

# **Residence and contact in Spain and Catalonia**

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# Overview

- Concept and Historical development
- Legal situation in Spain and Catalonia
- Issues:
  - Attribution of the family home
  - Child maintenance
- Some statistics
- Current debate / Final remarks

## Sole-custody arrangements

- One parent has physical custody of child
- The other parent has contact
  - Visitation time
  - Overnight stays : typically
    - Alternate weekends
    - Half of school holidays
    - + one day a week
  - Communication
- Non-custodial parent also has legal custody (shared parental responsibility)

## Shared custody

- Terminology: joint physical / alternating / shared custody
- Custody is attributed to both parents, and child spends similar time with each parent on an alternative basis
- Possible arrangements:
  - Alternating weeks or months
  - Alternating weeks + midweek visit
  - Alternating weeks + midweek overnight stay
  - Rotation: 2-2-3
  - Rotation 3-3-4-4
  - Rotation 2-2-5-5

## Spain and Catalonia

- Spanish Civil Code (1889) – Also applied in Catalonia.
  - Minors under the age of 3: mother  
(unless there were special reasons to establish otherwise)
  - Minors, age 3 or older:
    - With the parent who acted in good faith, or was innocent
    - If both parents were innocent
      - Sons with the father
      - Daughters with the mother
    - If both were guilty, under guardianship
- 1958 Amendment: elevated the age to 7

## Spain and Catalonia

Amendments to the Spanish Civil Code – Also applied in Catalonia:

- 1981 Divorce was introduced
  - Legal preference for the mother for children under 7
  - Eliminated link between custody and cause of breakup
  - Best interest of the child
  
- 1990 - Legal preference for the mother was abolished

Spain	Catalonia
	<p>1998 Code of Family Law No reference to shared custody</p>
<p>2005 Introduced shared custody. Law 15/2005, 8<sup>th</sup> July, which amends the Civil Code and the Law on Civil Procedure, in matters of separation and divorce</p>	
	<p>2010 Introduced shared custody as the preferred option. Law 25/2010, 29<sup>th</sup> July, which approves the Second Book of the Catalan Civil Code, on Person and Family</p>

## Shared custody in Courts

- Even before legislation was passed on shared custody, some courts upheld shared custody agreements.
- However, initial starting point was opposition:

*Instruction* by Public Ministry TSJ in Catalonia 20/10/1995 held a strong opposition even when parents agreed, as a matter of principle:

Constant changes of residence meant insecurity for the child, much needed for their education and emotional stability.



## Spain and Catalonia

- When parents agree on custodial arrangement, Judge will confirm agreement, unless it is harmful to the child
- Judge must
  - Obtain a report from the Public Ministry
  - Hear the child,
    - When Judge deems this to be necessary
    - At the request of Public Ministry / parties / members of the Technical Judicial Team / child.
- Judge may obtain expert report on suitability of custody agreement

# Criteria to take into account - Spain

## ➤ **Spanish Civil Code (art. 92)**

- Relations parents maintain,
  - Among themselves
  - With their children
- Siblings should not be separated
- Best interests of the child

## ➤ **Supreme Court** - Provides criteria to take into account

- Parents previous relation with the children
- Personal aptitude
- Wishes expressed by children
- Fulfillment of parental obligations to the children
- Mutual respect between the parents: serious parental disputes may prevent shared custody

## Catalonia – Legal criteria

- a) The emotional bond between the children and each parent, and the relations with the other persons living in the respective homes.
- b) The ability of the parents to ensure the welfare of the children and the possibility to give them a suitable environment, according to their age.
- c) The attitude of each parent to cooperate with each other to ensure maximum stability to the children, particularly to adequately ensure the relations of the children with both parents.
- d) The time devoted by each parent to the care of the children before the breakdown and the tasks which were effectively exercised by them to ensure the welfare of the children.

## Catalonia – Legal criteria

e) The opinion expressed by the children.

f) The agreements in anticipation of the breakdown or those entered into outside the separation agreement before commencing the proceedings.

g) The location of the homes of the parents and the schedules and activities for children and parents.

- Siblings should not be separated
- Best interests of the child

# Shared custody may NOT be awarded

Spain	Catalonia
Ongoing criminal procedure against any of the parents for certain crimes (against life, physical integrity, freedom, sexual freedom) against the other, or the children	Final judgment for acts of domestic or sexist violence suffered directly or indirectly, actually or potentially, by the children
Well grounded indications of domestic violence	Well grounded suspicion that a parent may have committed acts of domestic or sexist violence suffered directly or indirectly by the children

## When parents do NOT agree Spanish Civil Code:

- Exceptionally, Judge may still award shared custody

On the basis that “it is the only way to adequately protect the best interest of the child”

- At the request of one of the parties
- With a report from the Public Ministry
  - Previous need for the report to be “favorable” has been deemed unconstitutional (STC 185/2012, 17 Oct)

# When parents do NOT agree

## Spanish Supreme Court

- Shared custody should not be regarded as an exceptional measure. It should be the desired option.

### Benefits of shared custody:

- Promotes good relations of child with both parents
  - Avoids perception of winner / loser parent
  - Promotes cooperation between parents
- Requires lower courts to provide good reasons if shared custody has not been ordered

## When parents do NOT agree Catalan Civil Code

- Judge may still award shared custody

It is the preferred legal option:  
custody, whenever possible, should be shared.

