

Terms of endearment

Carolina Marin Pedreño and Lucy Marks examine property regimes and pre-nuptial agreements from a Spanish perspective



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'Many leading Spanish academics dispute that there is such a thing as a pre-nuptial agreement in Spain or that the *capitulaciones matrimoniales* is such an agreement.'

British family lawyers are waiting intently for the result from the Supreme Court in *Radmacher v Granatino*, which many believe will place us closer to our European counterparts in terms of the recognition and enforcement of valid, and effectively drafted, pre-nuptial agreements. How much difference will the decision make in terms of enforcing agreements entered into before marriage in Spain, where spouses are in a position to govern what is known as the matrimonial property regime?

Economic regimes and matrimonial property

It is common to hear from clients who married in Spain that they signed a 'pre-nuptial agreement', when they in fact signed an agreement determining the parties' matrimonial property regime. What is a 'matrimonial property regime?' How does this tie in with the concept, as we know it, of a pre-nuptial agreement, applying specifically to the law in Spain?

The EU Green Paper of July 2006 – *On Conflict of Laws in Matters Concerning Matrimonial Property Regimes Including the Question of Jurisdiction and Mutual Recognition (COM 2006 400)* – defines a matrimonial property regime as 'matrimonial property rights of the spouses' and:

... the sets of legal rules relating to the spouses' financial relationships resulting from their marriage, both with each other and with third parties, in particular their creditors.

The Spanish perspective

Spanish family law is regulated by the Civil Code (Código Civil). In Spain, spouses can choose how they wish their

assets to be held legally, and which matrimonial property regime will apply to the ownership of property, by entering into an agreement known as *capitulaciones matrimoniales*. Changes can also be made to this agreement during the marriage.

The *capitulaciones matrimoniales* is defined by the agreement between the parties establishing or modifying their matrimonial property regime. The legal basis for this comes from Article 1325 of the rules of the Civil Code, which enables parties to 'choose, modify or replace' the matrimonial property regime of their marriage.

According to Article 1327 of the Civil Code, the *capitulaciones matrimoniales* agreement is valid when it is in the form of a public notary deed. Article 1328 of the Civil Code states that it will be invalid if it is against either the law or good custom, or if it limits the equal rights of each spouse.

There are three different matrimonial property regimes in Spain dealing with the way spouses can hold property:

- *gananciales*;
- separation of assets; or
- participation.

Different regimes: different consequences

Gananciales

If the parties do not sign a *capitulaciones matrimoniales* agreement, or the agreement is invalid, the matrimonial property regime of the marriage will usually be '*gananciales*' or a community property regime (according to Article 1316 of the Civil Code), save for in those Spanish communities where regional law provides a different

regime by default (Catalonia, Aragon, Balears, Basque Country and Navarra).

The definition of the community property regime and its administration, liquidation and dissolution are explained in articles 1344-1434 of the Civil Code. This regime divides assets into private assets (such as property, or gifts, acquired before the marriage and inherited assets or gifts) and matrimonial or acquired assets. The latter category will include property and assets acquired during the marriage that will belong to both spouses in equal shares, including income.

Article 1346 states that the following assets remain in the separate ownership of the parties:

- goods and rights owned at the beginning of the relationship;
- inherited assets;
- clothes; and
- inexpensive items for personal use.

The regime will end on divorce, separation or if the parties choose to enter into a different economic regime.

Separation of assets

The separation of assets regime will automatically take effect if the spouses have determined in the *capitulaciones matrimoniales* agreement that the *gananciales* regime will not apply, but have not expressed which other regime will take effect, or if they have chosen this particular regime.

A separation of assets regime is regulated in articles 1435-1444 of the Civil Code. The regime means that any property or asset that belonged to one of the spouses before the marriage, or was acquired as a result of that spouse's work or investment, will belong solely to that spouse. Similarly, any income or interest received from either spouse's property or assets will belong solely to that spouse. Each spouse will also have the right to control and dispose of any of their own assets independently of the other spouse.

Participation

The participation regime is the third type of matrimonial regime available. This is set out in articles 1411-1434 of the Civil Code. In this regime, each

spouse has the right to share in any profits earned by their spouse. All assets owned before the marriage, or acquired by gift or inheritance after the marriage, will be held separately, and that spouse will have the right to manage, dispose of or enjoy these assets as they choose. During the regime, as it applies to the marriage, if the parties purchase or acquire any assets, these are owned jointly. Either spouse may request the termination of the participation regime if the other spouse is compromising their interests by not dealing with finances sensibly.

Pre-nuptial agreements in Spain

Are *capitulaciones matrimoniales* agreements similar to pre-nuptial agreements in this jurisdiction? *Crossley v Crossley* [2007] involved a couple who met when the husband was 60 and the wife was 48. Both of them were financially independent at the time of the marriage. They entered into a pre-nuptial agreement in this jurisdiction providing that, in the event of a divorce, neither would be entitled to any financial assistance from the other. Thorpe LJ, referring to this pre-nuptial agreement, commented (at paragraph 17):

I would classify, in the circumstances of this case, the contract into which the parties entered in December 2005 as in many respects akin to a marital property regime into which parties enter in civil law jurisdictions in order to provide for the property consequences of a possible future divorce.

