

# **FAMILY LAW & CASES DIGEST**

**Concerning divorce proceedings, paternal  
responsibility, custody and primary residential  
parent, child support, alimony and  
dissolution of conjugal partnership**

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## **I. Introduction**

This Family Laws & Cases Digest explain in detail the Civil Code provisions and its interpretative case law concerning to Family Law matters. We discuss specifically divorce proceedings, paternal responsibility, custody and primary residential parent, child support, alimony and division of community marital property.

## **II. The Divorce in Puerto Rico**

### **A. Introduction**

The Civil Code of Puerto Rico provides that a legitimate marriage can be dissolved only by: (1) the death of one spouse; or (2) by a legal divorce obtained by the one or both of the spouses.

Since 1978, Puerto Rico allows for two different procedures for a divorce. The first one is the traditional mechanism of an ordinary suit. This is a regular plaintiff-defendant suit, in which is required to prove one of ten motives or causes provided by our Civil Code in Article 96, 31 L.P.R.A. Section 321.<sup>1</sup> In

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<sup>1</sup> Article 96 of the Civil Code, 31 L.P.R.A. Section 321 provides the causes for divorce. These are:

- (1) Adultery on the part of either of the parties to the marriage.
- (2) Punishment by imprisonment of one of the spouses for a felony, except when said spouse receives the benefit of a suspended sentence.
- (3) Habitual drunkenness or the continued and excessive use of opium, morphine, or any other narcotic.
- (4) Cruel treatment or grave injury.

U.S. jurisdictions, this type of divorce is known as fault divorce.

The second procedure is the not fault divorce or mutual consent divorce, in which spouses request divorce to the court voluntarily. In these proceedings is not necessary to establish any cause of divorce entitled by our Civil Code.

## **B. Jurisdictional Requirements**

Each divorce has to fulfill all jurisdictional requirements established by Article 97 of the Civil Code, 31 L.P.R.A. Section 331.<sup>2</sup> Judgments on the pleadings or by summary judgments are not allowed on this kind of cases.

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(5) Abandonment of the wife by the husband or of the husband by the wife, for a longer period of time than one year.

(6) Absolute, perpetual, and incurable impotency occurred [occurring] after marriage.

(7) Attempt of the husband or wife to corrupt their sons or to prostitute their daughters and connivance in their corruption or prostitution.

(8) Proposal of the husband to prostitute his wife.

(9) Separation of both spouses for an uninterrupted period of more than two (2) years. After the separation for the expressed period of time of more than two (2) years has been satisfactorily proven, neither of the spouses shall be considered to be guilty nor innocent when the judgment is rendered.

(10) Incurable insanity of either of the parties to the marriage, supervening after the marriage, for a period of more than seven (7) years, when it seriously prevents the spouses living together spiritually, if such insanity is satisfactorily established at the trial by the opinion of two (2) medical experts; Provided, That in such cases the court shall appoint legal counsel to represent the insane spouse at the trial. The plaintiff spouse shall be under obligation to protect and to satisfy the needs of the insane spouse in proportion to his or her condition and fortune, as long as it is necessary for his or her support; Provided, further, That this obligation shall in no case be less than two-fifths ( 2/5) of the gross income which the plaintiff spouse may have from salaries, wages, or any other receipts.

In every divorce case, is necessary to examine the competence of the court, the conciliatory meeting, and the court's jurisdiction over the divorce.

**i. Court's competence**

The Superior Court and the District Court Section ("subsección de Distrito") can hear divorce cases. In the District Court's Section, the divorce can be a contentious one, called as "fault divorce", in which there are no children under 21 years old, and where the marital property does not exceeds \$50,000.00 dollars. Also, if the couple settles the division of marital

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<sup>2</sup> Article 97 of the Civil Code, 31 L.P.R.A. Section 331 provides that;

A divorce can be granted only in an action instituted in the ordinary manner, and by judgment rendered therein by the Court of First Instance. A divorce cannot be granted when the ground upon which it is sought be the consequence of an agreement or understanding between the husband and wife or an acquiescence of either to secure it.

No person can secure a divorce under this title who has not resided in the Commonwealth for one full year immediately preceding the action, unless the act or acts on which the suit is based have been committed in Puerto Rico, or while one of the parties to the marriage resided here.

Where the action of divorce is based on "cruel treatment or grave injury" or on "abandonment of the wife by the husband or of the husband by the wife, for a longer period of time than one year" and there are minor children had in the marriage sought to be dissolved by said divorce action, it shall be the duty of the court, before fixing a date for the holding of the trial, to subpoena the parties, if they reside in Puerto Rico, for a preliminary hearing or act of conciliation, over which the judge of the court shall preside in his chamber and the trial shall be held within the ten days following the above-mentioned summons; Provided, That if in the act of conciliation, either of the spouses shows his firm and irrevocable purpose not to resume marital relations, the presiding judge shall order the clerk to include the case in the special calendar.

property that exceeds the \$50,000.00 dollars limit, the District Court can hear the divorce.

On the other hand, every divorce by mutual consent that exceeds the \$50,000.00 limit for marital property, and there are no children under 21 years old or with legal incapacity, can also be heard by District Court.

All other divorces are heard by the Superior Court.<sup>3</sup>

**ii. Conciliatory meeting**

In divorce cases based on fault, such as abandonment or cruel treatment with children under age involved, and both spouses residing in Puerto Rico, the court must hold a conciliatory meeting. This meeting is mandatory because it is a jurisdictional requirement.

The third paragraph of Article 97 of the Civil Code, 31 L.P.R.A. Section 331, provides that;

[...]When the action of divorce is based on "cruel treatment or grave injury" or on "abandonment of the wife by the husband or of the husband by the wife, for a longer period of time than one year" and there are minor children had in the marriage sought to be dissolved by said divorce action, it shall be the duty of the court, before fixing a date for the holding of the trial, to subpoena the parties, if they reside in Puerto Rico, for a preliminary hearing or act of conciliation, over which the judge of the court shall preside in his chamber and the trial shall be held within the ten days following the above-mentioned summons; Provided, That if in the act of conciliation, either of the spouses shows his firm and irrevocable purpose not to

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<sup>3</sup> See *Serrano Geyls & Cancio González, Derecho de Familia de P.R. y Legislación Comparada*, San Juan, Puerto Rico, E.J.C., 1997, pp.680-682.

resume marital relations, the presiding judge shall order the clerk to include the case in the special calendar.

**iii. Jurisdictional statute**

Each action has to establish that;

1. Plaintiff or any of the petitioners reside in Puerto Rico during the year prior to filing the divorce action;
2. The cause or motive of divorce occurred in Puerto Rico;
3. The defendant lived in Puerto Rico when the cause or motive occurred.

The court has jurisdiction when any of the three situations mentioned above are proved. After the court determines jurisdiction, the grounds for divorce or the mutual consent proposal is examined. In divorce by mutual consent, the court's jurisdiction is determined by the general rule of one year's of residency by any of the petitioners.

The Puerto Rico's Rules of Civil Procedure, 32 L.P.R.A. Ap. III, Rule 62.2, provide meetings and procedures in cases of matrimonial dissolution, paternal relations, filiations, adoption, allowance for food and other necessities (alimony), and, custody or guardianship of minors. These meetings are

private, except when one of the petitioners wants it to be public.<sup>4</sup>

### **C. The most common divorce causes or motives**

Article 96 of the Puerto Rico's Civil Code, 31 L.P.R.A. Section 321, establishes the causes for a divorce. In the discussion that follows, we explained the most common grounds for divorce. These are: cruel treatment, abandonment, divorce by separation, and the divorce by mutual consent.

#### **i. Cruel Treatment**

This is a culpable "fault" and subjective cause. A cause and effect relationship is required. The motives are considered if the person made the cruel treatment with adverse effects to the person that received such treatment. The court, in the evaluation of this ground, should consider the following factors:

1. Determine if the intensity of treatment elevated the act to a cruel treatment basis.

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<sup>4</sup> See *Urrutia de Basora & Negrón Portillo, Reglas de Procedimiento Civil, Preguntas y Respuestas*, San Juan, P.R. E.J.C. (1996), pp.305.