- Sole-custody may be awarded if it is deemed more convenient for the child



# Attribution of the family home

Spain	Catalonia
Special rules as regards shared custody ? NO	Yes (art. 233-20 CCCat)
By agreement	By agreement
Courts apply art. 96 CC, by analogy	In case of shared custody, it will be attributed to the parent who is most in need
Courts - usual criteria: need.  If there is no economic need: use is limited to 1 or 2 yrs, to ensure transition to a new residence.  Liquidation of matrimonial property	

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# Child's legal residence

- Where will the minor be registered?

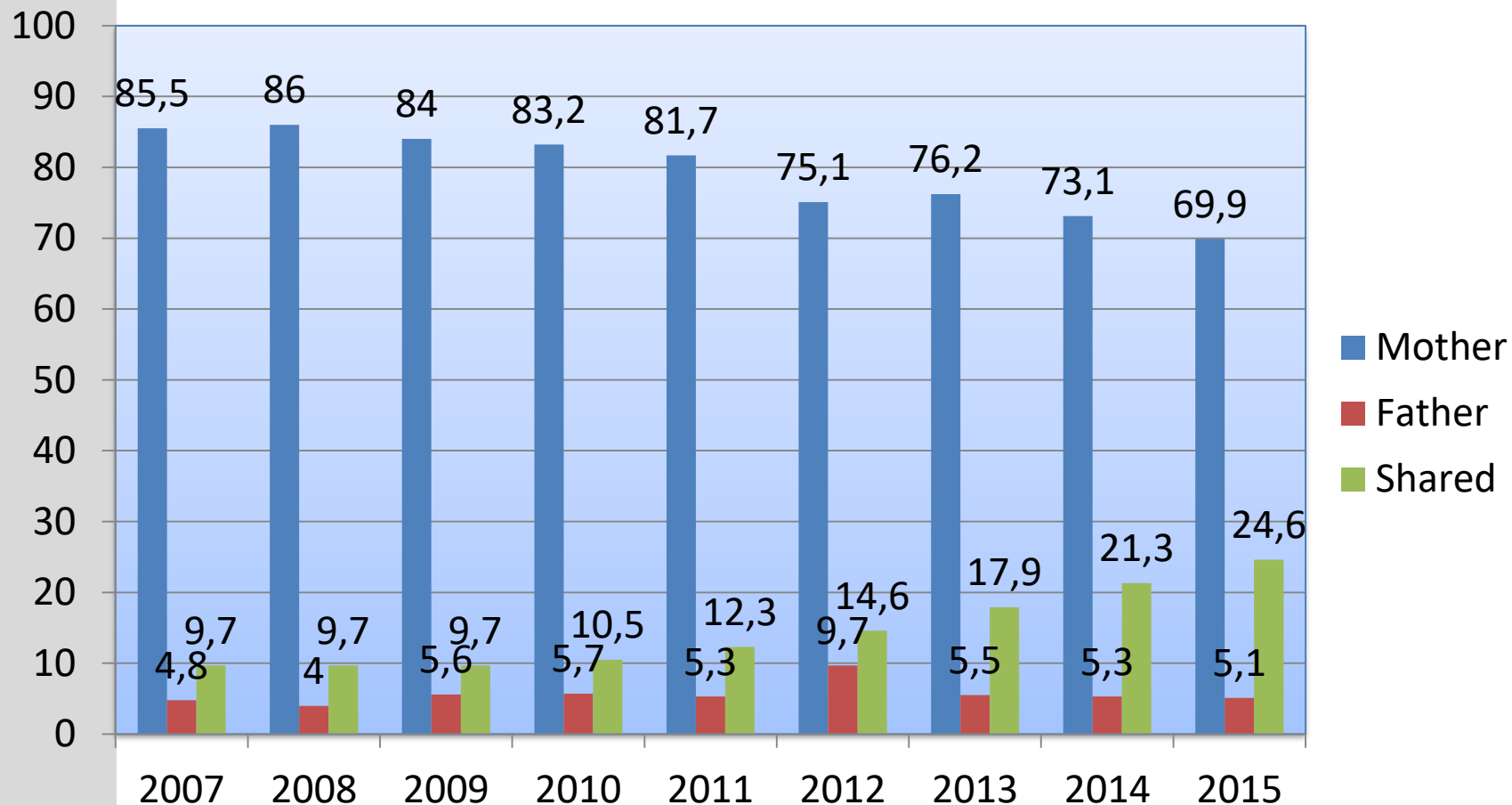
Instruction 1/2006 by the Public Ministry

- Where the child spends more time (annual count)
- If it is balanced:
  - Where the parents agree. If there is no agreement,
  - Judge will decide, taking into account where the child used to reside

# Child maintenance

Spain	Catalonia
Special rules as regards shared custody ? NO	Yes (art. 233-10.3 CCCat)
Courts apply art. 93 CC: Depends on economic circumstances and child's needs	“Shared custody does not alter the content of the duty of maintenance, although one must take into account <ul style="list-style-type: none"><li>▪ the time spent with each parent,</li><li>▪ the expenses each of them has assumed to pay directly”</li></ul>
Incentive to request shared custody? Erroneous idea that shared custody excludes maintenance	

# Who is awarded custody in Spain?



Source: *Instituto Nacional de Estadística*

# Current debate in Spain

- Should shared custody be the preferred option in Spain?
  - Trend seems favorable: Aragón, Basque country
  - No default position: Draft Bill 2014 (now abandoned), Navarra
- Need to regulate consequences of shared custody
- Is shared custody compatible with high parental conflict?  
Would it promote parental cooperation?

# Final remarks

- While shared custody may be the ideal option, it may not always be realistic
  - Economic or practical reasons: ie, when parents live far away
  - When parental conflict is high?
  
- Need for research
  - On the impact shared custody has on children
  - Is there an increase in requests for modification of measures after judgement?



**Thank you!**  
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