PREMARITAL AGREEMENTS ON THE MATRIMONIAL PROPERTY REGIME AND REGULATING A FUTURE MATRIMONIAL DISSOLUTION

By Luis Zarraluqui Navarro
Solicitor

Premarital agreements comprise two different kinds of agreements, i.e. those executed before the date of marriage and those executed after such date. However, both agreements may be granted together in the same document, or in different documents. In any case, the purpose of both agreements is precautionary and both are aimed at preventing the increasing difficulties arising both from marital coexistence and from the regulation of the consequences of break-ups. These problems are being aggravated by the fact that according to a study carried out by the ASSER-UCL Consortium at the request of the European Commission in 2002, more than five million nationals of the Member States are not living in their native country, a figure which reached fourteen million in year 2000 if we take into account citizens of other non-European nationalities. Naturally, the number of marriages within the European Community is in proportion with such numbers, to the extent that the Commission study shows that there are approximately 170,000 international divorces in the Union each, year, i.e. 16% of all divorces.

No doubt remains that the problems derived from the economic aspects of marital union occupy a prominent position within this conflict. The principal aim of all legal practitioners is to resolve conflicts in a peaceful manner, without the need for the Courts to intervene. With the aim of preventing these problems, or at least reducing them, we shall consider in this paper two marital agreements of special significance.

The first of such agreements, known as *Capitulaciones Matrimoniales* (Marriage Contract), is mainly aimed to determine the matrimonial property regime, whereas the second form of agreement aims to determine the personal and economic consequences of a hypothetical divorce between the contracting parties, and is signed before the relationship between the parties is affected by the consequences of their separation. This allows for more objectivity and a better balance, which can eliminate subsequent confrontations, if such a situation arises.

I.- MARRIAGE CONTRACTS

We must begin with two first considerations: the first being that in the systems based on or influenced by Roman law and the Code of Napoleon, marriage generates a unique patrimonial situation, known as an ‘economic regime’, which covers a whole set of rules which affect ownership, regulation and management of goods, income, and debts.

The Vienna Action Plan (1998) (OJ C 23rd Jan 1999) included among its priorities the creation of a European legal instrument for marital regimes. This was included among the provisions of the Council and the Commission (OJ C 12 15th January 2001). Subsequently the Commission drew up the Green Paper on the conflict of the laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition (COM (2006) 400 final).

Although matrimonial property regimes were excluded from the existing legal instruments before the aforementioned Green Paper was presented by the European

Commission, and although Council Regulation (EC) No 2201/2003 does not cover the patrimonial effects from separation or dissolution of marriage, it should be pointed out that the applicable law for matrimonial property regimes was regulated by the Hague Convention signed on the 14th of March 1978, which came into effect on the 1st September 1992. Such Convention allows the spouses to designate the law of the State most connected to their nationality, country of residence, and personal situation. However, this Convention has only been ratified by France, Luxembourg and the Netherlands.

But the applicable law is only the first of the unknown factors which affect these regimes, since this legal concept is not recognised in many judicial systems.

However, all laws regarding the aforementioned economic regime usually authorize, under different limitations and solemnities, the spouses to designate the regime which will apply to them from amongst those which each State recognizes and which are classified under concepts such as universal community property, jointly owned goods, regimes of the sharing of community property or the separation of goods; which, although included under identical headings, contain very different rules.

However, most States are aware of the fact that married couples frequently refuse to sign these contracts due to ignorance, failure or indifference, and have therefore established a subsidiary rule, which establishes a specific regime by default. The problem is that such subsidiary rule in the absence of a specific contract differs from State to State and is often difficult to understand and not precise enough, especially when it deals with the marriages of people of different or multiple nationalities, residences and home addresses.

This situation is even worse in the case of Spain, which has a unique legal concept called the "civil neighbourhood" ("*vecindad civil*"), which is an idea somewhat similar to nationality, although it refers to a regional territory. This is fundamentally complicated for the following reasons:

Firstly, the territorial scope of the rules applicable to the different civil neighbourhoods is often different to that of the current Autonomous Communities, for historical reasons. Secondly, one’s neighbourhood is changed merely by spending ten years in a different neighbourhood, without any formal declaration on the matter. There are, therefore, a large number of citizens who have a wrong idea with respect to their neighbourhood.

In any case, the difference in nationality, domicile and civil neighbourhood of the spouses requires the application of certain conflict rules which not only differ from one country to another, but also take into account factors which are difficult to determine or are unknown by the spouses. The fact that such rules provide different alternative scenarios undoubtedly complicates this issue even further. The evidence is that very often the spouses are unaware of their economic regime or get it wrong.

