

[Home](#) > ... > [Family Matters & Inheritance](#) > [Parental Responsibility - Child Custody and Contact Rights](#) > [Spain](#)

Parental responsibility - child custody and contact rights

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European Judicial Network
(in civil and commercial matters)



1 What does the legal term “parental responsibility” mean in practical terms? What are the rights and obligations of a holder of parental responsibility?

In Spanish law, parental responsibility is usually referred to as '*patria potestad*' (parental authority). It consists of the rights and duties of the individuals, normally the parents, or legal entities entrusted with the protection of the minor's person and property by law or by a court decision.

Parental authority must always be exercised for the benefit of the children, in accordance with their personalities, and with respect for their physical and psychological integrity. It includes the following duties and powers:

1. Looking after them, being with them, feeding them, educating them and ensuring that they receive a well-rounded education.
2. Representing them and administering their property.
3. Deciding on the place of habitual residence of the minor, which may be changed only with the consent of both parents or, failing that, by judicial authorisation.

2 As a general rule, who has the parental responsibility over a child?

Parents have parental responsibility for minors.

In the event that the parents separate, divorce, split up or do not live together, all the rights and duties regarding minors, in relation to their persons and their property, belong to both parents, except in exceptional circumstances.

If the parents live apart, parental authority will be exercised by the parent with whom the child lives. However, upon an application by the other parent, accompanied by supporting reasons, the court may, in the interests of the child, award them parental authority to be exercised jointly with the first parent, or may distribute the functions inherent in exercising parental authority between the two parents.

3 If the parents are unable or unwilling to exercise parental responsibility over their children, can another person be appointed in their place?

In Spanish law, other relatives, persons or institutions may be appointed, under judicial supervision, to exercise parental responsibility over minors, if the parents fail to carry out the duties of protection laid down by the law on the care of minors, or do not carry them out satisfactorily.

4 If the parents divorce or split up, how is the question of parental responsibility determined for the future?

If the parents divorce or separate, parental responsibility may be determined:

- At the request of both parents, in a Regulating Agreement (*convenio regulado*), which must be approved by the courts;
- By a court decision, in adversarial proceedings.

Parental responsibility, as an institution for the protection of minors, lies with both parents.

The arrangements for the care and custody of minors may be summarised as follows:

- Award to just one of the parents. Visiting arrangements are usually made for the parent without custody.
- Joint award, with alternating periods in which the minors are with one or the other parent.
- On an exceptional basis, where circumstances so dictate and in the interests of the minor, a court decision may be issued awarding care and custody to another person, either following a proposal by the parents themselves or at the direct decision of the court.

In cases where the administration is responsible for the care of the minor, this situation is maintained, and custody is not awarded to either parent.

The specific system of custody is decided on a case-by-case basis, in accordance with the interests of the minor.

5 If the parents conclude an agreement on the question of parental responsibility, which formalities must be respected to make the agreement legally binding?

Parents who reach an agreement on issues of parental responsibility must submit a signed Regulating Agreement containing all the points agreed on. This must set out expressly, in addition to other measures:

- the care and custody of the minor;
- the visiting arrangements with parents;
- the exercise of parental responsibility;
- the use of the family home;
- the maintenance allowance for the minor.

The Regulating Agreement is submitted together with the application to the appropriate Court of First Instance. It must be ratified by the parents in court. The minors will be heard where this is deemed necessary on an ex officio basis or at the request of the prosecutor, the parties, members of the court's technical team or the child himself. After seeking the opinion of the public prosecutor, the judge assesses the agreements.

Unless they are damaging for the children, agreements by the spouses adopted to govern the consequences of annulment, separation or divorce will be approved by the judge. If the parties propose arrangements for visits and communication between grandchildren and their grandparents, the judge may approve them after having a hearing with the grandparents in which they give their assent.

If agreements are rejected, this must be done through a decision accompanied by reasons. In this event, the spouses must submit a new proposal for approval by the judge, if applicable.

6 If the parents cannot come to an agreement on the issue of parental responsibility, what are the alternative means for solving the conflict without going to court?

Family Mediation is the best alternative measure to a court decision for arriving at an agreement between the parties.

For any agreements adopted to be enforceable, they must always be approved by a court decision.

