

Shared Custody: A Comparative Study of the Position in Spain and England

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*Abstract**

The purpose of this paper is to provide a comparative analysis of Spain and England and their respective approaches to the emerging trend of shared custody. To begin with, this paper will seek to show that the movement towards shared custody arrangements in Spain has been a slow process despite the existence of a legal power to make shared custody orders. However, this paper will further seek to demonstrate that legislative and judicial changes currently taking place in this field in Spain show that there is a marked movement towards a greater acceptance of shared custody arrangements and to a limited extent the preferential treatment of this custody model in Spain. Having considered the Spanish position, this paper will then concentrate on the English position. The English approach to shared custody provides an interesting comparison to that of Spain, as despite both countries having started with the same scepticism towards shared custody, the English courts have quickly overcome this, resulting in England now having perhaps the most developed jurisprudence in relation to this subject among European jurisdictions.

Título: Custodia compartida: Estudio comparativo entre España e Inglaterra

Keywords: Shared custody, attribution criteria, the best interests of the child, comparative law, Spain, England

Palabras clave: Custodia compartida, criterios de atribución, interés del menor derecho comparado, España, Inglaterra

* This work was partially prepared as part of the Final Master's Degree Project in completion of the LLM 2009 program (Master in Legal Sciences) at the Universitat Pompeu Fabra. I am especially grateful to Dr. Josep FERRER RIBA, supervisor of my LLM paper.

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1. Introduction

The debate in relation to shared custody has once again hit the headlines in Spain, as on 20 May 2010 the autonomous region of Aragon took a ground breaking step by passing a law that makes shared custody the preferred option whenever separating or divorcing couples cannot agree on how they will care for their children (2/2010 Act, 26 May, Equality in family relationships before the breakdown of parental cohabitation; BOE n. 151, 22.6.2010; henceforth 2/2010 Act). Other regions in Spain are expected to follow suit and Catalonia has now implemented the 25/2010 Act of the Second Book of the Catalan Civil Code regarding the law of persons and the family (BOE n. 203, 29.7.2010; henceforth 25/2010 Act) requiring judges to award custody according to the shared nature of parental responsibilities where an agreement between parents cannot be reached (Art. 233-10 (2) 25/2010 Act). Thus, despite a deep rooted tendency of the Spanish courts to award custody to just one of the parents where an agreement between parents cannot be reached, little by little, a social change is taking place that is starting to be reflected in Spanish case law. The ground breaking effect in Spain of the Aragon Parliament's decision may come as a surprise to some jurisdictions given that there is a line of argument that in most Western cultures there is now a certain cultural consensus that joint custody is in the best interests of children when their parents separate or divorce (KURKI-SUONIO, 2000, p. 183). Nevertheless, LOWE (2009, p. 2).has commented that a good deal of scepticism in relation to the value of alternating orders still exists in Europe, particularly in the absence of parental agreement, upon the basis that they undermine children's key need for a stable home.

This comparative analysis will consider the application of the principle of the best interests of the child to shared custody decisions in England and Spain, as well as comparing and contrasting the their differing approaches to shared custody arrangements.

2. The meaning of shared custody

In order to put into context the subject matter that we are about to consider it is important to understand the meaning of custody as distinguished from parental responsibility and in particular what is meant by the concept of shared custody. As parental responsibility in itself can be difficult to define it is helpful to consider how the term has been conceptualized in a broad sense by international texts, such as the [Principles of the Commission on European Family Law](#) (henceforth CEFL Principles) to include a collection of 'parental rights' and 'parental duties' aimed at promoting and safeguarding the welfare of the child. According to Principle 3.1 of the CEFL Principles, these rights and duties encompass amongst others the care, protection and education of a child.