The difficulty to determine the subsidiary economic matrimonial regime leads to many errors because the law requires the spouses to declare their matrimonial regime in certain acts, including any acts related to real estate and the Real Estate Registry. Such a requirement is necessary because the matrimonial regime affects the capacity to dispose of or encumber assets, and also affects the nature of the community (i.e. Germanic or Roman community) created on such assets. However, one cannot prove what this regime may be before the Notary authorizing the relevant deed, since such a regime is not stated in writing or specified in any Registry or location whatsoever. The regime

may be evidenced by means of a certification of the Civil Registry and the Marriage Contract itself (except for the enforceability thereof), in the event that such regime has been agreed to, but not when the spouses have not executed any Marriage Contract and the regime is to be established by the subsidiary rules.

The aforementioned Green Book (section 2.5) provides that "it would be worth improving the publicity of matrimonial property regimes in the Union in order to guarantee legal certainty for all parties concerned, in particular creditors. It would also be desirable to exempt spouses from the obligation to renew the formalities regarding publicity about changes affecting their matrimonial property regimes each time they change their residence".

In addition to the serious problem of the lack of publicity of matrimonial property regimes, the issue becomes more serious if we consider that, regardless of which regime may be applicable, if such regime is to be applied under subsidiary rules in the absence of a Marriage Contract, not only may doubts emerge on how to determine such regime, but also there is no way to prove or furnish evidence of such regime. This involves an absolute lack of legal certainty both for the spouses themselves and for any third parties which may be deal with them.

In any event, marriage in all countries is a solemn and formal act, which must meet a series of obligatory requirements, so it would not seem difficult to add a further requirement which is most easily fulfilled; especially if we keep in mind the beneficial effects of a clear and express designation by the spouses, which would also oblige them to fulfil what is now one of the most heavily emphasised requirements to carry out any valid legal act: the requirement which stipulates that there must be informed consent. The only solution would be to impose on the spouses the obligation to designate, at the time of celebrating the wedding or a short time before, their matrimonial economic regime, specifically mentioning the applicable law, with this designation being later registered in the Civil Registry. Evidently, this would encourage spouses to inform themselves about which of the available options would most suitably accommodate their personal and economic situation, removing doubts and future conflicts, and further improving legal certainty vis-à-vis third parties.

II.- PREMARITAL AGREEMENTS

The spread of marital break-ups, the manifest inadequacy of certain legal provisions applicable to such situations and the lack of legal certainty which leads to a notorious unpredictability of judicial decisions have generated an ever-increasing desire to determine the consequences of marital dissolution before marriage.

The difficulties which have always converged on the signing of Marriage Contracts due to the spouses' failure to talk about financial issues at such times are linked in this respect to the problems of discussing and agreeing certain matters in anticipation of a marital rupture, conduct which seems improper right before the wedding. However, these agreements are becoming increasingly popular, and are often favoured by individuals who are about to get married but are still suffering the seriously harmful and most unjust effects - a least in their judgment - of a previous marriage. The runaway distortion of all the foundations and bases, both legal and social, of traditional marriage and the consequences of its rupture, together with the ever incipient doctrine and case-law on the matter, make it difficult to predict the scope and enforceability of such agreements. Therefore, we should examine the validity and enforceability of premarital agreements, in the light of the current Spanish legal system.

Abolishing the ban on agreements by and between spouses, Article 1.323 of the Spanish Civil Code permits the spouses to officially enter into any kind of contract containing all the stipulations, terms and conditions which they may think fit, without any other limiting factor than (according to Article 1255 CC) law, morality or *ordre public*. This option includes the possibility of agreeing, as a precaution, the situations of marital crisis concerning negotiable matters.

The point is to determine which of these agreements are valid and which are not because they exceed the limits of the law, of morality or of *ordre public*, thus affecting non-negotiable matters. On these occasions, at an international level, in practically all the countries surrounding us, there exists an uncertainty about how effective these agreements (which are becoming increasingly popular) actually are, in the event the marriage is dissolved. On the 1st of February 2004 the Bavarian Supreme Court provided an example of the reluctant attitude of the Courts when it comes to recognising the effectiveness of these agreements. On this date it declared the nullity of one of them, based on the inequality of the spouses, considering that the wife had inferior economic means to her husband, and therefore she did not have the chance to receive proper legal advice. This doctrine, as Doctor Jank-Domdey pointed out, puts at risk millions of agreements considered valid until that time.

