

International family law—Spain

28/04/2023

Family analysis: In the continuation of a series of News Analysis considering family law provisions in other jurisdictions, Jorge A. Marfil, founder at Marfil Abogados, and Carolina Marín Pedreño, partner and head of the children department at Dawson Cornwell LLP, outline the key principles in Spain in relation to jurisdiction, divorce, financial provision, private children and non-court dispute resolution, as well as recent and forthcoming law reform.

What is the structure and key laws in Spain?

Spain is a codified civil law system. Any judicial decision is based on the law. The custom is applied in the absence of applicable law, as long as it is not contrary to the moral and public order. The general principles of law apply in the absence of legislation and custom.

The [Spanish Civil Code of 1889](#) (the Civil Code), as amended, is the primary source of law in relation to marriage, the breakdown of the marriage and the welfare of children.

The country is formed of 17 autonomous regions. Some of them have delegated functions to legislate on some family matters. The Civil Code applies if there is no specific legislation from the region.

The Spanish Constitution reserves for the State certain fields of competence in relation to questions such as:

- international relations
- all cases dealing with rules on the application and enforcement of rules of law
- legal and civil relations concerning matrimony
- public register and instruments
- base of contractual obligations, and
- rules to solve conflicts between laws

How is jurisdiction established in Spain and what is the approach to domicile and habitual residence?

The general rule of jurisdiction was established in the Civil Code, until 1981 when the [Law 30/1981, of 7 July](#), modified the regulation of marriage in the Civil Code and determined the procedure to be followed in cases of annulment, separation, and divorce. Its First Additional Provision establishes the cases in which the Spanish courts have jurisdiction to hear applications for annulment, separation, and divorce. These are:

- when both spouses have Spanish nationality
- when they are residents in Spain
- when the applicant is Spanish and has their habitual residence in Spain, whatever the nationality and residence of the respondent
- when the respondent, whatever their nationality, is resident in Spain

Therefore, the criteria determining the jurisdiction of the Spanish courts are, jointly or separately, nationality or residence in Spain.

These same criteria are taken into account by the Organic Law of the Judiciary of 1 July 1985, Article 22 QUARTER, in force since 1 October 2015, which establishes that the Spanish courts shall have jurisdiction:

‘In matters of personal and marital relations between spouses, marriage annulment, separation and divorce and their modifications, provided that no other court has jurisdiction, when both spouses have their habitual residence in Spain at the time the action is brought or when they have had their habitual residence in Spain and one of them resides there, or

when Spain is the habitual residence of the defendant, or, in the case of an action by mutual consent, when one of the spouses resides in Spain or when the plaintiff has been habitually resident in Spain for at least one year since the filing of the action, or when the plaintiff is Spanish and has been habitually resident in Spain for at least six months prior to the filing of the action, and when both spouses are Spanish nationals.'

The approach to domicile and habitual residence by the Spanish Courts finds its origins in Article 40 of the Civil Code which states that:

'For the fulfilment of civil obligations, the domicile of natural persons is the place of their habitual residence, and, where appropriate, the place determined by the Civil Procedure Act.'

It is significant to take into consideration that the concept of domicile refers to residence, where the person lives.

Further, the jurisprudence affirms that, in general, the place of habitual residence must be taken into account, which is equivalent to domicile, as it materialises the will to remain in a certain place.

Are marriage contracts enforceable in Spain and, if not, are they taken into consideration by the courts?

In accordance with Article 1325 of the Civil Code, in the marriage contracts the parties may stipulate, modify or substitute the economic regime of their marriage or any other provisions relating to the marriage; their validity requires that they be recorded in a public deed.

Once the marriage has been celebrated, the marriage contract becomes enforceable; in the event of non-compliance, the parties may resort to the courts to enforce what has been stipulated.

The efficacy of the contracts is subject to the celebration of the marriage; for this reason, with regard to those granted before the celebration of the marriage, Art. 1334 of the Civil Code provides that:

'All that is stipulated in capitulations under the assumption of future marriage will be without effect in the event that it is not contracted within one year.'

What are the causes of divorce and is same-sex marriage or civil union possible in Spain?

There are no causes of divorce. According to Article 81 of the Civil Code, to which Article 86 refers, the application for divorce can only be made three months after the marriage has taken place.

Once the three months have elapsed from the celebration of the marriage, the divorce may be requested by both spouses or by one of them with the consent of the other (divorce by mutual consent), or by one of them without a cause of action (contentious divorce).

Marriage between persons of the same sex is lawful. [Law 13/2005 of 1 July 2005](#) amended the Civil Code with regard to the right to marry and introduced a second paragraph in Article 44 of the Civil Code according to which 'Marriage shall have the same requirements and effects when both parties are of the same or different sex'.

What are the key considerations regarding financial provision between spouses?

The economic relations between the spouses have a different content depending on the matrimonial property regime in force between them. The spouses could opt for any of the three matrimonial property regimes available, ie:

- community of property
- separation of property, or
- participation

The community of property is the default regime in the main parts of Spain.