Since Spain's system of law is an example of a multiple legal system, it is necessary to distinguish between so called common civil law that is the Spanish Civil Code of 1889 (henceforth CC), applicable only in those territories lacking their own special civil law regime, and the law of

Navarra, Aragon and Catalonia, autonomous communities that have legislative competence over civil law and may preserve and develop their own civil legislation. Given the scope of this paper and as there are no marked differences among the regulations of parental responsibility in the different Spanish subsystems, this section of the paper will concentrate on common civil law, however, this paper will later go on to consider the separate legislation in relation to shared custody that has been implemented by the autonomous regions of Aragon and Catalonia.

In Spain, parental responsibility is not defined in law. It is recognized under Art. 154 CC as the general concept of *patria potestad* and described in legal writing and case law as a collection of powers and duties over a child and the child's property, vested equally with the child's father and mother (GONZÁLEZ BEILFUSS, 2004). Under Article 154 CC *patria potestad* is allocated certain specific statutory functions including personal duties, such as the duty to care for, maintain and educate children. There is also a duty to represent and administer the property of the child. Although the exercise of *patria potestad* is unaffected by divorce, separation or annulment of a marriage, the outcome of all three is usually that the parental responsibility holders do not live together, it is this fact, regardless of whether there was previous cohabitation, that renders certain measures necessary. These measures affect the exercise of parental responsibility. Under Article 156 CC it is established that the parent the child lives with will exercise *patria potestad* unless the non-resident parent requests a joint exercise or distribution of functions between parental responsibility holders. The judge will decide the issue in view of the best interests of the child.

So far as English law is concerned, the main controlling statute is the Children Act 1989 (henceforth CA 1989) which came into force in October 1991, a key aim of which was to replace the concept of parental rights and duties with the concept of parental responsibility. Section 3(1) of the CA 1989 states that: "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'. According to Section 2(1), CA 1989, where the father and mother of the child were married to each other at the time of the child's birth, they each have parental responsibility. This responsibility is an ongoing responsibility and therefore it is not affected by divorce, separation or annulment of marriage. According to Section 2 (7) CA 1989, however, notwithstanding that parental responsibility is shared, each person who has it "may act alone and without the other (or others) in meeting that responsibility" except where a statute expressly requires the consent of more than one person in a matter affecting the child. In cases of disagreement over any issue concerning a child's upbringing it is always an option to seek a resolution of the dispute before a court. Under Section 1(1) CA 1989, the overarching principle of English child law is that when any court determines any question with respect to the upbringing of the child, or the administration of the child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration

The concept of custody or more accurately physical custody is displayed in all the parental duties that require constant day-to-day care of a child and establishes where a child will live. Thus, a parent with physical custody has the right to have his/her child live with him/her (GUILARTE MARTÍN-CALERO, 2010, p. 4). Thus, despite, the inextricable link between parental responsibility

and custody, it is acknowledged that custody should be understood as an additional function to those that shape the content of parental responsibility (LAUROBA LACASA, 2010, p. 1494).

In Spain, the terms *guarda* and *custodia* are used synonymously to refer to the same thing, namely the physical personal care of a child. In practice, it is usually the case that parental responsibility continues to be shared jointly between the parents with the judge making a final decision that distinguishes as to whether actual physical custody of the child will be attributed to one or other or both of the parents by way of shared custody. Indeed the phrases “custody is to be attributed to parent A, with parental responsibility to continue jointly” or, “custody is to be attributed to..., the exercise of parental responsibility will be shared by both parents” are common parlance in Spanish case law (LAUROBA LACASA, 2010, p. 1494).

In England, the legal term ‘Residence’ is employed to refer to what is widely recognized as physical custody. A residence order awarded by a court in England and Wales, sets out with whom a child should live [Section 8(1) CA 1989] and if a residence order is granted through the court, parental responsibility will automatically be given to any person in whose favour the order is made if they do not already have it [Section 12 CA 1989]. A person shall not cease to have parental responsibility solely because some other person subsequently acquires parental responsibility for the child [Section 2(6) CA 1989].

