisions of a daily nature? Does it make any difference if the child is only living with one of the holders of the parental responsibilities?**

The basic idea is that if parental responsibilities are jointly vested on both the father and mother, they are to be exercised jointly, or by one with the express or tacit consent of the other. *Vis a vis* third parties there is actually a *iuris et de iure* presumption that each of the parental responsibility holders acts with the consent of the other.

There is authority to act alone in decisions of a daily nature, such as authorizing a son or daughter to go to the cinema or to visit a friend or relative, and also in regard to urgent decisions, such as if the child urgently needs medical treatment.

If there is disagreement between parental responsibility holders they will have to apply to the court. This is further developed under Q 38.

If parental responsibility holders do not live together they are not granted an equal exercise of parental responsibilities (see Q 36).

**38. If holders of parental responsibilities cannot agree on an issue, can they apply to a competent authority to resolve their dispute? If applicable, specify whether this authority's competence is limited to certain issues e.g.. residence or contact.**

If there is a disagreement between the holders of parental responsibility either of them can apply to a judge to resolve the dispute. The court will hear both parents and the child; in all cases if he or she is older than sixteen and also for those younger, if they have attained a sufficient degree of maturity. There is also the possibility to hear other persons and to ask for expert reports.

As a result of this procedure, the judge will confer the power of decision on one of the parents. The law does not provide any specific criteria to make the choice. The judge cannot substitute the parents and decide the dispute by imposing his or her own views (Art. 156 Spanish CC) unless he or she thinks the decisions proposed by both partners constitute a danger for the child. The fact that the judge confers the power of decision onto one of the parents does not hinder them from later agreeing to decide otherwise.

Catalan law basically has the same regulation. The main difference is that while the judge has the discretion to order mediation (Art. 79 Catalan Family Code), the result of the procedure can be appealed whereas it is final in the Civil Code regime. Catalan law also offers an alternative to judicial intervention by providing that the parents can agree to substitute judicial intervention with the intervention of two relatives, one from each branch of the family.

If disagreements become common or the joint exercise of parental responsibility is seriously disturbed the judge can temporarily confer the exercise of parental responsibility to one of the parents or distribute its functions between them (Art. 156 Spanish CC and Art. 138 Catalan Family Code).

Statute does not limit judicial intervention to conflicts over certain issues.

**39. To what extent, if at all, may a holder of parental responsibilities act alone if there is more than one holder of parental responsibilities?**

It is useful to distinguish whether the parents live together.

If they live together the power to act alone is granted only for decisions of a daily nature and for urgent decisions (see Q 36), or if the judge has solved the dispute among the parental responsibility holders by attributing the power to act alone to one of them (see Q 38). There is also a power to act alone if there is a conflict of interest between one of the parental responsibility holders and the child. In this situation, the other parental responsibility holder acts alone (see Q 8 (e)).

If the parental responsibility holders do not live together, the Civil Code regime and Catalan law differ. The Spanish CC confers the exercise of parental responsibility to the parent the child lives with, unless the judge provides otherwise. This parent is therefore granted a general power to act alone. Catalan law, on the contrary, establishes that both parental responsibility holders must continue to jointly exercise parental responsibility, but that each of them is to take care of and protect the child when the child is with him or her (see Q 36). In this respect one can say that parental responsibility holders have an alternating power to act alone that is confined to a small number of areas (attention to the physical and psychological needs of the child, duty of surveillance), because decisions on important issues like the type of education or the domicile require the consent of both parents. This regime can be disregarded by the judge (see Q 36).

There is also a power to act alone if it is impossible to act jointly because the parental responsibility holder is not available, incapable or absent (Art. 156 Spanish CC and Art. 137.3 Catalan Family Code). These concepts are to be restrictively interpreted.

**40. Under what circumstances, if at all, may the competent authority permit the residence of the child to be changed within the same country and/or abroad (so called relocation) without the consent of one of the holders of parental responsibilities?**

There is a different regulation between the Spanish Civil Code regime and Catalan law.

The Spanish CC basically confers the exercise of parental responsibility to the parent with whom the child lives. This parental responsibility holder can change residence without the other parent's consent unless the parental responsibility holders had previously agreed that a change of residence should be consented by both. If a change of residence is subject to the consent of both parental responsibility holders and they do not agree, it will be necessary to bring the matter before the court (see Q 38). A judge can also subject changes of residence to previous judicial authorization according to Articles 103.1 and 158.3 c) Spanish CC. These provisions were introduced in a law dealing with Child Abduction.<sup>14</sup> These measures are therefore conceived as preventive measures, meaning that there must be a risk of child abduction.