In the community of property regime (Article 1344 of the Spanish Civil Code), the earnings or profits obtained by either spouse are common to the spouses or will be distributed to them in half upon dissolution of the community property regime. This community property is administered, in the absence of an agreement in the marital contracts, by both spouses. Acts of disposition for valuable consideration require the consent of both spouses.

This community property supports the expenses arising from the support of the family, the feeding and education of the children of both spouses, as well as the welfare expenses in accordance with the uses and needs of the family.

The assets of the spouses prior to the marriage are considered private assets and are not included in the division of the community property regime.

The separation of property is regulated in Article 1437 of the Spanish Civil Code. This is the default regime in particular regions as Catalonia. This system allows the earnings and assets of the spouses acquired during the marriage to be separated. The income or gains acquired during the marriage will belong exclusively to each one of them. A mass of marital property is not formed.

The system of participation is regulated in Article 1411 of the Spanish Civil Code. This system is a combination of the other two. While the couple is married, the spouses keep their assets separated however in case of divorce, each spouse is entitled to participate of the benefits acquired by the other spouse during the marriage.

In conclusion, in Spain there is more certainty in the financial claims by the spouses because we have as a starting point what system will regulate the division. The spouses can agree to vary their regime within their marriage.

What are the key considerations in relation to private litigation concerning children?

The key criterion for resolving disputes concerning minors is the best interests of the minor. As to what the best interests of the child are or what they consist of, numerous Supreme Court judgments state that the best interests of the child:

‘Is the sum of different factors that have to do not only with the personal circumstances of the parents and the emotional needs of the children after the break-up, but also with other personal, family, material, social and cultural circumstances that must be assessed in order to avoid as far as possible a risk factor for the stability of the child.’

The best interests of the child is the overriding principle or consideration that should inspire all measures concerning children, and therefore all public authorities, including the judiciary, should look after the best interests and benefit of the child.

What rights do unmarried couples have in Spain?

Common civil law does not regulate unmarried couples. The civil legislation of certain autonomous communities recognises certain inheritance rights, as well as social and administrative legislation.

The Social Security Act, approved by Royal Legislative Decree 8/2015, of 30 October, recognises the right of unmarried couples to a widow's or widower's pension similar to that of a married couple, provided that the requirements established in the Act are met, including the fact that the couple has been constituted two years in advance. The Act of state passive classes (Royal Legislative Decree 670/1987, of 30 April) also recognises widow's and widower's pensions for unmarried couples.

In the Autonomous Community of Catalonia, Law 10/1998 of 15 July 1998 regulates stable partnerships, both heterosexual and homosexual.

Law 5/2015, of 25 June, on Civil Law of the Basque Country considers the survivor of the unmarried partner to be the beneficiary of the usufructuary quota, a quota that amounts to the usufruct of half of the assets if he or she is in common with descendants and the usufruct of two thirds of the assets, in the absence of descendants.

Law 18/2001 of 19 December 2001 of the Autonomous Community of the Balearic Islands regulates stable couples. It contains the rules regulating these couples during their cohabitation and the effects of their extinction, establishing their economic regime. In the event of termination of the cohabitation, economic compensation is established if there is an economic inequality between the members of the partnership that implies an unjust enrichment in the cases established by the law. Once the partnership has ended due to death, the survivor is recognised, in both testate and intestate succession, with the same rights that the Compilation of Balearic Civil Law provides for the widowed spouse.

Law 2/2006, of 14 June, on Galician Civil Law, establishes in its Third Additional Provision that 'For the purposes of this Law, marital relations maintained with intention or vocation are equated to marriage, whereby the rights and obligations that this Law recognises for spouses are extended to the members of the couple'.

The jurisprudence of the Supreme Court has declared that the economic consequences derived from the termination of the extra-marital union by unilateral decision of one of its members must be regulated by a specific law, in the absence of which they will be governed by the agreements established by its members and, in the last place, by application of the technique of unjust enrichment (SSTS 160/2006, 22 February; 12 September 2005).

Are there any non-judicial methods (out-of-court dispute resolution) that are compulsory or widely used?

Out-of-court dispute resolution is regulated in Spain by Law 5/2012, of 6 July, on mediation in civil and commercial matters.

The Act defines mediation as 'That means of dispute resolution, whatever it may be called, in which two or more parties voluntarily attempt to reach an agreement by themselves with the intervention of a mediator'.

The Act is applicable to mediation in civil or commercial matters, provided that it does not affect rights and obligations that are not available to the parties under the applicable law.

Mediation is voluntary and the mediation agreement must be signed by the parties or their representatives. The parties may convert the agreement reached into a public deed, which shall be enforceable. If the mediation has been reached after the commencement of judicial proceedings, the court may request its homologation (ie granting of approval) in accordance with the provisions of the Civil Procedure Act.

Are there any notable developments in relation to family law in Spain or key areas of reform?

The key area for reform is the creation of the family jurisdiction. There are some specialised family courts in the capital cities, but outside the cities family proceedings are allocated to any civil judge dealing with any kind of claim, insolvency, property issues etc.

A specific key area that needs to be legislated upon is the issue of filiation in particular of children born from surrogacy contracts.