Traditionally, the regulation of child custody on separation or divorce was resolved by attributing custody to only one of the parents in the context of “unilateral custody” or “sole custody” and in conformity with this concept the child on the divorce or separation of his parents would reside with just one of his/her parents (usually subject to the power of the court to order visitation or contact rights to the non-custodial parent) (LATHROP GOMEZ, 2008, p. 275). This model, however, has shown inadequacies in certain cases in protecting and promoting the best interests of the child (MARTINS, 2005, p. 225), particularly with regard to the right to grow up whilst maintaining contact with both parents enshrined under Article 9, paragraph 3, of the United Nations Convention on the Rights of the Child 1989 (henceforth CRC):

“Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interest”.

The inadequacies of the sole custody model at respecting this right and a changing social context in which fathers are generally more actively involved in the care and upbringing of their children has led to the emergence of a shared custody model in a number of jurisdictions, this model permits both parents to exercise parental care together after a divorce or separation and is an arrangement by which a child divides his time between two adults (normally their parents) who are no longer living together.

As a relatively new phenomenon the terminology relating to this concept is not consistent across jurisdictions. The term “joint custody” was first used in the USA where such arrangements

originated and where it is now more commonly referred to as “alternating custody”. In the UK the term “shared residence” is used to refer to the legal status recognizing that a child has two homes. In Spain, the terms *guarda conjunta* (Art 92.7 CC), and *guarda* and *custodia compartida* (Articles 92.5 and 92.8 CC) are used synonymously and intermittently to refer to the same concept. Both denominations have been subject to criticism in Spain because it is argued that they do not respond to the dynamic that the term is actually referring to; custody is neither joint nor shared it is alternate and for this reason it would arguably be more appropriate to talk about *guarda* or *custodia alternative* (GUILARTE MARTÍN-CALERO, 2008, p. 13). Indeed, the term alternating residence is the term attributed to this arrangement in the CEFL Principles, however as shared custody is still the popular term used to describe this practice, to avoid confusion, I will generally refer to this arrangement as shared custody throughout this paper, although I will use the term shared residence when concentrating on the English position.

Shared custody has increasingly risen in status to the extent that it is now taking preference in a number of countries as it is seemingly more in harmony with the vision of the child as a person and a holder of fundamental rights, namely the right to freely develop ones personality, and it is arguably more in harmony with the consideration of the child's best interests in the protection and promotion of his/her fundamental rights (MARTINS, 2005, p. 225). Given the modern trend towards such arrangements CEFL felt it appropriate to deal with this matter in its Principles. CEFL Principle 3.20(2) provides that the child may reside on an alternative basis with the holders of parental responsibilities upon either an agreement approved by a competent authority or a decision by a competent authority. The competent authority should take into consideration such factors as:

- a) The age and opinion of the child,
- b) The ability and willingness of the holders of parental responsibilities to cooperate with each other in matters concerning the child; as well as their personal situation,
- c) The distance between the residences of the holders of the parental responsibilities and to the child's school.

In CEFL's commentary to 3.20(2) it is evident that the Principle establishes that alternating residence should be possible, however it does not clarify whether it should be a rule or an exception. It does however consider such orders being made by a competent authority even where alternating residence has not been agreed by the parties, although it considered that orders in such circumstances should be exceptional. In any event, as Principle 3.3 stipulates, in all cases the overarching principle is that alternating residence should only be provided for where it is in the best interests of the child.

3. The Spanish position - Shared Custody

3.1. Background to the law

In order to understand the current position in Spain in relation to shared custody, it is important to have some understanding of its historical development, including both the social and political changes that took place with the introduction of the new Spanish Constitution of 1978 (BOE n. 311, 29.12.1978) which lead to a wave of legislative reform transforming the regulation of family relationships in the field of civil family law (GORIENA LEKUE, 2007, p. 95). These reforms lead to the evolution of child custody in Spain in a number of distinct stages. Arguably, it is only at the final stage that shared custody has been given proper recognition in Spanish legislation.