Rule 62.2 of the Puerto Rico's Rules of Civil Procedure, 32 L.P.R.A. Ap. III, R.62.2 provides;

All hearings upon the merits shall be conducted in open court in a courtroom, unless the court decides otherwise due to the nature of the proceeding. All other acts or proceedings may be done or conducted by a judge in chambers, or in any other place, without the attendance of the clerk or of other officials.

- a. For this determination, it is necessary to evaluate all defendants' acts as a whole. Each and every act should be accumulated for the evaluation of whether cruel treatment exists. Examples of this kind of treatment are violence, physical and mental aggressions, and verbal offenses.
  - b. Plaintiff must establish that these acts affect negatively his or her physical and mental health.
  - c. Lastly, it must be shown that is impossible for the separate spouses to live together because the basic purpose of the marriage does not exist anymore.
2. Determine who are the persons involved and their particular circumstances. Examples are: the cultural environment, social and economic position, customs or practices, moral and religious beliefs, education and physical and mental situation of the persons involved.
  3. Demonstrate that negative conduct has the intention or purpose of bother and has caused harm to the person involved.

In Sánchez v. Torres, 123 D.P.R. 418 (1989), the Supreme Court of Puerto Rico held that conducts and acts made by the husband to his wife, which causes personal contempt, constitutes an attempt to her personal dignity. This type of harm includes

insults and verbal attacks to her self-esteem. The Supreme Court held that physical aggressions, as the one explained above, are sufficient to show cruel treatment.

In Rosado v. Rivera, 81 D.P.R. 158 (1959), the Supreme Court held that for cruel treatment cause in a divorce, it should occur during marriage. If the acts happened before marriage, cruel treatment cause cannot be used to obtain a divorce.<sup>5</sup>

#### **ii. Abandonment**

This is a culpable "fault" ground for divorce. In González v. Santiago, 84 D.P.R. 366 (1962), the Supreme Court held that where the action of divorce is based on the ground of abandonment, it is not committed with the initial act of the separation. It is not until the period of time fixed by law has elapsed that the definite cause which gives rise to the divorce is perfected.

About the definition of desertion, in Gómez v. Trujillo, 59 D.P.R. 47 (1941), the Supreme Court determines that desertion as a ground for divorce does not merely mean the separation of the spouses; it means the firm and deliberate will of one spouse to

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<sup>5</sup> In Romero v. Morales, 134 D.P.R. 734 (1993), the Supreme Court held that in Puerto Rico's jurisdiction does not exist a torts legal action in favor of the innocent spouse on a cruel treatment case, against the guilty spouse's adulterer.

abandon the other. The firm and deliberate act is called the nolation act of the spouse.

In Parés v. Echandi, 55 D.P.R. 156 (1939) it was held that the term of one year is counted, not from the moment in which the spouses separate, but from the moment of the nolation or, that is, from the time that a spouse declares his express, firm and decided intention to abandon the other spouse. In this case it appears from the evidence that the nolation was manifested weeks after the date of May 4, 1937, on which the defendant left, and that the complaint was filed on May 5 of the following year. The Supreme Court concludes that the year of abandonment required by law had not passed when the complaint was filed. Abandonment is counted until the moment of the nolation act of the other spouse, and it has to occur for more that an uninterrupted year.

In sum, the elements that should concur in the abandonment cause are:

- a. The intention to terminate the marriage;
- b. More than an uninterrupted year, until the moment of the nolation act of the other spouse;
- c. Voluntary and unilateral. It cannot be provoked by one or by both of the spouses. Also, it cannot be a concerted activity with mutual consent of both spouses.

- d. The court's decision will held an innocent spouse, who is the abandoned spouse, and a guilty spouse, which is the abandoning spouse.
- e. Abandonment means no physical contact, neither sexual relations between spouses.

### **iii. Divorce by separation**

According to *Zanón Masdeu*,<sup>6</sup> marital separation means the end of life in common between the spouses, either by unilateral or bilateral agreement, permanently or temporarily, and without the intervention of judicial authority. From this definition, one may infer as an immediate consequence that actual separation presupposes the following elements:

1. An objective element: the absence of cohabitation between spouses;
2. A subjective element: the animus, or unilateral or bilateral intention of the spouses to end their life in common and, consequently, all marital relations.

The spouses must discontinuance their marital life with the intent to end their life in common. *Puig Brutau*<sup>7</sup> affirms: "[O]ne must bear in mind that mere physical estrangement by the spouses does not imply a true cessation of marital cohabitation, but

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<sup>6</sup> *Zanón Masdeu, L. La Separación Matrimonial de Hecho*, Barcelona, Hispano Europea (1974), pp. 22.

rather, the separation must be carried out with the intent to end their life in common.”

The requirements for a divorce by the ground of separation are:

- a. The intention of separation. The intention should be real, by an uninterrupted term of more than 2 years since the physical separation.
- b. The decision of separation can be unilateral or bilateral, but always voluntarily.
- c. The separation has to be in public notice. The separated couple cannot live on the same home.<sup>8</sup>
- d. The separated couple can accomplish their rights and duties as spouses. However, they cannot practice cohabitation or sexual relations. One separate sexual relation may not interrupt the separation term of two years. In separation divorces, both spouses are innocent.

#### **iv. Divorce by mutual consent**

In this type of divorce, both petitioners request under oath to the court their intention to get divorced and the inexistence of any of the grounds for divorce. This decision has

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<sup>7</sup> *Puig Brutau, J. Fundamentos de Derecho Civil*, Tomo IV, Barcelona, Bosch 2da Edición 1985, pp. 60.

<sup>8</sup> See, *Cosme v. Marchand*, 121 D.P.R. 225 (1988).

to be voluntarily and freely made by the couple, without coercion by one of the spouses to the other.

The spouses need to stipulate everything that is related to an adequate protection of each petitioner. These stipulations include the paternal relationships, if children are involved, and their child custody and support.

Also, it is necessary to stipulate the division and the separation of marital property and all the circumstances that appear during the divorce process.<sup>9</sup>

In Igrávidez López v. Ricci Asencio, 98 J.T.S. 143 (1998), the Supreme Court held that stipulations in a case of divorce by mutual consent constitutes a judicial settlement, because the civil action is ended and mutual agreements are established by the parties, with the court's consent and approval. When one of the parties fails to comply the agreement in the separation of the marital property or conjugal partnership, the Rules of Civil Procedure allows the affected party to request the execution of the judgment by the court. Thus, the affected party cannot begin an independent or new civil action against the party that fails to comply with the agreement. If a party files a new action, it would have the effect of the res judicata doctrine, which is

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<sup>9</sup> See, Figueroa Ferrer v. E.L.A., 107 D.P.R. 250 (1978).

defined as an issue that has been definitively settled by judicial decision. It is an affirmative defense barring the same parties from litigating a second lawsuit on the same claim.<sup>10</sup>

During trial, both parties are questioned about their voluntarily decision to seek a mutual consent divorce. Stipulations made concerning to paternal relationships, or allowance does not constitute *res judicata*. The court can revise these stipulations if one of the petitioners requests it. The court evaluates the present circumstances and the possible changes that occurred since the original stipulation. Thus, the court cannot grant a waiver for a revision on these stipulations.

#### **D. Temporary measures during divorce**

The temporary measures during the divorce procedure known as *pendente lite* measures provide a guarantee in the accomplishment of the obligations by the court's orders. These *pendente lite* measures are only effective during the divorce procedure. Once the court grants the divorce, these *pendente lite* measures are eliminated without further order from the court. The *pendente lite* measures include;

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<sup>10</sup> The three essential elements are (1) an earlier decision on the identical issue, (2) a final judgment on the merits, and (3) the involvement of the same parties in privity with the original parties. See, *Garner, Black's Law Dictionary*, West Group 1996, pp. 546

1. Allowance for food and other necessities between spouses and to their children (alimony);
2. The establishment of a domicile;
3. Family assets;
4. Paternal relationships.