However, eliminating the lack of legal certainty should be the goal of national and international legislative action, and regulating these prenuptial agreements aimed to foresee a matrimonial rupture should be the principal objective at a national and international level.

For this to happen, one must begin with the premise of the freedom to make an agreement, which is afforded to spouses or future spouses. In principle there is nothing in general terms which opposes the freedom to make an agreement, in a Marriage Contract or in any other document, on issues related to separation or divorce. The free exercise of the power to self-regulate any private relationships is recognised by Spanish doctrine and case-law, on condition, naturally, that all essential requirements generally established by law (Article 1261 CC) are met.

In this respect one should distinguish between agreements designed to determine:

A.- The consequences of the death of one of the spouses, known as succession agreements.

B.- The consequences of an eventual and unforeseeable marital dissolution.

C.- The effects of a separation or divorce which is imminent or in the process of regulation.

Let us exclude from these notes the last of the regulatory agreements concerning the effects of separation or divorce and focus exclusively on the previous two.

A.- SUCCESSION AGREEMENTS

The Spanish Civil Code, applicable on the Spanish common territory, i.e. the territory on which there exists no local or especially valid legislation, prohibits any succession agreements and any joint wills (Article 669 CC) and establishes the principle that final wishes may be revoked. In this sense, Article 1271(2) prevents contracts being made concerning future inheritance other than those whose aim is to carry out the division of wealth among the living and other such regulations, in accordance with the provisions laid down in Article 1056. In turn, Article 816 CC provides that any waiver or settlement concerning the future forced heirship between the testator and his or her forced heirs is null and void and the forced heirs may claim such heirship when the testator dies, although any assets received through such waiver or settlement must be deducted.

However, Article 9(8) CC – in connection with Article 10 CC – provides that inheritance due to death shall be governed by the national law of the decedent at the time of his/her death, whatever the nature of the goods and the location in which they are found; however, any regulations made in the will, and the beneficiary agreements organised in accordance with the national law of the testator or stipulator, will maintain their validity at the time when they are granted, even though it may be a different law which governs succession, provided however that the forced heirship must be adjusted to such different law. The rights attributed by law to the surviving spouse will be governed by the same law which regulates the effects of the marriage, always excepting the minimum inheritance of the descendents.

In accordance with this, it is necessary to look at the regulations of local and special legislation on this subject, which address this option in a different way. The Basque Country's civil local Law allows such agreements. Article 15(1) of the Catalonia Family provides that marriage contracts may include, in addition to the matrimonial economic regime, any provisions on inheritance and donations, and include any lawful stipulations and clauses as the parties may think fit. The Catalonia Code of Inheritance (Article 67) regulates the aforesaid designation of heir (*heredamiento*), defined as the contractual designation of the heir, and provides that such designation may only be granted in Marriage Contracts or by means of special power of attorney. Such designation may be granted in favour of either of the spouses or both; in favour of the children or descendents of the spouses, and mutually by and between the spouses. Only individuals of age may grant such designation. However, in order to grant such preventive designation, the capacity to marry will be sufficient. Any designation in favour of the spouses (Article 75) may be granted under condition to keep the economic unity of the family, and therefore, save where otherwise provided, the testator, the heir, and his or her respective spouses and common children will be under the obligation to unite their efforts under the direction and free administration of the testator and to contribute all their income and the income of their goods to the family community to better meet the needs of the household and its members. Such designation only confers the rights as contractual heir, which rights are inalienable and not subject to seizure. In connection with the aforesaid freedom to execute marriage contracts, Article 377 recognises the legality of any provisions on survival entered into by the spouses in such marriage contracts, whereby the spouse who outlives the other waives the minimum inheritance which would be awarded to him/her in the intestate inheritance of his or her non-pubescent child, and also the legality of any dowry or donation provisions, whereby the descendant who receives goods or money from a parent by way of payment for a future minimum inheritance renounces all possible supplement. Similarly, in Galicia, Article 117 of Law 4/1995 of the 24th of May provides that the waiving of inheritance can take place in a will, through the law and through beneficiary agreements regulated by such Law. Each spouse may grant the other, reciprocally or unilaterally, universal usufruct in widowhood. This may be done reciprocally in joint testament, in a marriage contract or in any other deed, and unilaterally in any form of testament, in a marriage contract or in a deed (Article 118(1)). Beneficiary agreements or contracts which are agreed in favour of one of the children or descendants will be valid, without further limitations than those concerning the right of the legitimate heirs (art. 128). Betterment clauses are of a very personal nature and may only be entered into by those who are of age, but the delegation of the power to make such betterment under a marriage contract will be valid (Article 129). Law 172 of Navarra establishes that through a beneficiary agreement one may establish, modify, extinguish or renounce the rights of succession *mortis causa* of an inheritance or part of it, in the lifetime of the person leaving it; inheritance agreements not granted in marriage contracts or in other public writing being null and void. In Ibiza and Formentera inheritance