In Catalan law, both parental responsibility holders must always consent to a substantial change of residence, even if they are separated; provided the judge has not ruled otherwise. There is a duty to inform the non-resident parent, who can object to the change of residence. If within 30 days after having been informed he or she does not object to the change of residence, the residential parent is allowed to proceed. If he or she wishes to object he or she has to bring the matter to the court (see Q 38).

Statute does not provide criteria to decide whether a change of residence should be authorized. Case law gives the impression that in most cases attention is focused on readjusting the regulation of contact after the change of residence and on determining how travel expenses are to be distributed.

**41. Under what conditions, if at all, may the competent authority decree that the child should, on an alternating basis, reside with both holders of parental responsibilities (e.g. every other month with mother/father)?**

Both in Catalan law and the Civil Code regime it is possible for parents to agree on such a scheme. Judge's are not prevented from decreeing that children reside on alternating basis with each parent, if this is in the child's best interests. However, from case law decisions it is much more common that these arrangements are not permitted because they are considered detrimental to the child's best interests due to the lack of stability for the child. Still, this matter is currently being discussed in an announced reform of divorce law. The Government wishes to promote shared custody because it allows children to exercise their right of contact with both parents more fully.

**42. Does a parent with sole parental responsibilities have full authority to act alone, or does he/she have a duty to consult:**

- (a) The other parent;**
- (b) Other persons, bodies or competent authorities?**

A parent can have sole parental responsibility in four cases:

- because parenthood was established only for that parent or there was a single-person adoption, which is permissible in Spanish Law,

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<sup>14</sup> Ley Orgánica 9/2002, de 10 de diciembre, de modificación de la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, y del Código Civil, sobre sustracción de menores.

- because parental responsibility was granted only for that parent because the parenthood was resulted from a sexual crime or was established in a judicial procedure which that parent opposed,
- because the other parent was discharged of parental responsibility, or
- because the other parent died or was declared absent or dead.

A parent with sole parental responsibility has full authority to act alone unless a public protection measure has been decreed. However, this might also happen if parental responsibility is held jointly.

## E. CONTACT

### 43. Having regard to the definition by the Council of Europe (see above), explain the concepts of contact used in your national legal system.

Spanish law uses the concept of access (*derecho de visita*) rather than contact, whereas Catalan law establishes a right to maintain personal relationships (*dret de relacionar-se personalment*). However, the difference is more a difference in terminology because both concepts include a right to visit, that is: to temporarily see the child without the other parental responsibility holder's presence, a right to communicate with the child by post, phone, electronically or by other means and a right to stay with the child at the place (his or her domicile, a hotel) chosen by the person having contact rights *vis a vis* the child.

Contact is described in case law and legal writing as both a right and a duty that is subordinate to the child's best interests. An agreement whereby one parent renounces his or her right and duty to maintain a personal relationship with the child is not permissible. The exercise of access cannot be delegated to a third party, such as the grandparents.

### 44. To what extent, if at all, does the child have a right of contact with:

#### (a) A parent holding parental responsibilities but not living with the child

A child has the right to maintain personal relationships with his or her parents (Art. 160 Spanish CC and Art. 135.1 Catalan Family Code), regardless of whether they hold parental responsibilities. In a divorce, annulment or separation procedure there is an obligation to regulate the contact of the child's non-resident parent, even if the parties do not it (Art. 90a, 94 and 103.1 Spanish CC.) This regulation is applicable to unmarried couples as well, although in this case courts often do not intervene since the end of the relationship does not require a judicial procedure.

#### (b) A parent not holding parental responsibilities

Children have a right to maintain personal relationships with their parents regardless of whether the parents hold parental responsibilities, unless a judicial decision provides otherwise or the child has been adopted by another person or persons. The suspension or discharge of parental responsibility does not necessarily imply a suspension or discharge of contact; that will depend on whether it is in the child's best interest to have contact with the parent (see Q 53)



**(c) Persons other than parents (e.g. grandparents, stepparents, siblings etc...)?**

Catalan law establishes that parents must facilitate contact between the child and other relatives, as well as between the child and other close persons (such as the former partner of the parent), and that the parents cannot without justification impede contact. There is authority to support that the right of the child to maintain contact with other relatives and close persons is an actionable right; if this contact is unjustifiably impeded, a Judge will remedy the situation. The Spanish CC was recently modified to clarify this. Article 160 Spanish CC, which contained a regulation similar to that of Catalan Law, was modified in order to specifically provide for such an action.<sup>15</sup>

**45. Is the right to have contact referred to in Q 43 also a right and/or a duty of the parent or the other persons concerned?**

In the case of parents, Case law has clearly established that contact is both a right and a duty of the parent. Parents can neither delegate nor renounce the exercise of contact because it is established in the interests of children. It will therefore not take place if it is not in the best interests of the child.