7 If the parents go to court, what issues can the judge decide upon relating to the child?

In the court decision the judge must always decide upon the following matters in the interest of minor children, avoiding the separation of siblings if possible, after hearing them if they are capable of judgement:

- the judicial measures concerning custody and care, granted to one or both parents, and education;
- the visiting arrangements between the parents, indicating the time, method and place when parents can communicate with their children and have them in their company;
- exceptionally, these visiting rights may have to be limited or suspended if serious circumstances occur or if one of the parents seriously and repeatedly fails in his or her duties;
- the award of parental authority, and, if necessary and if appropriate for the children, a decision as to total or partial exercise of such authority by one of the parents, including deprivation of such authority if there is good reason;
- the maintenance to be paid by each parent to meet the needs of the child, having regard to the economic circumstances, and adopting the measures necessary to ensure the effectiveness of the maintenance;
- allocation of the use of the family dwelling and of commonplace objects, in cases when there is no agreement between the parents, giving preference to underage children.

8 If the court decides that one parent shall have sole custody of a child, does this mean that he or she can decide on all matters relating to the child without first consulting the other parent?

As a general rule, parental authority is shared by both parents. Both parents, therefore, share the power to decide upon and resolve all matters concerning a minor, even if only one of them has been awarded custody.

In the event of disagreement between the parents over decisions that can or should be taken concerning a minor child, for instance in relation to schooling and educational matters such as choosing a school or extracurricular activities, health care when choosing a doctor, personal matters such as the choice of a name or religious education, or choosing the place or country where the minors live, etc., and when mutual agreement has proved impossible, either of the parents may have recourse to the court to resolve the dispute.

After hearing both parents and the child (if they are capable of judgement), the judge will award decision-making powers to one of the parents. If the disagreements recur or some other cause arises that seriously impedes the exercise of parental responsibility, the judge may assign decision-making powers totally or partially to one of the parents, or may distribute these functions between them. All these measures may be adopted for a maximum period of two years.

9 If the court decides that the parents shall have joint custody of a child, what does this mean in practice?

In cases when the custody of a minor is awarded jointly to both parents, in practice day-to-day care of and direct attention to the minor alternates for predetermined periods. The joint custody arrangement may vary; usual practice is to alternate weeks or to share out the days of the week, with the parents taking alternate weekends.

All holiday periods are shared between both parents.

10 To which court or authority should I turn if I want to lodge an application on parental responsibility? Which formalities must be respected and which documents shall I attach to my application?

In matrimonial proceedings for separation or divorce by mutual agreement, the competent court is the Court of First Instance within whose jurisdiction the last joint matrimonial home, or the home of either of the applicants, is

located.

In adversarial matrimonial proceedings the competent court is the Court of First Instance in the location of the conjugal home, and if the spouses are resident in different judicial districts the plaintiff may choose between the court in the area of the last matrimonial home or in the area where the defendant is resident.

Those without a fixed address or residence may be sued in the place where they are currently based or that of their last residence, at the choice of the plaintiff; if the jurisdiction can still not be determined, it will fall to the court of the place of address of the plaintiff.

In proceedings that solely concern the care, custody and maintenance of minor children, in which the parents are not married to each other, the Court of First Instance which has jurisdiction is that in the location of the last shared residence of the parents. If they live in different judicial districts the plaintiff may choose between the court in the area of residence of the defendant or that in the area of residence of the minor.

A certification of the marriage's registration at the Civil Registry and, as appropriate, the birth certificates of any offspring shall be attached to the application, along with the document or documents on which the spouse may base his or her rights. If measures on the division of property are sought, the plaintiff must provide the documents in his or her possession which allow the financial circumstances of the spouses and, as appropriate, those of the children, to be assessed, such as tax returns, payslips, bank statements, property deeds or registration certificates.

11 Which procedure applies in these cases? Is an emergency procedure available?

The procedures applicable in these cases are the following:

In cases where there is agreement between the parties, the mutual agreement procedure established by Article 777 of the Law on Civil Procedure (*Ley de Enjuiciamiento Civil*), for separation, divorce and the adoption of definitive measures on the care, custody and maintenance of minor children, when there is no marriage.