agreements granted in marriage agreements (*espolits*) under a notarial deed will be valid and may contain any regulations *mortis causa*, for universal or single purposes, with substitutions, categories, *reservas*[1], waivers, clauses of reversal, charges and obligations which the grantors may establish (Article 72). In Aragon the law 1/1999 of the 24th of February concerning inheritance due to death refers to these agreements in Transitory Provision 7, which provides that the rules of the present Law with regard to effects, transfer of assets *inter vivos* and responsibility for transferred assets, and the rules on the effects of the revocation of gifts, will also be applicable to those inheritance agreements granted before such Law came into effect.

Therefore, inheritance agreements present no more difficulties than do those which are inherent in the system of sources of Spanish law, and show the need to amend the regulations on civil neighbourhood, and the changes and publicity thereof.

B.- AGREEMENTS CONCERNING THE CONSEQUENCES OF AN EVENTUAL DISSOLUTION

The Spanish family legislation of 1981, and particularly in Law 30/1981, on divorce, involved an spectacular step in the regulation of marital crises as, even though such Law still provided for separation or divorce based on culpability, it admitted the possibility of applying for divorce and, above all, of regulating the effects of dissolution by agreement between the spouses. In this manner such Law accepted the spouses' capacity to regulate the end of their life together and the effects of the same.

However, this possibility is subject to judicial approval in order to be set out in the judicial decision on divorce or separation. However - and this is most important – the Court may only refuse to approve such agreement in two events: "*If such agreement is detrimental to the children or seriously harmful to one of the spouses*." And the Law added a further condition which reflects the restrictive nature of such requirement: "*The court's refusal must be made by means of a judgment stating grounds"*, as compared with the court's approval, which does not require the stating of grounds. Also one can deduce the legislator's wish to grant efficacy to the wishes agreed by the spouses when in the case of refusal of any clause of the agreement the law provides that "*in such case, the spouses must submit a new proposed clause for the Judge's approval*". The judge will not immediately decide on the matter, but rather asks the spouses to submit a new proposal, thus giving a new opportunity for the agreement to come into effect. Therefore, this is an extraordinary supervision mechanism, because the law limits it to those events where the judge can refuse such clause, i.e. when the Judge determines that the clause is detrimental to the children.

With regard to the second possibility - that the clause may be seriously harmful to one of the spouses - this not really taken into consideration in practice. A harmful effect on one of the spouses may never be a reason to invalidate an agreement. Harm means a damage caused or a loss of profit; and the spouses, with legal capacity, are fully entitled to harm their own interest. Any waiver of rights or acquisition of obligations is harmful and is inherent to cost-free acts, which are legitimate and valid. The Spanish Supreme Court Judgment (STS) of 2 December 1987 accepted that alimony allowances may be validly waived, even if such waiver is harmful. The opposite position – to prohibit any harmful clause – would close the way to waivers based on generosity or, even, in certain cases, on dignity.

[1] *A term referring to a portion of the estate of a person dying without issue, which passes first to lineal ancestors and may not then be alienated from the direct degree of kinship where a better claim subsists*.

One must not confuse the effectiveness of agreeing on harmful aspects with the invalidity of the acts due to the absence of informed consent. This nuance is not reflected in Spanish law, unlike other legal systems which require the incorporation of a clause in the agreements representing that both parties have received information from an independent advisor.

Nevertheless, the divorce agreement, as approved by the Court, has full efficacy and, as Article 90 states, once approved its clauses "*may be enforced via enforcement proceedings*." Any clauses refused by the Court lack any efficacy, both (i) in the event the refused clause is replaced by the spouses by mutual consent, or (ii) in the event the court case is withdrawn by any spouse, in which case the court decision refusing such clause renders it invalid.