**i. Allowance for food and other necessities between spouses (Alimony)**

Article 100 of the Civil Code, 31 L.P.R.A. Section 343, provides a remedy to the affected spouse that does not have sufficient economic resources for living, an allowance for food and other necessities (alimony) during the divorce procedure.<sup>11</sup> This remedy is provided in situations in which the community property of the couple does not constitute sufficient economic resources or if the couple made pre-nuptial agreements. In such cases, the court would order to the other spouse to pay alimony in proportion to his/her properties and income, in accordance to the social status of the person. The only evidence required is the economic incapacity of one of the spouses. The court can only grant alimony when the affected spouse requests it.

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<sup>11</sup> Article 100 of the Civil Code, 31 L.P.R.A. Section 343 provides that;  
If one of the spouses has not sufficient means to provide for his or her maintenance during the suit, the Court of First Instance shall order the husband or wife to pay the other party for his or her separate maintenance in proportion to his or her means.

However, if the couple voluntarily stipulates the alimony payment, the court does not have to intervene.

The allowance can be requested in the same action or in a separate motion. If the spouse shows that is a creditor of the alimony, the court will grant the allowance from the moment of his/her request. This temporary alimony responsibility concludes when the case is resolved, even though there is a divorce or not.

If the community property of the couple has assets, the court could order, by petition of one of the spouses; (1) the co-administration of the goods, (2) the access to one particular good or property, (3) specific amount of money for the quantity of that particular property, or (4) alimony order that does not constitute a debt to the spouse participation in the community property of the couple. In such cases, the petitioner does not have to show his/her necessities during the divorce, except when the spouse requests some specific amount of money that is equivalent to more than a half of the total monthly income of the community property of the couple.

In Suria v. Fernández Negrón, 101 D.P.R. 316 (1973), the Supreme Court held that the action to collect or demand alimony already accrued, that is, the delay in the payment of alimony previously claimed and granted, prescribes by the aforesaid term of five (5) years contained in the first paragraph of Article

1866, 31 L.P.R.A. Section 5296 of the Civil Code. This term arises from the date on which each installment of the alimony should have been paid.

**ii. Child support**

In concern to child support assigned by the court to children under age of 21 years old, the parents' obligation never ends until the children become of legal age.<sup>12</sup>

In Ríos v. Calvo, 23 D.P.R. 378 (1916), the Supreme Court held that the parent that has the custody, is entitled to bring an action for maintenance from the moment the action for divorce is commenced. The only question to be disposed is whether or not provisional maintenance shall be allowed in view of her necessities and the property of the husband or wife. Thus, the alimony would be established since the moment that was requested.

If petitioner requests the alimony payment before the formal request was made, he/her has to demonstrate to the court extraordinary circumstances that cause this necessity. The alimony assigned by the court to the parent, upon the

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<sup>12</sup> Public Law No. 59 of July 18, 2001 provides for the Derogation of Article 3, which reduced the majority age to 18 years old in the Rights and Duties of the Minor. This derogation re-establish Article 247 of the Civil Code, 31 L.P.R.A. Section 971, which provides:

Majority begins at the age of (21) twenty-one years.  
A person having attained the age of majority is capable of executing all the acts of civil life, with the exceptions established in special cases by this title.

institution of a divorce suit, is a temporary measure, which must cease as soon as the case is determined by a final and unappealable judgment.<sup>13</sup>

### **iii. The establishment of a domicile**

Generally, the domicile is established by an agreement made by the newly divorce couple. The law does not require a conjugal domicile during the divorce. Therefore, the spouse has to request an individual domicile to the court if he or she wants to eject the other spouse from the marital home.

### **iv. Family assets**

The law provides that marital community property of the couple does not finish during the divorce action. Article 101 of the Civil Code, 31 L.P.R.A. Section 344, provides that after the divorce action is filed, any debt or obligation acquire by any of the spouses, would not be a responsibility of the marital community property of the couple.<sup>14</sup> Article 101 applies if the court does not authorize such expenses. Thus, once the divorce is filed every debt or obligation incurred by the spouses without the courts consent, will be classified as a personal debt and not responsibility of the marital community.

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<sup>13</sup> See, Rodríguez v. District Court, 71 D.P.R. 723 (1950).

<sup>14</sup> Article 101 of the Civil Code, 31 L.P.R.A. Section 344 provides;  
From the day the proceeding of dissolution begins no debt contracted or transaction made by either of the spouses, chargeable to the community property, shall be valid without authorization of the Court.

Other way that guarantees the assets of the marital community property is a request to the court to freeze these mutual assets, until the divorce is concluded. This measure avoids the possibility of transactions made by the spouses with the marital community patrimony without the court's permission.

**v. Parental relationships and Custody (Primary Residence)**

Article 98 of the Civil Code, 31 L.P.R.A. Section 341, establishes that; if there are children procreated in the marriage whose provisional custody is claimed by both spouses, the Court shall summon the parties in the divorce suit under admonition of contempt, for an urgent hearing of priority handling. The court also shall hear such evidentiary and documentary evidence they may present, and based on the evaluation and consideration thereof, and in the best interests and welfare of the children involved in the dispute, shall grant provisional custody of the child or children to one of the spouses while the divorce suit is tried and adjudged. In addition to the above, the Court may adopt any measure that is needed to adjudicate custody for the welfare of the children.

As we can notice, this Article does not induce to a preferential treatment to the mother in such cases. This provision was approved with the intention of eliminating any

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discrimination by sex in custody cases. In such cases, primary residential parent will have the custody.

### **E. Reconciliation**

Article 103 of the Civil Code, 31 L.P.R.A. Section 361, provides the extinction of the divorce action by reconciliation.<sup>15</sup> If reconciliation occurs, plaintiff cannot continue with the divorce action. However, plaintiff could start another action by motives that occurred after the reconciliation occurred. In such case, the plaintiff could argue one of ten causes of divorce, as provided by Article 96 of the Civil Code, 31 L.P.R.A. Section 321.

### **F. The Effects of the Divorce**

The divorce produces the following effects;

1. The dissolution of the marriage;
2. The division of the marital community property of the couple. However, if the community is not dissolved, the goods will be on co-ownership classification. In Soto v. Colón, 97 J.T.S. 74 (1997), the Supreme Court held that

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<sup>15</sup> Article 103 of the Civil Code, 31 L.P.R.A. Section 361 provides;  
An action for divorce shall be lost upon the reconciliation of the parties, whether said reconciliation occurs after the act, which might have been the cause for the divorce, or after the action has been brought.

after a divorce, if the husband or wife obtains exclusive control of the dissolved marital community property, the ex-wife or the ex-husband has all the legal rights under the legal community provisions, provided by the Civil Code.<sup>16</sup>

3. Both parties are free to get married again.

4. The assignment of alimony between ex-spouses, child support, paternal responsibilities, custody and primary residential parent.

#### **A. Alimony between ex-spouses**

Article 109 of the Civil Code, 31 L.P.R.A. Section 385, regulates the alimony between ex-spouses. This Article establishes that any spouse after the divorce is ordered, can request alimony to the other ex-spouse if he or she has the necessity to do so. The court will discretionally grant this request, after appraising these factors;

1. Agreements between ex-spouses.

2. Age and health conditions.

3. Profession and the possibility of obtaining a job.

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<sup>16</sup> Article 326 of the Civil Code, 31 L.P.R.A. Section 1271, provides;

When the ownership of a thing or of a right belongs undividedly to different persons, it is held to be owned in common.

In default of contracts or of special provisions, the common ownership of property shall be governed by the provisions of sections 1271-1285 of this title.

4. Family responsibilities.
5. Collaboration in the economic activities of the other ex-spouse.
6. Duration of the marriage.
7. Economic status and necessities of the other ex-spouse.
8. Any other significant factor.

This alimony can be modified when the circumstances change. Circumstances such as the income will be evaluated for the modification of the original alimony. However, the court can annul the alimony if it is unnecessary, if the ex-spouse gets re-married and if the ex-spouse lives in public concubinage.