Originally, the Spanish Civil Code of 1889 anticipated that in cases of separation and divorce, the attribution of custody would take place according to the age and gender of the children. In this way, sons and daughters under the age of seven always remained in the care of their mothers. From the age of seven upwards, the test of good faith or the innocence of the respective spouses in annulment or separation came into play. Under this requirement all children remained in the custody of the spouse who acted in good faith or was innocent in the breakdown of the marriage. If it was considered that both parties were innocent and had acted in good faith, sons remained under the custody of their fathers and daughters with their mothers (Articles 70 and 73 CC original draft). As considered by ALASCIO CARRASCO and MARÍN GARCÍA (2007, p. 10), it was not until the implementation of the 30/1981 Act, 7th July (BOE n. 172, 20.7.1981), that Spanish legislation endorsed the criteria of awarding custody to the parent considered to be most suitable to care for the child, without taking into account, in generic terms, the cause of the matrimonial breakdown.

From 1981 onwards, according to GARCÍA RUBIO (2006, p.75-79), we can discern three distinct stages in the evolution of child custody in Spain. The first stage took place between 1981 to 1990 during which time there existed a clear preference for the mother, the pillars of this tendency were on the one hand, settled in the current prevailing psychology that considered the maternal figure as the most suitable to care for the child and on the other hand, in the drafting of Article 156 of the Spanish Civil Code which prescribed "if parents live separately, and do not reach a common agreement between them, children under 7 years old will remain in the care of their mother, unless a judge, motivated by special reasons, provides otherwise".

During the second stage between 1990-2000, it is suggested that there existed a progressive recognition of the father when the discriminatory criteria giving preference to sole custody of children under the age of 7 to the mother was eliminated by the 11/1990 Act, 15th October (BOE n. 250, 18.10.1990), the Civil Code reforms, in the application of non sexual discrimination which reformed the Civil Code by applying the principle of non discrimination. According to GUILARTE MARTÍN-CALERO (2010, p.3), this affirms the evolution experienced in this matter, that initially reflected a patriarchal society where the role of child custody was perfectly attributable to the mother, determined by the legal consecration of the old but still valid tender years doctrine, in virtue of which it is presumed that all mothers, for the pure fact of being a mother, is better qualified than the father to raise and care for the children except where a specific incapacity is proven.

Finally, the third stage initiated in the year 2000 to the current date is considered to be that of a progressive movement towards shared custody and a broad recognition of communication and visiting rights in favour of the non-custodial parent (GONZÁLEZ MARTÍNEZ, 2009, p. 4). Indeed, today the law is neutral and presumes that both parents are equally capable of raising the children, meaning that the only legal criteria that should be fixed by the judge is that of the best interests of the child (GUILARTE MARTÍN-CALERO, 2010, p. 3).

3.2. The law today

The entry into force on the 8th July of 15/2005 Act modifying the Civil Code and the civil procedure rules on matters of divorce and separation, (BOE n. 163, 9.7.2005) modified the Spanish Civil Code and the Civil Procedure Rules (*Ley de Enjuiciamiento Civil*) on matters of separation and divorce and introduced the notion of shared custody into the Spanish legal system for the first time. Article 92 CC deals with the specific procedures in relation to shared custody and paragraph 5 establishes that:

“The practice of shared child custody will be awarded when it is applied for by both parents in the regulatory agreement proposal or when both parents arrive at this agreement in the course of proceedings. The judge that awards shared custody, after providing justification for his decision, should adopt legitimate precautions for the efficient performance of the custody arrangement established, endeavouring not to separate siblings”¹.