On the other hand, the validity and efficacy of an agreement not submitted for judicial approval is accepted by the law, although it is obvious that such agreement cannot be directly enforced by the courts. The STS of 22 April 1977 provided that there was no obstacle to the validity of such agreements, nor to their efficacy, because if such agreement has not been approved by a Court it has not been the subject of a judicial case and therefore has not procedural efficacy. In a similar direction, see the STS of 2 December 1988, quoting the STSs of 25 June 1987, 26 January 1993, 22 April and 19 December 1977, which provided that such agreements are valid, but were not enforceable by the Courts, as such enforceability is only granted by a judicial judgment.

However, a number of academic scholars have expressed a word of caution with respect to the possibility of regulating future situations, and ignoring the factual situation which may exist at the time of dissolution and which may condition the determination of the effects of separation or divorce on the personal and patrimonial position of the spouses and the children. This caution is particularly significant as it comes to the waiving of rights. An emblematic judgment for those who defend the prohibition to waive rights such as the rights to receive alimony payments where such waiver is made by the financially weaker spouse is the Judgment of the Asturias Provincial Court of 12 December 2000. This Provincial Court examined the matter ex officio and determined that such waiver was invalid, because it was made with reference to a future, hypothetical and uncertain right, which emerges at the time of the separation and is subject to the condition that separation creates an economic imbalance between the former spouses, which worsens either spouse's position in comparison with the position held by such spouse during the marriage. Such judgment provided that, pursuant to the Supreme Court's case-law, *"the waiving of rights must be made in connection with the rights recognized by the laws in force at the time of such waiver, but cannot be made in connection with the rights established and regulated in later laws* (*Judgments of 24 February and 30 March 1951, 18 December 1952, 21 January 1965)"*.

However, the STS of 15 December 2002 has established that the validity and binding effect between the parties of a waiver is not conditional on approval and authorization by the Court, as the Supreme Court, in its judgement of 2 December 1987, following an appeal for reversal in the interest of law, accepted that alimony payments may be agreed upon by the parties, and therefore, that any waiver of such alimony under a divorce agreement is valid and applicable.

The absence of general regulation means that doubt concerning this issue persists. In particular, a change of circumstances (which may render the agreement null and void pursuant to the *rebus sic stantibus* clause) does not affect the validity and the efficacy of a contract *per se*. Such clause, which the Supreme Court considers dangerous and to be applied with caution, requires, in any case, an extraordinary change in the circumstances of the time of application of the contract in relation to the circumstances prevailing at the date of

signature thereof, an exorbitant disparity, outside all estimation, between the obligations of the contracting parties, which truly breaks the contract by destroying the balance between their respective obligations; and all this should occur due to the occurrence of unforeseeable circumstances.

Such validity and efficacy are neither affected, under the principle of judicial protection for minors, if the application of the agreement to the minor may be harmful – not meaning less favourable than another clause from the judge's point of view, but meaning pernicious – and such application is therefore suspended or cancelled.

In any case, there is an obvious need to consider these agreements and to regulate them in order to prevent any risk of legal uncertainty. For such reason Article 15.1 of the current Family Code of Catalonia specifically provides for the free regulation of family relationships, and allows for the incorporation in marriage contracts of any lawful clauses and covenants regulating a future dissolution, thus clearing the way for the legal recognition of these *forward-looking clauses*, which already are beginning to have an impact on society.[2].

Along the same lines but going slightly beyond this, the Catalan Civil Code Proposal, amending the aforementioned Family Code, contains the wording of Article 231(20) 'Covenants regulating a future dissolution' recognizing the lawfulness and efficacy of such covenants, and clearly underlining the need to provide either spouse with previous and separate information both on the rights and of the financial position of the other spouse, further provides that such covenants must be solemnly granted, have reciprocal effects and are void in the event of change of circumstances existing on the date of grant thereof, and requires that such covenants are granted at least 30 days before the celebration of the wedding.

Therefore, pursuant always to the limits laid down in Article 1255 CC, the spouses may validly execute agreements regulating any future situations of matrimonial crisis related to negotiable matters.

Thus, under a marriage contract or not, the future spouses or either spouse after the wedding, may enter into any clauses related to their marital dissolution. The point at stake is the determination of which agreements are valid and which are not because they exceed the limits of the law, of morality or of *ordre public*, and affect any non-negotiable matters. We shall analyse these clauses.