The 1995 amendment to Article 109 of the Civil Code, Section 385, introduced these changes<sup>17</sup>:

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<sup>17</sup> Article 109 of the Civil Code, 31 L.P.R.A. Section 385 provides;

If any of the spouses does not have sufficient means for subsistence once the divorce is decreed on any of the grounds established in § 321 of this title, the Court of First Instance may assign alimony, [at] its discretion, from the income, earnings, salary or property of the other spouse.

The court may grant said alimony, taking into account any of the following circumstances, among others:

- (a) The agreements reached by the former spouses.
- (b) Age and state of health.
- (c) Professional qualifications and likelihood of access to employment.
- (d) Past and future commitment to the family.
- (e) Participation with regard to work in the commercial, industrial or professional activities of the other spouse.
- (f) Duration of marriage and marital cohabitation.
- (g) Financial wealth and means and the needs of each of the spouses.
- (h) Any other factor deemed appropriate within the circumstances of the case.

Once the alimony is fixed, the judge may modify the same on the grounds of substantial changes in the situation, income and wealth of

1. It eliminates the requirement of innocence in a divorce order held by court for the request of alimony. Therefore, both ex-spouses can request alimony at any moment.
2. It eliminates the maximum amount of 25% of economic income that was imposed to the ex-spouse that pays the alimony.
3. It eliminates the cause of "licentious way of life", as one of the motives for termination of alimony.
4. It eliminates the erroneous conception that placed the ex-wife as the only person that can request alimony. Now, as decided in Milán v. Muñoz, 110 D.P.R. 610 (1981), the ex-husband may request alimony.
5. It establishes the specific factors that will be considered when alimony is requested.

The right of the ex-spouse to request the post-divorce alimony never prescribes. The action of collecting the alimony that was established and was not paid, prescribes in (5) five years. Is necessary for the provider to invoke this

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one or the other spouse. Alimony shall be revoked through judicial decision if it becomes unnecessary, or if the divorced spouse entitled to such alimony contracts a new marriage or lives in public

statute. On the other hand, if alimony is established to one of the ex-spouses without a previous separation of the marital property, both amounts cannot be requested as credits against the marital community property.

In Toppel v. Toppel, 114 D.P.R. 16 (1983), the Supreme Court held that assignments of alimony to the ex-spouse falls within the court's discretion in its analysis of Article 109 of the Civil Code. In sum, a divorced spouse is entitled to receive alimony when (a) he or she is the innocent party in a divorce suit, (b) he or she establishes that does not has sufficient means of subsistence, and (c) he or she establishes that her or his ex-spouse has sufficient income, earnings, salary, or property to support the ex-spouse.

In Cantellops v. Cautiño, 98 T.S.P.R. 136 (1998), the Supreme Court decided that, even though the divorce by mutual consent is established by case law and, therefore, is not included in the grounds for divorce established in Article 96 of the Civil Code, it is not excluded from Article 109 in the establishment of alimony. Once the divorce is ordered, no matter by which cause or by mutual consent, there is a right to request alimony if all requisites of Article 109 are met. The court reasoned that it would be unconstitutional if the spouses

divorced by mutual consent were excluded from requesting alimony, as established by Article 109 of the Civil Code.

In Román v. Mayol v. Superior Court, 101 D.P.R. 807 (1973), it was established that a divorced wife's right to alimony can be made effective against the disability pension, which her ex-husband, a federal ex-employee, receives, from the Government of the United States. For the purposes of 5 U.S.C.A. Section 8346 provision, which exempts a federal pension from "execution, levy, attachment, garnishment, or other legal process", by claims raised by third parties; "other legal process" refers to current obligations originated in private contracts which may give rise to attachment, foreclosures, or garnishment, but it does not include by implication the obligation of an ex-husband to furnish alimony to his divorced wife.

In Martínez v. Rivera, 116 D.P.R. 164 (1985), the Supreme Court held the validity of partial or total payment of alimony by the social security payment. The provider can satisfy the alimony responsibility when he/she receives the social security pension. Also, the Supreme Court determined that all judgments and resolutions concerning alimony accrue interests by late payment, and it is computed from the moment in which the

judgment was entered. The Rules of Civil Procedure provide that interests will be accrued based on the market interest.<sup>18</sup>

In Colón v. Ramos, 116 D.P.R. 258 (1985), the Supreme Court points out that in a divorce judgment, alimony can be established in default of the defendant. Therefore, if the plaintiff requests and shows his/her need for alimony, as provided by the Civil Code provisions, the court may order the alimony. In sum, the non-appearance of defendant is subject to an order of execution of the alimony judgment.

In Magee v. Alberro, 126 D.P.R. 228 (1990), the Supreme Court explains how stipulations operate when alimony is agreed. In this case, the ex-spouses agree that the ex-husband would pay

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<sup>18</sup> See Cuevas Segarra, J., Tratado de Derecho Procesal Civil, Publicaciones JTS, (2000), pp. 740-749.

Rule 44.3 of the Civil Procedure Code, 32 L.P.R.A. Ap. III R. 44.3 provides;

(a) Interest, at the rate fixed by regulation by the Finance Board of the Office of the Commissioner of Financial Institutions in effect when judgment is pronounced, shall be included in every judgment ordering the payment of money, to be computed on the amount of the judgment from the date it was pronounced and until paid up, including costs and attorney's fees. The interest rate shall be stated in the judgment.

The Board shall periodically fix and review the interest rate on judgments, taking into consideration the market's fluctuations, with the objective of discouraging the filing of frivolous claims, avoiding unreasonable delay in compliance with the existing obligations and stimulating the payment of judgments as soon as possible.

(b) Except when the defendant is the Commonwealth of Puerto Rico, its municipalities, agencies, instrumentalities or officers acting in their official capacity, the court will also impose on the party that has acted rashly the payment of interest at the rate fixed by the Board by virtue of the previous subsection which is in effect at the moment the judgment is pronounced, from the time the cause of action arises in every case of collection of money and from the time the claim is filed in actions for damages until the date judgment is pronounced, to be computed on the amount of the judgment. The interest rate shall be stated in the judgment.

the ex-wife the alimony for life, if she did not get re-married. After a couple of months, the husband requested a revision of the alimony because he could not pay the amount that had been agreed. The court held that alimony could not be modified solely by the request of the husband without any evidence of a change in substantial economic circumstances that affect the provider. In sum, the alimony modification agreement is based only if substantial economic changes occur. Moreover, the court decides that all alimony modification agreements that are subjected to some conditions have to be expressly subscribed in such agreement.

Also, as explained before, the 1995 amendment to Article 109 of the Civil Code eliminates the top amount of 25% income that was imposed to the ex-spouse that subscribes the alimony agreement. This 1995 amendment establishes no limits for the imposition of a quantity in alimony agreements.

## **B. Child support**

### **i. Pendente lite measures**

In every divorce case in which there are minors, the court will establish by order, a child support payment to the father or mother that does not has custody of the children. In Rivera v. Rodríguez, 117 D.P.R. 616 (1986), the Supreme Court

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establishes the term for request alimony assigned that was not paid. This term is five years after the minor reaches the legal age. However, parental obligations in alimony are not concluded solely because the minor reaches legal age. The parent responsible for the payment of the alimony should request the court that ordered the payment, the discontinuance of this responsibility. If the parent ceases to pay the alimony without the formal request to the court, it could be subjected to civil contempt with the imposition of civil sanctions. Also, the court can impose the payment of all the debts that have been accumulated.