Protection is weaker for those who are not parents. If parents unjustifiably impede other's contact with the child there is a court action to enforce contact (see Q 44). One cannot speak of a duty that these people have to the child.

**46. To what extent, if at all, are the parents free to make contact arrangements? If they can, are these arrangements subject to scrutiny by a competent authority?**

See Q 17 and 25. Agreements are permissible unless the child was declared to be bereaved or abandoned. See Q 32.

Agreements must be approved by the judge, who can reject them if they are not in the child's best interests or detrimental to one of the parents. Scrutiny in practice, however, is rather formal because the judge will not have sufficient knowledge of the family's situation or why the agreements were made. Private agreements are not enforceable through the court system if they are not voluntarily complied with. If the agreements are breached, there is an action to ask for a court decision on contact. The agreement will be just one of the elements taken into account when the judge makes the decision.

**47. Can a competent authority exclude, limit or subject to conditions, the exercise of contact? If so, which criteria are decisive?**

The competent authority can limit, suspend or subject contact to conditions if there are serious circumstances justifying this measure or if the duties imposed in the judicial decision are gravely and repeatedly not complied with (Art. 94 Spanish CC and Art. 135.2 Catalan Family Code). A total and irrevocable exclusion of contact is

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15 Ley 42/2003, de 21 de noviembre, de modificación del Código Civil y de la Ley de Enjuiciamiento Civil en materia de relaciones familiares de los nietos con los abuelos.

not permissible because circumstances may change, and it may then be possible to recover contact if it is in the best interests of the child.

The Spanish CC and the Catalan Family Code allow for the suspension, modification or limitation of contact if parents do not fulfil their duties. These duties are clearly the duties implicit in the exercise of contact, such as the duty to return the child or to act loyally towards the other parental responsibility holder. Contact cannot be restricted because the maintenance obligation was not fulfilled.

Contact can also be modified on grounds of other serious circumstances such as sexual harassment, serious mental illness or drug addiction. The child's wishes are also used a criterion to limit contact, especially in the case of older children.

In practice, courts tend to be very restrictive in limiting contact, whereas it is quite common to supervise contact, or subject contact to conditions such as surveillance by psychologists or social workers. Bigger cities have *Puntos de encuentro*, which are places in which contact can take place.

**48. What if any, are the consequences on parental responsibilities, if a holder of parental responsibilities with whom the child is living, disregards the child's right to contact with:**

**(a) A parent**

It basically depends whether contact rights had previously been determined in a judicial decision or in an agreement ratified by the court.

Once there is a court decision on the matter there is a possibility to ask for the enforcement of contact. See Q 58. In cases in which non compliance with the judicial decision is especially grave a criminal offence may have been committed (*delito o falta de desobediencia a la autoridad* Arts. 556 and 634 Spanish Criminal Code). This however requires that the exercise of contact rights as fixed in a judgment have been repeatedly opposed and that all possibilities provided by the law of Civil procedure have been exhausted.

If there is no judgment on contact there will be no possibility to enforce contact rights. The course of action then would be to go to the court and ask for a judgment on contact, which will then become enforceable.

**(b) Other persons?**

Spanish law recognises that the child has the right to contact with relatives and close persons (see Q 44). If contact with these persons is impeded there is the possibility to have the exercise of contact rights established in a judicial decision. This decision is then enforceable.

## **F. DELEGATION OF PARENTAL RESPONSIBILITIES**

**49. To what extent, if at all, may the holder(s) of parental responsibilities delegate its exercise?**

If the holders of parental responsibility are private persons and cannot fulfil the obligations implicit to parental responsibility, there is the possibility to delegate the

exercise of parental responsibility to a public body (so called *guardia administrativa* or administrative custody). The aim of this delegation is to re-establish the conditions necessary for parental responsibility to be properly exercised. Such a delegation is only possible if there is a serious reason for the inability to exercise parental responsibility and the reason is transitory.