When there is no agreement between the parties, the adversarial proceedings governed by Articles 770 and 774 of the Law on Civil Procedure, which is also applicable to family proceedings and proceedings concerning minors, when the parents are not married to each other.

In urgent cases the adoption of measures under the following procedures may be requested:

Interim measures prior to the submission of the application for annulment, separation, divorce or in proceedings concerning the care and custody of minor children and maintenance. This is governed by Articles 771 and 772 of the Law on Civil Procedure.

It is expressly provided that, if there are grounds for urgent action, measures may be adopted immediately the same day and for the purposes referred to in Article 102 of the Civil Code (*Código Civil*).

Interim measures deriving from the acceptance of the application for matrimonial proceedings or proceedings relating to minors, as in the previous cases. This is provided for in Article 773 of the Law on Civil Procedure.

12 Can I obtain legal aid to cover the costs of the procedure?

Total or partial legal aid may be obtained, provided that proof is produced that the requirements for entitlement to legal aid are met, under the Law on Legal Aid (*Ley de Asistencia Jurídica Gratuita*). (See '[Legal Aid - Spain](#)').

13 Is it possible to appeal against a decision on parental responsibility?

To know which decisions can be appealed, distinctions must be drawn between all the possible decisions relating to matters of parental responsibility, namely:

- All decisions in adversarial proceedings may be appealed before a Provincial Court;

- Decisions in mutual agreement proceedings may only be appealed, before the Provincial Court, when a measure is agreed which differs from the terms of the Regulating Agreement.

The law provides no recourse against decisions on prior interim measures or interim measures, or decisions on the exercise of parental authority.

14 In certain cases, it may be necessary to apply to a court to have a decision on parental responsibility enforced. Which court should I use in such cases and which procedure applies?

In cases when judicial decisions on parental responsibility are not complied with voluntarily, an application may be submitted to the Court of First Instance that issued them, by submitting a request for enforcement of the measure or measures not complied with.

The sentence or decision whose enforcement is sought, and the person against whom enforcement is to be carried out, must be identified.

15 What should I do to have a decision on parental responsibility that is issued by a court in another Member State recognised and enforced in this Member State?

Decisions issued in a Member State on the exercise of parental responsibility in matrimonial proceedings concerning a child of the relationship, which were enforceable in the said Member State and which have been notified, shall be recognised in Spain at the request of any of the interested parties without the need for proceedings, pursuant to the provisions of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. This Regulation applies to decisions given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements which have become enforceable in the Member State where they were concluded before 1 August 2022. After that date, Regulation (EU) 2019/1111 of 25 June 2019 will apply.

To request enforcement, an enforcement request must be submitted to the court of the place where the minor is located and where enforcement is requested. A copy of the decision whose enforcement is sought must be attached to the request and must meet all the requirements for determining its authenticity, in accordance with the standardised form set out in Annex V. A lawyer and legal representative are necessary.

16 To which court in this Member State should I turn to oppose the recognition and enforcement of a decision on parental responsibility issued by a court in another Member State? Which procedure applies in these cases?

To oppose in Spain the recognition of a decision on parental responsibility adopted by another Member State, the party concerned must apply to the Court of First Instance to which the request for recognition has been made and plead the existence of any of the grounds for non-recognition laid down in Regulation 2201/2003 and, in due course, those recognised by Regulation 2019/1111.

The grounds that may be pleaded at present are:

- a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked, taking into account the best interests of the child;
- b) where it was given in default of appearance, if the person in question was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable them to arrange for their defence unless it is determined that the said person has accepted the decision unequivocally;

- c) upon application by any person claiming that the decision infringes their parental responsibility, if it was given without such person having been given an opportunity to be heard;
- d) if and to the extent that it is irreconcilable with a later decision relating to parental responsibility given in the Member State in which recognition is invoked;
- e) if and to the extent that it is irreconcilable with a later decision relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child, provided that the later decision fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked;
or
- f) if the procedure laid down in Article 82 has not been complied with.

17 Which law does the court apply in a proceeding on parental responsibility where the child or the parties do not live in this Member State or are of different nationalities?

The applicable law is that of the minor's habitual residence, in accordance with the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and the Measures for the Protection of Children.

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