**ii. After the Divorce is held by the Court**

The right of the children to receive support from their parents does not end with their parents' divorce. The obligation of both parents to support their children persists even after the dissolution of the marriage bond. This obligation continues "even when, by court order, the minor has been placed in a foster home or when, for purposes of protection, the minor is in custody of another person or a public or private agency or institution", as provided by Section III, Article 4 of the Special Child Support Act. The obligations of the conjugal partnership include, among others, the "support of the family

and the education of the children begotten in common and of those of either of the spouses".<sup>19</sup>

*Manresa*<sup>20</sup> in his comments to Article 1.408 of the Spanish Civil Code, equivalent to our Article 1308, 31 L.P.R.A. Section 3661, says:

Pursuant to law, the conjugal partnership has the obligation to support and educate, not only the children born of both parents, but also the legitimate children of only one of the spouses. Whoever marries a widower or a widow (according to *Goyena*) cannot disregard whether that person has children and his or her obligation to support them; otherwise, this would invite for trouble and sow discord in the second and subsequent marriages. This is a logical principle inasmuch as the conjugal partnership will use and benefit from all the work of the father and of the mother, from all their assets, and even from those of their minor children should that be the case, and the support would come from the product of that work and from the fruits of such assets, it is only natural then that whatever is necessary to serve that purpose should be taken from that fund.

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<sup>19</sup> Article 1308 of the Civil Code, 31 L.P.R.A. Section 3661 establishes; Chargeable to the community property shall be:

(1) All debts and obligations contracted during the marriage by either of the spouses.

(2) The arrears or credits deriving during the marriage from obligations encumbering the private property of the spouses as well as the community property.

(3) Minor repairs or mere maintenance repairs made during the marriage on the private property of either of the spouses. Major repairs shall not be chargeable to the community property.

(4) Major or minor repairs of the community property.

(5) The support of the family and the education of the children begotten in common and of those of either of the spouses.

(6) Personal loans incurred by either of the spouses.

<sup>20</sup> *Manresa*, Comentarios al Código Civil Español, Madrid, Ed. Reus (1969), T. IX pp. 738. See also *Scaevola*, Código Civil, Madrid, Ed. Reus (2da Ed. 1967), pp. 514-515.

Child support assigned after the divorce is held will be established according to the necessities of the children and the economic position of the provider. The Special Law of Sustenance to Minors provides a mandatory guide or table that considers the income and the expenses of the provider and the primary residential parent. It is also considers the number, age and expenses of each of the children involved.

Article 142 of the Civil Code, 31 L.P.R.A. Section 561, provides that child support includes everything that is indispensable for the sustenance, habitation, clothes, medical assistance and education, depending on the economic circumstances of the provider.<sup>21</sup> These include physical and intellectual necessities of the children. Moreover, the concept of education includes elementary school, high school, and even college or vocational school.<sup>22</sup>

About the child support that is assigned for education, the Supreme Court held in Guadalupe Viera v. Morell, 115 D.P.R. 4 (1983) that parent's obligation to educate the minor receiving support encompasses means to complete higher

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<sup>21</sup> Article 142 of the Civil Code, 31 L.P.R.A. Section 561 provides;  
Support is understood to be all that is indispensable for maintenance, housing, clothing and medical attention, according to the social position of the family.

Support also includes the education and instruction of the person supported when he is a minor.

<sup>22</sup> See Torres Peralta, La Ley Especial de Sustento de Menores y el Derecho de Alimentos en Puerto Rico, Publicaciones STP, San Juan, 1997, pp. 1.25.

education even after reaching legal age, if said education began while still a minor.

In Key Nieves v. Oyola, 116, D.P.R. 261 (1985), the Supreme Court analyzed in detail this issue. The Supreme Court held;

First, parental duty to provide means for education of child does not cease for the mere fact of child reaching legal age.

Second, the parental obligation to supply economic support for graduate or professional studies should be decided in view of particular facts of each case.

Third; the offspring requesting parental financial support for graduate or postgraduate studies has burden of proof of deserving such aid.

Fourth; the parental duty to provide economic support for child to complete full academic career beyond attaining legal age is conditional by resources of provider and needs of recipient, besides needs of other offspring.

Fifth; the petition for support to continue academic career by child of legal age who began studies during minority may be filed within original divorce case.<sup>23</sup>

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<sup>23</sup> See Rodríguez Amadeo v. Santiago Torres, 133 D.P.R. 785 (1993) that followed Key v. Nieves case.

However, if substantial economic changes on the circumstances occur to the provider or to the son or daughter that receives the alimony, the amount can be modified or even eliminated. The court will make the change effective (increase, reduction or elimination of the pension) considering these effects:

1. If the modification is an increase in the alimony, this will be effective since it was requested;
2. If the modification is for the reduction of the alimony, it will be effective since the court decrees it.
3. If the alimony is eliminated, this will be effective since the court decrees it.

The law distinguishes between the ways to accomplish the obligation of providing alimony. It can be by the payment of a specific amount imposed by the court or by receiving and maintaining the son or daughter of the divorced couple.

As a general rule, the action to collect or demand child support already accrued, that is, the delay in the payment of child support previously claimed and granted, prescribes by the aforesaid term of five years. This term arises from the date on

which each installment of the child support should have been paid.

In a case of alimony assigned to minors or to a legally disabled person, the five-year period would begin to run from the time the child becomes to legal age or when the incapacity ends.<sup>24</sup>

The obligation to provide child support concludes when:

1. The provider dies or the son or daughter of the couple dies, because this responsibility is a personal one.
2. The economic income of the provider is reduced at the extreme in which the provider cannot sustain himself.
3. The economic income of the son or daughter of the divorced couple is sufficient for his or her subsistence, making the child support unnecessary.
4. The son or daughter can work on any profession, vocational job, or service.
5. The necessities of the son or daughter are a consequence of the irresponsibility or bad conduct at work.

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<sup>24</sup> See Rodríguez v. Rodríguez, 107 D.P.R. 616 (1986).

The Special Law of Sustenance to Minors and the Law for the Administration for the Sustenance of Minors created an administrative-judicial mechanism (A.S.U.M.E., an administrative agency), for a faster resolution on alimony controversies.<sup>25</sup> In these procedures, all the evidence that concern to the case will be evaluated by the Administrative Judge, deciding and imposing the alimony pension by the applicable laws. The law also creates some measures for the effectiveness of the payment of the alimony pension. These measures are:

- (1) The retention of the salary income by the employer to the employee provider. This is a mandatory mechanism, that is established by the court or by the Administrative Judge of A.S.U.M.E., which has to notify to the employer of the provider about the retention of salary;
- (2) The garnishment on properties;
- (3) The establishment of guaranties of payment;
- (4) The retention of federal and local tax refunds.

The Law for the Administration for the Sustenance of Minors (A.S.U.M.E. organic law) also recognizes the civil contempt as a

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<sup>25</sup> Public Law No. 5 of December 5, 1986, which creates the Administration for the Sustenance of Minors. (A.S.U.M.E.).

necessary measure for the accomplishment of this responsibility. However, this would be the last way.

Article 31 of the Organic Law of A.S.U.M.E. provides that once the motion of civil contempt is presented and the Administrative Judge held in favor of it, the provider could be reclude in jail. This petition will be notified and resolved in no more than twenty (20) days after its formal request.

The time of non-compliance by the provider that is reclude in jail by the civil contempt cause cannot be considered as a credit to the alimony pension. If the responsible parent does not pay, the debt will be accumulated.

## **G. Parental responsibilities and custody**

### **i. Parental responsibilities ("Patria Potestas")**

*Castán Vázquez*,<sup>26</sup> defines the paternal responsibilities ("Patria Potestas") as "the body of rights and duties of the parents over the person and patrimony of each one of their unemancipated children, by means of which they exercise their natural role of educating and protecting their offspring. Under the Civil Code provisions, the body of rights conferred and duties imposed on parents is bidimensional: it touches both, the personal and the patrimonial relationships."

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The paternal responsibilities can only be accomplished by the mother or father of the child, or, by both of them together. The grandparents cannot assume the paternal responsibilities, but they can assume the guardianship and custody of the children.

Article 152-A of the Civil Code, 31 L.P.R.A. Section 591, recognizes to the grandparents the right to visit their grandchildren after the dissolution of the parent's marriage, by the death of one of the parents, by divorce, by nullity of marriage or by separation.<sup>27</sup>

Grandparents always have the right to visit their grandchildren, even though the child becomes from an extra-marital relation.<sup>28</sup>

About the role of grandparents, professors *H. Rutkin & H. Elrod*,<sup>29</sup> comment that;

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<sup>26</sup> *Castán Vázquez, J.M., La Patria Potestad*, Madrid, Ed. Rev. Der. Privado (1960) pp. 9-10

<sup>27</sup> Article 152-A of the Civil Code, 31 L.P.R.A. Section 591, provides that;  
The patria potestas over unemancipated children belongs to both parents, jointly, and in case of emergency may be exercised solely by the parent having the guardianship of the minor at the time of such emergency.