Spanish law does not directly contemplate the possibility for parental responsibility holders to delegate the exercise of parental responsibility into the hands of other private persons. Since these situations occur in practice there are some rules on so called *guardia de hecho*, but in these cases there is *strictu sensu* no delegation of parental responsibility.

When parental responsibility is held by a public child protection body (see Q 32), parental responsibility is delegated either on a foster family with whom the child resides or, if a foster family cannot be found, on the director of the child protection institution in which the child lives. In the case of a foster family only the duties as regarding the child will be delegated; that is, the foster family will acquire a duty to care for, protect, maintain and educate the child. The delegation of parental responsibilities to a foster family must be in writing, and requires the consent of the child, if he or she is older than sixteen, and of the child's parents or guardians, the foster family and the public child protection body. If there is opposition by the child's parents or guardians the delegation of the exercise of parental responsibilities to the foster family will require a judicial judgment; otherwise it will be the result of an administrative procedure.

There are different types of foster situations depending on whether the situation is more or less transitory and on whether an adoption by the foster family is in view. If the foster situation is a long term situation, the judge can grant a broader delegation of parental responsibilities that includes legal representation.

**50. To what extent, if at all, may a person not holding parental responsibilities apply to a competent authority for a delegation of parental responsibilities?**

There is no direct possibility of going before a competent authority and asking for a delegation of parental responsibility in one's favour. But in the framework of the institution of guardianship there is an obligation to initiate a guardianship procedure if a child is not subject to *patria potestad*. The law imposes this obligation on the persons listed in order to become guardians.

## **G. DISCHARGE OF PARENTAL RESPONSIBILITIES**

**51. Under what circumstances, if at all, should the competent authorities in your legal system discharge the holder(s) of his/her/their parental responsibilities for reasons such as maltreatment, negligence or abuse of the child, mental illness of the holder of parental responsibilities, etc.? To what extent, if at all, should the competent authority take into account a parent's violent behaviour towards the other parent?**

The discharge of parental responsibilities can take two forms. The first is the so called *privacion de la patria potestad*, that is privation of *patria potestad*. Both Art. 170

Spanish CC and Art. 136 Catalan Family Code establish that parental responsibility holders can be deprived of parental responsibility if they seriously or repeatedly fail to comply with their obligations as parental responsibility holders. This refers to conducts such as mistreatment, sexual abuse, exploitation, induction to crime, or non compliance with the obligations of care (malnutrition etc).

The measure must be decreed by a judge as a consequence of a judicial procedure to have effect. It can be decreed in the framework of criminal or matrimonial proceedings as well. In criminal law, deprivation of *patria potestad* is conceived as a preventive measure to protect the child; in civil law it is a measure of protection as regards the child, although there are some authors who still conceive it as a sanction.

It is necessary to establish that the decree of this measure is convenient to the child's best interests. Mental illness, drug addiction, etc. do not *per se* suffice for the discharge of parental responsibility; it must moreover be established that this is the best way to protect the child. Judges are extremely cautious in this respect because deprivation of *patria potestad* means that parental responsibility holders lose all rights and faculties, and that the adoption of the child will be possible.

Another less harsh possibility is the so called *declaración de desamparo*, which does not imply the loss of *patria potestad* but the suspension of the exercise of some or all of the faculties or rights inherent to *patria potestad*. As a consequence, the public child protection body assumes the functions implicit to guardianship. A declaration of bereavement or abandonment usually means the child will not be allowed to continue living with the parents, meaning that the child will either live with a foster family or in a child protection institution. For further explanations, see Q 32 and 49.

**52. Who, in the circumstances referred to in Q 51, has the right or the duty to request the discharge of parental responsibilities?**

Parental responsibility holders are deprived of *patria potestad* through a judicial procedure. It can either be an *ad hoc* procedure or decided in a matrimonial or criminal procedure. In a criminal procedure, the measure will be adopted by the judge on his own motion or on request of the *Ministerio Fiscal*. The civil procedure in order to deprive a parental responsibility holder of *patria potestad* can be initiated by the child himself or herself, the father or mother, certain relatives of the child, the *Ministerio Fiscal* or the public child protection body (Art. 134,2 Catalan Family Code and Art. 158; 167 Spanish CC) . In a matrimonial procedure, the measure can be decreed by the judge on his own motion, on request of the *Ministerio Fiscal* or of one of the spouses (92 Spanish CC), if it is discovered that there is reason for privation of *patria potestad*.