1º.- Firstly, these premarital agreements may be aimed to limit the legal grounds for separation or divorce. Now that Spain's current legislation has eliminated the need to provide specific grounds for divorce, there are couples who may desire, for sentimental, religious, social or economic reasons, to limit or impose conditions upon such grounds. For example, they may prefer that there be a period of factual separation prior to divorce or that separation or divorce may only be possible in the event the husband commits certain acts. The State of Louisiana in the US authorizes the limiting of the grounds for divorce to those who marry in accordance with these regulations. Would a similar agreement be valid in Spain? The limitation of the right to separation or divorce by mutual agreement of the spouses is not contrary to law, because there exists no particular rule which prohibits it; traditional morals

[2] DGRN 19-6-2003 EDD 2003/112605 resolves the cases in which people attempted to write marital agreements which had as their exclusive content various stipulations with the assumption that in the future a judicial separation and/or divorce may take place, the DGRN considering that these future agreements in precaution against marital rupture should remain at the margins of the commercial register, without damaging their validity.

See also Article 3 of the Aragonese law for the regime of marital law 2/2003 of the 12th of February for Aragon's economic regime for marriage and widowhood.

are more in favour of this limitation than they are opposed to it; and the agreement does not have any effect vis-à-vis third parties because the parties in the agreement are the interested parties; other persons affected, such as the children, do not experience, in principle, different consequences due to the fact that the divorce may be more or less restricted. But there are still two obstacles, i.e. the *ordre public* and the non-negotiable nature of the matter. Evidently, any agreement which extends the legal grounds for dissolution would be affected by such obstacles. Such an agreement could also fall under the prohibition of Article 45 CC relating to the condition, terms, or manner of consent. But here we are referring to the waiver - at the maximum - or the limitation – at the minimum – of the right to apply for legal separation or divorce. Are such agreements to be considered as contrary to *ordre public* or having a non-negotiable nature?

This leads us to consider whether there exists a fundamental right to separation and divorce under the law passed in 2005, which deeply amended former regulations. Although separation and divorce are not included among fundamental rights, their denial may be considered contrary to *ordre public* and, consequently, the agreement would be null and void because it excludes separation or divorce for a specific marriage. But if we are talking about the grounds for separation and divorce, which according to the Spanish Constitution must e regulated by subsequent laws (not even basic laws), the restriction of such grounds does not seem to infringe any fundamental regulation.

2º.- Clauses relating to the future life of the spouses. -

Some spouses wish to limit the future freedom of the other spouse after separation or divorce, or to condition certain benefits on the carrying out of certain actions or the exclusion of subsequent acts or situations by the other spouse. This happens when one or both of the spouses attempts to prohibit the other from remarrying or living with anybody else in the future; or with another person of the same sex; or with a specific person or persons; or that the consequence of such acts is the loss or limitation of an specific benefit. Sometimes one of the spouses also wishes to prohibit the other from taking residence in a specific locality or region. These agreements would be null and void, without doubt, because they restrict the person's fundamental rights to get married, enter a de facto relationship or fix his/her residence freely. The agreement relating to specific consequences of similar acts is a different issue. For example, a clause providing that any new marriage or de facto relationship, either with specific individuals or with individual with specifics characteristics, will revoke a right such as the use of a property. If such a right is derived from an agreement between the interested parties, there is no reason why the parties may not restrict or impose conditions on the start or continuation of this contractual right, as long as the conditions are not in conflict with the law or with morality.

3º.- Clauses relating to children.-

A universally accepted principle provides that that all measures which affect minors must be taken for their benefit and that everything agreed or undertaken will be invalid if it results in harm to them. Regardless of the difficulty of knowing exactly what is better or worse for a child, there are two important issues which arise here: How far the legal capacity of the parents, with parenting rights or parental responsibility over the children, extends to making agreements on their behalf; and which is the body of public control over the actions of the parents.

First of all, parents jointly hold parenting rights, which they jointly exercise or which one parent exercises alone, with the express or implicit consent of the other, or even without such consent according to generally accepted customs or in circumstances or situations of urgent need (Article 156 CC). Only in cases of discrepancy the parents can turn to the judge

to resolve the disagreement. If no disagreement exists, both parents amicably take all decisions they may think fit regarding their children. The parents may fix or change their children's residence, enrol them in school or change their school, consent to medical or surgical treatment, and organize their education and training. If the parents separate, they usually maintain joint parenting rights; however, the judge becomes involved in these decisions and the *Fiscal* (public attorney) intervenes to theoretically defend the interests of the children, whom he or she does not remotely know. But the issue in question concerns the parents' ability to make a valid agreement concerning underage or handicapped children.