Every public or private hospital shall accept the consent of either one of the parents with patria potestas over their unemancipated children in case of emergency medical treatment and surgery recommended by an authorized physician. The Secretary of Health shall establish the administrative procedures needed to comply with such provisions.

The patria potestas shall belong to only one of the parents when:  
(1) the other has died, is absent or is legally incapacitated;  
(2) only one has recognized or adopted the child.

[S]cholars have come to recognize the important unique role that grandparents play in a child's life.....[G]randparents can offer unconditional love without expectations and help connect the child with the past..

Therefore, Article 152-A of the Civil Code recognizes the role of grandparents in the development of their grandchildren.

On the other hand, the Civil Code and the case law establish the parental responsibilities. These are;

1. The responsibility to provide food and maintenance.
2. The responsibility to live with them.
3. The responsibility to educate and instruct them in accordance with their social status.
4. The responsibility to correct and punish them when necessary, in a moderate way.
5. The responsibility to provide the consent for his/her marriage.
6. The responsibility to grant their emancipation.
7. The responsibility to represent them in the exercise of all the actions that are for their best interest.

Parents are the legitimate representatives of their children and they can initiate civil actions on their behalf. Parents do not need a judicial authorization to file a civil

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<sup>28</sup> See *Toro Vélez, El Derecho de Visita de los Abuelos en Puerto Rico*, 33 *Revista de Derecho Puertorriqueño* 15 (1993).

action. However, they need authorization in extra-judicial settlement cases, for example a torts civil action.

Regarding a torts claim, Article 1810-A of the Civil Code, 31 L.P.R.A. Section 5150, provides that a son or daughter cannot file action against his/her parents, because it can cause harm to the family union. However, when there is no family union involved, and there are no paternal relations to protect, the minor can file a torts civil action against their parents.

Recently, in Alonso García v. Ramírez Acosta, 2001 T.S.P.R. 126 (2001), the Supreme Court encompasses Article 1810-A protection to grandparents. Grandchildren cannot file tort actions against their grandparents because they represent a similar (but not equal) role as the parents in the children's life.

About the property that belongs to minors, the parental responsibilities are;

1. The administration of property.
2. The right to receive the usufruct of such property.
3. A limited right to dispose that property.

Article 155 of the Civil Code, 31 L.P.R.A. Section 612, establishes that property acquired by an unemancipated child by labor of industry, or for any valuable consideration, belongs to

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<sup>29</sup> *H. Rutkin & H. Elrod* in Family Law & Practice, Lexis Publishing, 2001, pp. 32.

the said child, but the usufruct thereof belongs to the parents having the parental responsibilities over him whilst he lives in their company. Usufruct means the use and enjoyment of the properties that belong to the minor that live with his/her parents.<sup>30</sup> In sum, to be entitled to the usufruct, the parents must have the paternal responsibilities or "patria potestas" of the child, and the child must live with them.

However, if the child, with the consent of his parents, lives independently, he shall be deemed emancipated for all effects as regards the said property, and he shall be the full owner and have the usufruct and administration thereof.

On the other hand, Article 159 of the Civil Code, 31 L.P.R.A. Section 616 provides that the exercise of parental responsibilities does not authorize either of the parents to alienate or lay any encumbrance upon real estate property of any kind, or personal property belonging to the child which exceeds the value of two thousand dollars (\$2,000.00), and is under the administration of both, or either, of the parents. For the alienation or lay of the real estate property, parents must have the previous authorization of the Court of First Instance wherein the property is located, after the necessity and utility

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<sup>30</sup> In general, usufruct is defined as a right to use and enjoy another's property without damaging or diminishing the property. See, *Garner, Black's Law Dictionary*, West Group 1996, pp. 651.

of the alienation or encumbrance is verified, and according to the provisions of the law regarding special legal provisions. For the execution of real estate property lease contracts of over six years, it is required a previous authorization of the Court of First Instance wherein the property is located. In no case shall the lease or contract be entered into, nor the authorization for the lease be granted, for a period of time in excess of that required for the child, not otherwise disabled to become of age.

In Rodríguez v. ELA, 122 D.P.R. 832 (1988), Rodríguez Mejías on behalf of his daughter received a double compensation. One compensation was for the cause of action inherited from her mother. The other, from the daughter's suffering and mental anguish resulting from the death of her mother.

The Supreme Court held that the first compensation, the assets were lucrative in nature and such, its fruits and interests belonged to the father, if he stated under oath that at that time he had the patria potestas of his daughter, and that she lived with them. This requirement is based on the fact that under Article 155, the parents are entitled to retain the usufruct of the property of their children only if they have the patria potestas over the said children and if the children live with their parents. The purpose of this requirement is because

it would be totally meaningless to give the usufruct to the father for his own benefit, inasmuch as the usufruct must be used for the benefit of the entire family.

About the second compensation, the Supreme Court held that it is not a property contemplated by Article 155 of the Civil Code, which refers only to "[p]roperty acquired... by labor or industry, or for any valuable consideration," and is different in nature because of its origin. It is a compensation, which seeks to redress the damage caused to the physical and spiritual integrity of the injured person, is very personal in nature". The Supreme Court concludes that;

[T]hus, validating the general principle that the fruits belong to the owner of the thing or to the property which produces them, we hold that the fruits (the interests) derived from the compensation awarded to a minor for injuries, suffering, and mental anguish must increase his assets. This property can hardly be considered as acquired through work or industry, or for a valuable consideration.

Therefore, the Supreme Court concludes that a minor is entitled to receive the compensation awarded by the injuries and the accrue interests from that compensation. However, if it is an inherited cause of action, the assets are lucrative in nature and such, its fruits and interests belonged to the parent with paternal responsibilities or patria potestas.

The Code of Civil Procedure in 32 L.P.R.A. Section 2721 (5) establishes that parents with "patria potestas" need judicial authorization for acts or contracts related to the real state property of the minor. The petition shall be filed in the Court of First Instance setting forth under oath the faculty on law to dispose minor real estate properties.

About real and personal property of the minor, if the amount does not exceed the \$2,000 dollars limit, it is not necessary a court order. If the amount exceeds the \$2,000 dollars limit, a court order is required to the parent with patria potestas. Section 2721 (5) of the Civil Procedure Code also requires that parents have to establish the minimum price to be set in such sale. When the court determines that property shall be sold at a public auction, it shall indicate the price that shall serve as the minimum rate for the bid.<sup>31</sup>

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<sup>31</sup> The Civil Procedure Code, 31 L.P.R.A. Section 2721 provides that;

In all cases where, according to Title 31, the Civil Code, the parents or the guardian of a minor or disabled person need judicial authorization for acts or contracts related to the safeguarding of said minor or disabled person and of his/her property, an opportune petition shall be filed with the corresponding Part of the Court of First Instance setting forth under oath the following facts:

(1) The name, age, domicile, civil status and profession of the petitioner, his legal relationship with the minor or incapacitated person, and if the petitioner be the tutor, then he shall add the date of his appointment, the character of his tutorship and the affirmation that all the requirements necessary for the possession, security and faithful discharge of his duties as such tutor, have been complied with.

(2) The name, age, domicile, and civil status of the minor or incapacitated person and the names, and domiciles of his nearest akin relatives up to the fourth civil grade of consanguinity or second of affinity.

**ii. The extinction of parental responsibilities**

As provided by Article 164 of the Civil Code, 31 L.P.R.A. Section 631, paternal responsibilities (patria potestas) can be terminated or extinguished;

1. With the death of the parents or of the child.
2. By emancipation of the child.
3. By adoption.

Once the paternal responsibilities are concluded, it is impossible to obtain them again.