The administrative procedure in order to decree a declaration of bereavement is initiated by the competent public child protection body. The public child protection body will intervene on its own or at the request of any other public administration. Any person who comes to know that the child is in a situation of risk has the obligation to inform the competent child protection body. The child him or herself can also request public intervention.

**53. To what extent, if at all, are rights of contact permitted between the child and the previous holder of parental responsibilities after the latter has been discharged of his/her parental responsibilities?**

Spanish law does not relate rights of contact to parental responsibility. For parents, rights of contact are a consequence of parenthood (Art. 137 Catalan Family Code and Art. 160 Spanish CC); for other relatives or close persons, contact is established because and if it is in the child's best interests (see Q 44).

The fact that a parental responsibility holder has been discharged of his or her parental responsibility does therefore not *per se* impede contact. With a declaration of bereavement or abandonment, it is quite common to establish contact because the situation is considered to be transitory. One of the necessary conditions a foster family must agree with is contact with parents. With the privation of *patria potestad* contact it is, in practice, less commonly granted although still possible in theory. As shown above under Q 51 privation of *patria potestad* is an extreme measure that applies to situations in which contact is not commendable.

**54. To what extent, if at all, can the previous holder(s) of parental responsibilities, who has been discharged of his/her parental responsibilities, regain them?**

A parent who has been deprived of parental responsibility can regain parental responsibility if it is established in a court proceeding that the situation which caused deprivation has disappeared (Art. 170.3 Spanish CC and Art. 136 Catalan Family Code) and that recovery of *patria potestad* is in accordance with the child's best interests. In practice this is very uncommon.

The fact that a parent regains parental responsibility does not necessarily mean that the parental responsibility holder will be allowed to exercise parental responsibility. This requires an independent decision in which the child's best interests are paramount.

The declaration of bereavement has less harsh effects because it affects the exercise of parental responsibilities. The exercise of parental responsibilities will be regained if it is established that the parental responsibility holder has regained his capacity to exercise them properly. There may be a need to establish a transitory phase for the child's adjustment to the new situation.

## **H. PROCEDURAL ISSUES**

**55. Who is the competent authority to decide disputes concerning parental responsibilities, questions of residence of the child or contact? Who is the competent authority to carry out an investigation relating to the circumstances of the child in a dispute on parental responsibility, residence or contact?**

The competent authority to decide disputes is a judicial authority. Judges are also responsible for carrying out the investigation. Matters dealing with parental responsibilities are normally heard by a first instance judge specializing in civil

matters unless a public child protection body intervenes, causing a shift of jurisdiction to courts specializing in administrative matters. There is some confusion as to which matters belong to each kind of court.

If the matter is in the competence of a civil court it might be heard by a special family court. These exist in larger populations where there is more than one court dealing with civil matters. Special family courts are supported by a multidisciplinary team of psychologists, social workers and Doctors.

**56. Under what conditions, if any, may a legally effective decision or agreement on parental responsibilities, the child's residence or contact, be reviewed by a competent authority? Is it, e.g., required that the circumstances have changed after the decision or agreement was made and/or that a certain period of time has time has passed since the decision or agreement?**

Art. 775 of the Law of Civil Procedure establishes that legally effective decisions which have been decreed in matters of parental responsibility can be reviewed if there has been a substantial change of circumstances. This applies both to measures decreed by the Judge and to agreements approved by the Judge. If the agreement is private it will be possible to ask for a change of the agreement at any time because such an agreement is not enforceable through the court system. Once it is not voluntarily complied with, it is always possible to go to the court and ask for a decision on the matter.

**57. What alternative disputes solving mechanisms, if any, e.g.. mediation or counselling, are offered in your legal system? Are such mechanisms also available at the stage of enforcement of a decision/agreement concerning parental responsibilities, the child's residence or contact?**

Some Autonomous Communities such as Catalonia, Valencia, Galicia and Canary Islands have legislated Family Mediation, whereas in others these alternative dispute settlement mechanisms exist on an informal basis or do not exist at all. It is therefore difficult to give an answer which is valid throughout Spain.

The Catalan Law on Family Mediation provides that family mediation can be chosen by the parties as a dispute solving mechanism before a judicial procedure has begun. Once a judicial procedure has begun it is still possible to resort to mediation but only if the proceedings have been suspended (Art. 8.2). Mediation is not available once there is a firm judicial decision on an issue, even if difficulties arise in the enforcement phase of the decision. It is, however, expressly provided that mediation is possible if the matter is reopened because there has been a substantial change of circumstances [Art. 5.1.1 e) and 5.1.2 d)]. See Q 56.