We must begin with Article 156 CC which consecrates the exercise of joint parenting rights, with full efficacy not subject to any condition or limitation whatsoever. In addition, Article 159 CC provides that *"if the parents live separately*" – regardless of the grounds for separation - the judge will only decide with whom the underage children will live, if the parents *"do not decide by joint agreement."* Conversely, this means that if they take a joint decision, then such decision will be applicable.

If the family is broken up, Article 90 CC allows the parents to agree on the custody of the children and any future visitation regime, as well as other aspects related to them, under the separation or divorce agreement. Such agreement requires judicial approval, but the judge does only carry out an extraordinary control, only in those cases where the agreement is detrimental for the child. In this case only, the judge may overrule the agreement, and in such case the judge must duly provide the reasons therefore[3].

It is true that Article 751(1) of the Civil Procedure Act (hereinafter, the "CPA") establishes that neither the waiver, nor the admission, nor the settlement will have any effect on the proceedings regulated under Title I of Book IV thereof, including separation and divorce proceedings. Also Article 1810 establishes that in order to compromise the goods and rights of the children under parenting rights the same rules will apply as with transferring them, that is, the restrictions of Article 166 referring to property, commercial or industrial establishments, precious objects and securities are to be applied, and just cause and judicial authorization are required for such purpose. It is also true that Article 151 CC prohibits the waiving of the right to alimony and Article 1814 CC prohibits any compromise on future alimony. But it is equally true that section 3 of the same Article 751 LEC provides that *"notwithstanding the sections above, any petitions submitted in the proceedings regulated under this Title and whose subject-matter may be freely agreed upon by the parties, according to the applicable civil legislation, may be waived, admitted, settled or withdrawn, pursuant to the provisions laid down in Chapter 4, Title I, Book 1 of this Act."* This means that we return once more to the same starting point concerning the contractual availability or unavailability of decisions affecting children adopted by the parents while exercising their parenting rights.[4]. On the other hand, the concepts of *"waiver, admission and settlement"* are related to cases where there is a conflict between the position of each party, unlike the case we are referring to here, where there is a prior covenant or agreement between the parties.

The law does not permit the judge to refuse to approve the parents´ agreement, unless such agreement is harmful to the children. But once more we must ask ourselves: when does such harm exist, and how can the judge be aware of it? Usually parents know the most about their children and are those who love them most and worry the most about their wellbeing. Even so, a number of judges or public attorneys who fiercely defend their powers to

[3] See Article 77 CC, in relation with Article 76.1 of the Family Code of Cataluña.

[4] Regarding alimonies, one must keep in mind that in marital agreements the subject of the agreement is not the alimony of the children, which is integrally contained, but the contribution of one partner or the other to their benefit, which is very different. Regarding this see the STS of the 24.4.2000 (González Poveda).

intervene, when it comes to visitation rights, only intervene if the parents have not reached an agreement, thus approving the parents' subsequent agreements on the matter.

4º.- Clauses relating to the use of the family dwelling. -

The use of the family dwelling is one of the thorniest issues in separation cases. The issue gets worse if they have children. The Spanish Civil Code improperly provides that the custody of minor children is the only criterion for the judge to attribute the use of a dwelling to a spouse and, if the children are young, the continuation of the use of the property until such time as they become economically independent magnifies the problem. There are many future spouses who have had disagreeable experiences in previous separations. They have been dispossessed of their houses and often have not recovered them when they move to a second relationship and perhaps think of how their ex-spouse shares this dwelling with his or her new spouse. Article 96 CC, which determines what happens *"in the absence of an agreement between the spouses as approved by the judge"*, provides that the use of the dwelling will be attributed, in the first place, to the children; and, secondly, to the parent who is entitled to custodial rights. This Article goes from such determination without any nuance or exception to provide that if some children stay with one spouse and others with the other spouse, *"the appropriate decision will be taken"*. This legal provision is a paramount example of what a legislator should never do. It does not even include a mere guideline (as the one set out in Article 103 CC, which mentions the 'interest to be protected the most' with respect to provisional measures). The Article only mentions an "appropriate" decision.