Articles 166, 166A and 166 (B) of the Civil Code provide the grounds under which a parent is deprived, restricted or suspended from exercising paternal responsibilities. These are:

- (1) To cause or put the minor at substantial risk of suffering predictable harm or injury of his/her physical, mental, emotional and moral health.

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(3) Cause of the petition.

(4) The necessity or utility for the minor or incapacitated person of the act petitioned for.

(5) The minimum price to be set in all cases of sale of real and personal property, where the value thereof exceeds the amounts specified in §§ 616 and 786 of the Title 31. When the court determines that the property shall be sold at a public auction, it shall indicate the price that shall serve as the minimum rate for the bid.

(6) If the authorization be for the constitution of a lien or encumbrance on real property, the nature and conditions of encumbrance shall be stated.

(7) The specific conditions of the contract in the case of exchange of real property or of the lease thereof, for a longer term than six (6) years.

(8) The name of the party acquiring the right to be conveyed, except in the case of alienation through public sale.

(9) The placing or investment to be made of the thing obtained by the minor or incapacitated person through the act or contract referred to in the authorization.

- (2) To permit or tolerate another person to incur the above first grounds.
- (3) To fail to comply with the duties or exercise the powers provided in Article 153, 31 L.P.R.A. Section 601(1) of the Civil Code. These duties include, but are not limited to, the duty of having the minor in his/her company according to law, of supervising his/her education and development, of adequately providing sustenance, clothing, shelter, education or health care, according to his/her wealth or with the means provided by the Commonwealth or any natural or juridical person. Health care includes any treatment or preventive measure required to attend to or prevent any condition involving the physical, mental or emotional health of the minor. No person may be deprived of paternal responsibilities for the legitimate practice of their religious beliefs. However, when due to the above, the person fails to provide the minor with specifically prescribed health care, the court shall provide the adequate remedies to attend to the health of the minor, and in appropriate cases, shall deprive the person of his/her de jure or de facto guardianship, or even of patria potestas as may be best for the minor's health.
- (4) To fail in his/her duty to supervise and care for the minor under the de jure or de facto guardianship of another person:
  - (a) If he/she has not assumed the care and the guardianship of the minor in his/her own home.
  - (b) If he/she has failed to provide a reasonable amount for the support of the minor according to his/her financial means.

- (c) If he/she has failed to visit the minor or regularly maintained contact or communication with the minor or with his/her de jure or de facto guardian. The mere fact of being confined to a penal or health institution, or of residing outside of Puerto Rico, situations which limit the physical access and the communication of a father or mother, shall not constitute as such, a violation of the provisions stated herein; without prejudice of the provisions of Article 153, 31 L.P.R.A. Section 601, subsections (3) and (6).
- (5) To incur in unjustified voluntary abandonment of the minor, requiring the intervention of a Commonwealth or municipal agency or the court, or any other person, because he/she has failed to comply with his/her obligations as a father or mother. Abandonment shall be presumed to occur when the minor is found under circumstances which make it impossible to ascertain the identity of his/her parents or when knowing their identity, their whereabouts are unknown in spite of the steps taken to locate them, and said parents fail to claim the minor within thirty (30) days after the minor has been found.
- (6) To exploit the minor by forcing him/her to commit any act with the purpose of obtaining a profit or any other benefit.
- (7) To fail to comply with the service plan to return a minor to his/her home, effectively offered and provided by the Commonwealth agency in charge of the protection of minors, or by another person designated by said agency, for the parents of minors whom the Commonwealth has had

to deprive of their de jure or de facto guardianship. To deprive a person of patria potestas under this paragraph, the court shall determine that conditions which led to the separation of the minor from the home of his/her parents still exist, or that similar conditions exist which represent a grave risk to the welfare of the minor.

- (8) To incur conduct, which, should it be criminally prosecuted, that would constitute any of the crimes, listed on the Penal Code.<sup>32</sup>
- (9) If the parent has been convicted of any of the crimes listed in the Penal Code.

Article 166 (B) provides that every court shall deprive a father or a mother of paternal responsibilities, at the request

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<sup>32</sup> The Penal Code, 33 L.P.R.A. Section 4001 et.seq. proscribes:

- (a) Attempted murder, homicide or voluntary homicide, §§ 4001-4005 of Title 33.
  - (1) Child abuse, §§ 401nt and 437 of Title 8, and §§ 211m-211s of Title 3, known as "Minors Protection Act". Crimes against life and physical integrity, §§ 4008-4009 and 4031 of Title 33.
- (b) Rape, §§ 4061-4062 of Title 33.
- (c) Sodomy, § 4065 of Title 33.
- (d) Lewd acts, § 4067 of Title 33.
- (e) Indecent exposure, § 4068 of Title 33.
- (f) Prostitution of a son or daughter, whether biological or adopted, §§ 4072-4073 of Title 33.
  - (g) Obscene behavior, as prohibited in § 4077 of Title 33.
  - (h) Breach of the obligation to provide child support, § 4241
  - (i) Abandonment of a child, § 4242 of Title 33.
  - (j) Sexual perversion of minors, § 4246 of Title 33; public mendicancy, § 4247 of Title 33.

For the purposes of this section the words "material", "distribute", "knowingly", "obscene acts", and "sexual behavior" shall have the meaning established in § 4074 of Title 33.

No determination of a court under this subsection shall affect a subsequent criminal procedure for the same acts.

of a party, or motu proprio, if either the father or the mother, as the case may be, suffers a disease or a mental or emotional defect or condition, or alcoholism, or addiction to controlled substances. Also, parents can be deprived of parental responsibilities if they display conduct which makes them incapable of, or prevents them from providing supervision, and physical, mental and emotional care to the minor; except when it is positively shown that the above conditions can be attended to within a reasonably short period of time. In order to determine what a reasonable period of time is, the court shall take into consideration the condition involved, the age of the minor and of the father and the mother, and the circumstances, as a whole, that prevail in the home in which the child shall return.

Lastly, Article 166 (C), 31 L.P.R.A. Section 634, provides that any parent with patria potestas can be deprived of the custody by law and fact by any of the reasons mentioned before in Article 166 (A) or 166 (B).

### **iii. Custody**

*González Tejera*,<sup>33</sup> explains about the similarity between custody and the paternal responsibilities that;

[...]Although the Civil Code and case law sometimes treat custody as a devise independent from the paternal responsibilities or "patria potestas", in strict scientific

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<sup>33</sup> *González Tejera, Bienestar del Menor: señalamientos en torno a la patria potestad, custodia y adopción, Cambios Sociales y nuevos enfoques en el Derecho de Familia*, 48 Centro de Investigaciones Sociales, U.P.R. (1984)

terms, the former is in fact an inherent attribute of the latter. Hence, the aspects of custody are not, strictly speaking, separable from the parental responsibilities.

Article 107 of the Civil Code, 31 L.P.R.A. Section 383, provides that in all cases of divorce the minor children shall be placed under the care of the spouse whom the Court, in the exercise of its discretion, considers best fitted to serve the best interest and welfare of the minor. However, the other spouse shall have the right to continue family relations with his or her children, in such manner and extent as the Court may determine upon decreeing the divorce, considering the case at issue.

The spouse who has been deprived of the custody and paternal relations shall have the right to recover them if he or she proves before the Court of First Instance the death of the other ex-spouse or shows to the satisfaction of the Court that the said recovery of the custody and paternal relations is convenient to the best interest and welfare of the minor.

In Nudelman v. Ferrer, 107 D.P.R. 495, (1978), the Supreme Court held that in custody cases, the normative criterion and north star for courts, social workers and attorneys in cases involving custody of minors, is the welfare of such minors, pursuant to following factors:

- (a) Minors' preference, sex, age and mental and physical health;
- (b) Ability of parties in controversy to provide necessary love for minors;
- (c) Ability of parties to fulfill all affective, moral and economic needs of minors;
- (d) Degree of necessary adjustment by minors to home, school and community in which they live;
- (e) Interrelation of minors with parties, brothers, sisters and other relatives; and, psychological health of the parties involved.