**58. To what extent, if at all, is an order or an agreement on parental responsibilities, the child's residence or contact enforceable and in practice enforced? Describe the system of enforcement followed in your national legal system. Under what conditions, if at all, may enforcement be refused?**

Twenty days after a decision on parental responsibilities, each of the parties to a dispute can ask the judge to order the execution of that decision. The judge will request the other party to comply with the decision within a certain time, which the judge can determine freely. It is possible to establish that if the decision is not complied within the time limit there will not only be an enforcement of the decision but other consequences will arise, e.g., a fine will be imposed.

Within the required time, it is possible for the party against which execution has been ordered to present his or her objections to execution. It is thereby possible to obtain a refusal of enforcement because time limits have not been respected, documents are missing, etc. Art 158 Spanish CC and Art. 134 Catalan Family Code also allows the judge to adopt any measure necessary in order to protect the best interests of the child. This includes not enforcing a court order.

If the requirement, which has to be seen as a second chance to comply with the court order voluntarily, does not succeed, the court can, on request of the party asking for the execution, order any appropriate measure to obtain the execution of the court decision. This can include imposing a fine that is payable each month or even modifying the previous custody or access regime in order to obtain execution (776 LEC). It is also possible for the police intervene; not complying with a court order can amount to a criminal offence (see Q 48 (a)).

Although decisions on parental responsibilities are enforceable, it is generally admitted that enforcement is very difficult in this area; in practice it is possible that an enforceable decision will not be enforced. This is due to a variety of reasons. The Spanish court system is too slow and bureaucratic; it is sometimes said that it offers too many chances to block judicial action. Specifically there is also a reluctance of courts in this area to resort to criminal law or force because that is considered contrary to the child's best interests.

**59. To what extent, if at all, are children heard when a competent authority decides upon parental responsibilities, the child's residence or contact, e.g., upon a dispute, when scrutinizing an agreement, when appointing or discharging holder(s) of parental responsibilities, upon enforcement of a decision or agreement?**

The general right of the child to be heard is established in the UN Convention on the rights of the child, which was ratified by Spain in 1990, and in further legislation on the rights of children like the *Ley Orgánica de protección jurídica del menor* (Art. 9) or its Catalan Counterpart, Art. 11 *Llei d'atenció a la infància i l'adolescència*.

The right of the child to be heard is, however, implemented inconsistently by the courts because there are no clear general guidelines on how and when children must be heard. In matrimonial procedures, for example, it is established that children are always to be heard if they are older than twelve or have attained a sufficient degree of maturity in the case of younger children. When it comes to the discharge of parental responsibilities there is no such provision and the Supreme

Court has held that children need not necessarily be heard even if they are older than twelve.<sup>16</sup>

**60. How will the child be heard (e.g. directly by the competent authority, a specially appointed expert or social worker)?**

Legislation on this matter is very scarce. The law just establishes that the child's right to privacy has to be protected (Art. 9 *Ley Orgánica de protección jurídica del menor*). The child is usually heard by the competent authority, the judge, in court but often not in an open court session. If the judge orders it, the child might be heard by an expert (psychologist or social worker) if such an expert is available, but there are no clear guidelines on the matter.<sup>17</sup>

**61. How, if at all, is the child legally represented in disputes concerning:**

- (a) Parental responsibilities;**
- (b) The child's residence; or**
- (c) Contact?**

The child is represented by his or her legal representative. It is possible to name an *ad hoc* legal representative if both parents have a conflict of interests with the child, but the notion of conflict of interests only refers to a conflict as regards property (see Q 8 (e)).

The child's interests are moreover defended by the *Ministerio Fiscal*, a body equivalent to the French *Ministère Public* that is always party to the procedure if it relates to a child. It is generally admitted that the *Ministerio Fiscal* lacks resources in order to adequately carry out this function.

**62. What relevance is given in your national legal system to the age and maturity of the child in respect of Q 59-61?**

There is a general tendency to consider that a child who is twelve or older has attained a sufficient degree of maturity. As to younger children, there are big differences in practice, depending on the issue at stake.

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<sup>16</sup> STS of 25 June 1994.

<sup>17</sup> GUZMAN FLUJA- CASTILLEJO MANZANARES, *Los derechos del menor de edad en el ámbito del proceso civil*, Madrid, 2000, 105-118.