However, many leading Spanish academics dispute that there is such a thing as a pre-nuptial agreement in Spain or that the *capitulaciones matrimoniales* is such an agreement. Fundamentally, a *capitulaciones matrimoniales* agreement does not provide for the consequences of a property on divorce, but rather how such property is to be held during the marriage.

Further, there is no requirement for the parties to obtain independent legal advice before signing a *capitulaciones matrimoniales* agreement. These agreements are often signed without the involvement of lawyers, but in the presence of a notary, who ensures that the document is valid, checks the identities of the parties,

and makes sure that they understand what they are signing. The notary would not normally give either party legal advice.

In addition, there is not normally any financial disclosure before signing a *capitulaciones matrimoniales*. Although the safeguard in the UK is generally to ensure that an agreement is signed at least 21 days before the wedding, in Spain such a document can be signed at any time before the wedding, or even after it (according to article 1326 of the Civil Code). It will become void if the parties do not marry within one year of the date of the agreement (article 1334 of the Civil Code).

If spouses in Spain wish for a pre-nuptial agreement as we know it, defining what will occur on divorce, they can enter into any type of agreement with each other provided that it is not against public policy, morality or law. The Spanish courts may take the agreement into account but will not be bound to enforce it, given that pre-nuptial agreements *per se* are not specifically provided for under Spanish law.

What of those spouses who enter into this type of agreement in Europe and subsequently divorce in the UK, hoping that it may be viewed by the court as a pre-nuptial agreement and taken into account as one of the circumstances of the case? *F v F* [2009] (Eleanor King J) involved a couple who entered into a French separation of property contract before the marriage. The parties had believed that this was a requirement of French law. They had not met the French lawyer who drafted the document beforehand, nor did they fully understand the provisions of the French Civil Code detailed in the document. The court found that the agreement, instead of being an effective pre-nuptial contract, was simply an administrative inconvenience imposed by the state, in contrast to the agreement entered into in *Radmacher* as

F v F
[2009] EWHC 2485 (Fam)
Radmacher v Granatino
[2009] EWCA Civ 649;
[2008] EWCA Civ 1304
Crossley v Crossley
[2007] EWCA Civ 1491
Miller v Miller; McFarlane v McFarlane
[2006] UKHL 22

a condition of the marriage. On appeal Wilson LJ stated that:

The district judge was clearly right to attach no weight whatever to the contract.

Orders on divorce in Spain

Notwithstanding the economic regime provided for during the marriage in the *capitulaciones matrimoniales* agreement, either spouse may make a claim against the other for a financial order and for maintenance, if it can be proved that their standard of living has been adversely effected as a result of the divorce or separation. The powers

or where one spouse is near retirement, ill or infirm.

The judge can also make an order in relation to the matrimonial home, which often depends on who will be caring for the children. The ownership and division of the other assets would be dealt with in the process of liquidating the economic regime.

Matrimonial regimes in English law

Whether a matrimonial property regime exists in English law is the subject of some debate. Clearly, during the marriage, spouses can own property under various laws established by statute, for example as joint tenants or

become ever more interlinked and interdependent. Most couples now choose to share the ownership of much of their most significant property, in particular their matrimonial home and its contents.

She also stated that the UK has a:

Matrimonial property regime which... starts with the premise of separate property.

However, she acknowledged that:

... there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them.

If the parties do not sign a capitulaciones matrimoniales agreement, or the agreement is invalid, the matrimonial property regime of the marriage will usually be 'gananciales' or a community property regime.

Conclusion

It is hoped that the forthcoming judgment in *Radmacher* will help to bridge the gap between this country and the other member states of Europe, as highlighted by Thorpe LJ in *Crossley*, where he stated that:

of the court are dealt with in articles 90-101 of the Civil Code.

As well as maintenance, the court may order a 'compensatory pension' to be paid to the financially weaker spouse (in accordance with article 97 of the Civil Code) to make up for any economic imbalance between the spouses as a result of the divorce. It is often awarded for a limited period of time, to enable the spouse to adjust financially to life alone. Sometimes lifetime awards are made when it is determined that one spouse does not have the ability to work, where there has been financial dependence throughout the marriage

tenants in common, in the same way as cohabitants. But is there an underlying presumption in the UK regarding jointly held assets during the marriage?

In *Miller v Miller; McFarlane v McFarlane* [2006] Baroness Hale referred to UK as having a separate property regime on commencement of the marriage, but that this becomes less distinct as the parties' assets mingle over time. She said that (paragraph 123):

English law starts from the principle of separate property during marriage. Each spouse is legally in control of his or her own property while the marriage lasts. But in real life most couples' finances

There is an obvious divide between the provisions of the civil law jurisdictions and the absence of any marital property tradition in the common law systems. Undoubtedly, there would be some narrowing between this European divide if greater opportunity were given within our justice system for parties to contract in advance of marriage, to make provision for the possibility of dissolution.

If and when this occurs, a *capitulaciones matrimoniales* agreement providing for a matrimonial property regime, to be applied to a marriage, can still not be interpreted as a valid pre-nuptial agreement, and will not therefore be effective as such. ■

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