In Ex-parte Torres Ojeda, 118 D.P.R. 469 (1987), the Supreme Court held that both spouses can share the custody and the paternal responsibilities if they so agree, if this is in furtherance of the best interest of the minor. In the agreement, the court should make sure that the same is not a product of irreflection or coercion that would cause more harm than good to the minor. To such effects, the court shall investigate to ascertain whether the parents have the capacity, availability, and firm resolve to assume the responsibility of rearing their children together. This means that both parties must overcome personal disagreements, and it is imperative that they communicate properly to adopt those joint decisions that are

beneficial to, and in the best interests of the minor. In this task, the court shall see if the parties show any substantial, rather than transitory, degree of hostility and tension, and if there exists a real probability of future conflicts that would render the agreement inoperable. The court may also ask the child what he thinks, when age allows it. In sum, the court may inquire as to the following questions:

- (1) What are the real motives and aims of the couple in requesting a shared patria potestas and custody?
- (2) Can their profession, job, or trade impede the agreement's feasibility?
- (3) Can their income absorb any additional costs stemming from shared custody?
- (4) Is the location and distance between the two households detrimental to the children's education?

The analysis of all the above and related factors will provide the solution. Giving each its fair value, according to the particular circumstances of the case, will be the key to its final solution. Once these matters have been resolved, and once the parents' qualifications have been satisfactorily and positively examined, if it is seen that the children will in

fact benefit from a shared custody vis-á-vis a one parent custody, the court should so decree it. If the court finds that the child's psychological or emotional needs and his development will be adversely affected, it will deny the petition and award the patria potestas and custody pursuant to the prevailing doctrine of the best interest and welfare of the minor.

The elements and criteria outlined above should be stated and put in writing by the parents in stipulation. This will be the starting point. If there is no such agreement on shared custody and paternal responsibilities, the court will then proceed to award it to one of the parents. The stipulation shall contain all the information needed for the court investigation and verification. Ambiguities should be avoided. The agreement must be specific as to the time the children will spend with each parent, the education they will receive, their day-care; religion, if any, the location of the home or homes, and other related areas of child rearing.

After the parental responsibilities and custody were established, the court cannot alter these provisions without prior hearing both parties. This was held in Santana Medrano v. Acevedo Osorio, 116 D.P.R. 298 (1985). In this case, the Supreme Court held that a party awarded by the custody of the minor

children should not be deprived of it summarily, without sufficient grounds and prior hearing.

#### **H. Homestead and Dwelling**

*Muñoz Morales*,<sup>34</sup> explains that the word "homestead" has both popular and legal signification. In its popular sense it signifies the place of the home, the residence of the family. It represents the dwelling house in which the family resides, with the usual and customary appurtenances, including the outbuildings of every kind necessary or convenient family use, and lands used for the purposes thereof. While the term is nearly as old as the English language, its use in a legal sense is quite modern, and is peculiarly American. As used in the various statutes, the word homestead may be defined as meaning not only the property (the real estate) occupied as the home, but also the right to have it exempted from levy and forced sale. In this sense, a homestead is the land not exceeding the prescribed amount, upon which is the dwelling house, or residence, or habitation, or abode of owner thereof and of his family; and includes the dwelling house as an indispensable part.

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<sup>34</sup> *Muñoz Morales*, Apuntes sobre el Derecho de Hogar Seguro, IV Rev. Jur. U.P.R. 78. Cited by Federal Home Loan Mortg. Corp. v. Jiménez Soler, 614 F.Supp. 85 (1985).

Article 109-A of the Civil Code, 31 L.P.R.A. Section 385a, provides to the spouse to whom the custody is granted as a result of a divorce of the minor children of the married couple, or the physically or mentally disabled children, whether of legal age or minors or who are dependents as students until the age of twenty-five, the right to claim homestead. This constitutes the home of the married couple, which is held as community property claim as a homestead during the minority of the children, during his studies, or because of the disability of the children who remained in his/her custody due to a divorce.

Homestead shall not be subject to partition while any of the conditions by virtue of which the former was granted exists. It can be claimed in a divorce action, during the process thereof, or after the same has been decreed. In sum, the homestead can be claimed from the moment it is needed and the spouse, who claims this right, will retain all the property regularly used in the home.

Once the homestead is claimed, the judge shall determine what, in fairness, is proper according to the special circumstances of each situation. If the claim was not included in the divorce that has been decreed, the Court that heard the divorce case might grant the homestead claim.

### **III. The dissolution of conjugal partnership**

It is well settled that in Puerto Rico the conjugal partnership is a separate and distinct entity from the partners who constitute it. This conjugal partnership can be dissolved by the death of one or both of the spouses, by divorce or by a court's determination of marriage nullity.

In the dissolution of the conjugal partnership each partner has a right to half of the estate of the conjugal partnership. While said partnership exists, none of its partners has a separate share or quota over the assets that comprise said estate, for its sole owner is the conjugal partnership.

In García López v. Méndez García, 102 D.P.R. 383 (1974), it was held that when conjugal partnership is terminated through the dissolution of the marriage, while the liquidation of the said partnership is still pending, what exists at law is a common ownership. This common ownership is governed by the Civil Code provisions concerning to property owned in common.<sup>35</sup>

Article 1329 of the Civil Code, 31 L.P.R.A. Section 3713, provides for mutual and child support during separation. The husband and the wife shall mutually attend to their support during the separation, and to the support of the children, as

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<sup>35</sup> Articles 326 to 340 of the Civil Code, 31 L.P.R.A. Sections 1271 to 1285, provide for the property owned in common.

well as to their education, each one in proportion to his or her respective means.

Regarding to the prior creditors of the conjugal partnership, Article 1331 of the Civil Code, 31 L.P.R.A. Section 3715, provides that "the separation of the property shall not prejudice rights previously acquired by creditors." This was affirmed in García v. Montero, 107 D.P.R. 319 (1978). In this case, the Supreme Court held that vested rights of prior creditors should not be affected by separation of property resulting from divorce until precise date of its filing before court.

In Alameda v. Registrar, 76 D.P.R. 216 (1954), it was held that;

- (1) Any debt contracted by either the husband or the wife, as the case may be, from the day the marriage is contracted until the filling of the divorce suit directly affects all the property of the conjugal partnership irrespective of the separation of property caused by the divorce.
- (2) After the divorce decree becomes final and the division of property takes place, the conjugal partnership in liquidation shall

be solely liable to creditors who validly contracted with the partnership before the divorce suit was filed or after its commencement with the authority of the court.

On the other hand, Article 1332 of the Civil Code, 31 L.P.R.A. Section 3716, establishes that if the separation cease because the causes have disappeared, the property of the marriage shall again be governed by the same rules as before the separation, without prejudice to what may have been legally done during the same. At the time of reunion, the spouses shall specify in a public instrument the property which they bring anew, and said property shall be that forming the private estate of each one of them respectively. All said property should always be considered as new property brought to the marriage, even though it is the same, either partially or wholly, which existed before the liquidation made by reason of the separation.

Commentator *Manresa*<sup>36</sup> explains;

Separation is a heroic and extraordinary solution. It is an abnormal situation imposed by the circumstances. Once the motives that caused these circumstances disappeared, the law provides for the termination of separation, and the property of marriage shall again be governed by the same rules as before the separation.

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<sup>36</sup> *Manresa, Comentarios al Código Civil Español*, Madrid: Reus, S.A., (1969), T. IX, pp. 1038.

Lastly, Article 1347 of the Civil Code, 31 L.P.R.A. Section 3772, establishes that; "the husband and the wife cannot mutually sell property to each other, except in case the separation of property has been agreed upon or when a judicial separation of the said property should have taken place, authorized in accordance with the provisions of the Civil Code." This was interpreted by case law in International Charter v. Registrador, 110 D.P.R. 862, (1981). In this case the Supreme Court held that a sale of real estate property of one spouse who acquired it while single in favor of conjugal partnership constituted after his marriage violated the article cited above, and therefore the deed could not be filed in the real estate recording office.