Is the use of the family dwelling a negotiable matter? And therefore are the preventive or regulatory agreements concerning the dissolution fully effective? Of course, when no children exist, any agreement has an impact on the financial position and only on such position and, consequently, the agreement is valid and operative. But what happens when there are underage children who are or may be beneficiaries of the right to use dwelling? In united families, changes of dwelling take place, due to a change of use, economic or health problems, the need for more or less space, etc. And nobody is concerned by these changes. Why is the situation different in the case of marital dissolution? Are these agreements effective without the need for judicial approval or is such ratification essential? Should the judge have the opportunity to examine the situation in order to protect the interests of minor children? Pursuant to Article 96 CC which establishes the efficacy of the parties' agreement *"as approved by the judge",* one must lean towards this solution. The parties may also wish to establish a specific domicile so that one of them may reside there, alone or with the children. In this case, if it concerns a previous family dwelling, we will find ourselves in the aforementioned event (with certain nuances) and judicial approval will, then, be necessary. Conversely, if this concerns the fixing of a new domicile it may be freely agreed by the parties.

One of the issues which creates most concern is the possible occupation of the dwelling by the new partner - matrimonial or not - of the beneficiary of the right to use the property, including, sometimes, his or her own children or other relatives. Can the right to use the property be limited so that it is terminated if the new partner of the beneficiary moves in? It is true that the law only provides for the loss of alimony payments in the case of a new marriage, but it does not provide as regards the right to use the family dwelling, although many academics believe that the law should have provided so. However, whereas the use of the family dwelling is openly subject to negotiation, as long as the children are not left completely unprotected, it seems obvious that an agreement on termination of such use in such circumstances should be valid and effective.

5º.- Other financial agreements.-

As we have seen, such forward-looking clauses are more widely accepted by case-law and the academic doctrine. In fact, the Civil Code even forgot to mention the possibility of cancelling in the event that one of the spouses is damaged, in spite of the provisions laid down in Article 90 CC. However, we must not forget that Article 1328 CC establishes that *"any stipulation in contravention of the law or good customs or which limits the equality of rights which is afforded to each spouse is null and void."* Hence, upon the execution of a duly signed and accepted matrimonial property dissolution agreement, it is possible to initiate an action for revocation of an estate partition pursuant to Article 1076 CC, without the need to prove an error at the time of granting the relevant act. The principle of equality has been violated, and therefore the relevant legal act may be revoked upon request of a party. However, we must also point out that that this action for revocation can be waived, since the autonomy of will is the preferable standard. The STSs of 17 June 1944 and 13 October 1966 have already pointed out that the prohibition does not extend to consequences of a merely patrimonial nature arising from the civil status of specific individuals, because such consequences are of a private nature and do not affect *ordre public* or public interest. On the other hand, Article 6(2) CC allows for the "voluntarily exclusion of the applicable law and for the waiving of any rights arising from such law", provided that the exclusion or waiver do not conflict with the *ordre public* or interest or are detrimental for any third party, and that is undoubtedly not the case here.

As regards any act which involves the waiving of a future monetary right the STS, Division 1, of 22 of October 1999 provided that "*we believe that it should be possible to waive an expected right, because it is perfectly possible that in any future situation which may increase the assets of a person, such person should be able, in advance, to negotiate on such increase, within the scope of his or her contractual freedom".* The STS, Division 1, of 5 April 1997 reads as follows: *"... setting aside situations where one may waive a future right and that the waiver should be clear, explicit, unequivocal, final and leaving no doubt as to its meaning (...) there is no contract, nor bilateral legal agreement, but an unilateral one, setting out the wish to waive a right, or, in other words, an expected right protected by law."* The Judgment of the Madrid Provincial Court, of 22 June 2002, reads as follows: *"any waiver of the rights generally recognised by Article 6.2 of the Civil Code ('any voluntary exclusion of the applicable law and any waiver of the rights recognised in such law will only be valid where it does not conflict with public interest,* ordre public *or is not detrimental for any third parties'), as long as it does not conflict with public interest,* ordre public *or is not detrimental for any third parties, can be defined, in general, as a legal declaration of will whereby an individual removes from his own legal sphere a subjective right, expectation, power, claim, benefit, security, guarantee or legal position. There are three kinds of waivers, namely abdication, preventive waiver or acknowledgement, in connection with, respectively, an acquired, deferred or simply dubious or controversial right."*

For us, contractual liberty should be a top priority, as long as there are no issues related to law or *ordre public*, which is not the case here. The clear negotiability of alimony payments should cover the possibility a preventive waiver. The only condition which should be considered is that of the efficacy of the agreement, which on this matter, as on so many others, should contain a special requirement that consent be duly informed. On topics like this, the citizens are usually provided with scarce and often completely incorrect information.

In any case, it is necessary that the limits, forms and effects of agreements on future marriage dissolutions are regulated, in a harmonized manner at least for the Member States of the EU, to avoid a really alarming lack of legal certainty.