This supposes a formal recognition of shared physical custody that was not present before, because the law neither prohibited nor recognized this model of custody (GORIENA LEKUE, 2007, p. 101). However it can be asserted that before this change, shared custody was considered to be exceptional, because of the prevailing belief that it was harmful to the child as it did not satisfy the child’s main need for stability (GORIENA LEKUE, 2007, pp. 101-102). It is argued that today this legal provision does not pose a problem for judges or social agents in general as the argument for stability has acquired a new interpretation. Indeed, the Supreme Court (STS, 1st, 8.10.2009) made it clear that the argument that shared custody is detrimental to the child's best interests due to the lack of stability for the child is neither a fundamental nor decisive reason for justifying the denial of shared custody. Thus, stability is no longer interpreted to mean that a child should not be moved from one household to another – of course some conditions are required – but it is conceived as ensuring that emotional stability can be offered to the child if both parents agree and can maintain a minimum of harmony to deal with this system of caring for a child (GORIENA LEKUE, 2007 p. 102).

¹ “Se acordará el ejercicio compartido de la guarda y custodia de los hijos cuando así lo soliciten los padres en la propuesta de convenio regulador o cuando ambos lleguen a este acuerdo en el transcurso del procedimiento. El Juez, al acordar la guarda conjunta y tras fundamentar su resolución, adoptará las cautelas procedentes para el eficaz cumplimiento del régimen de guarda establecido, procurando no separar a los hermanos”.

However, despite a so called “new interpretation”, there continue to be cases particularly in the ordinary courts, in which judges reject shared custody as something that does not provide a stable environment for a child². In response to this, the Supreme Court of Spain is now endeavouring to educate the lower courts about the positive values of shared custody.

Indeed the Supreme Court Judgments of 10.3.2010 and 11.3.2010 reaffirmed the sentiment that instability (in the sense of not providing one stable home for the child) is not a permissible criterion for refusing to award shared custody. In coming to this conclusion the Court referred to the Supreme Court's decision of 8.10.2009, which recognized the difficulties facing Spanish judges who are obliged under a general clause (Article 90 II CC) to award shared custody always in the best interests of the child. The Supreme Court explained that since Spanish law does not provide a list of legal criteria in order to determine the best interests of the child it is very difficult to specify the requirements contained under this obligation. In looking for guidance, the Court turned to the study of comparative law and considered criteria being used in other jurisdictions such as France (French Civil Code), England (CA 1989) and America (American Law Institute Principles of the Law of Family Dissolution) in order to decide on the convenience or otherwise of a shared custody arrangement. The conclusion reached was that these jurisdictions were using criteria such as:

- 1) The parents personal aptitudes and previous relationships with their children;
- 2) The wishes of the competent child;
- 3) The number of children;
- 4) Performance of parental duties and mutual respect in personal relationships;
- 5) The results of legal reports;
- 6) Any other criteria that permits the children to live a suitable life, which by necessity should be more complex than when both parents live together.

In following the guidance provided in the STS, 1st, 8.10.2009; 10.3.2010 and 11.3.2010 decisions have made it clear that the Supreme Court considers that open criteria should be taken into account to determine the best interests of the child (including the use of comparative law), the denial of shared custody on the basis that it deprives a child of a stable environment is not an acceptable criterion and a judge that refuses to award shared custody, whether or not an agreement has been reached between the parents, must be able to provide a proper justification for this.

Where a common agreement exists between parents Art 92.6 CC establishes that in any case, before agreeing the custody regime, the judge should:

- a) Obtain a report from the Public Ministry,
- b) Listen to a child that has sufficient judgment, when it is considered necessary by the judge or is applied for by the Public Ministry, the parties or members of the technical

² SSAAPP Alicante 8.5.2006; Asturias 2.11.2007; Valencia 15.1.2007.

Judicial Team, or by the child himself/herself,

c) Assess the statements of the parties at the evidential hearing and the relationship that exists between the parents and their children in order to determine whether shared custody is a suitable arrangement.

Under Article 92.9 CC, at the request of the parties, the judge can also obtain reports from qualified specialists in relation to the suitability of the mode of exercising parental responsibility. Nevertheless, Article 90 II CC sets out the standard required in law where parents have reached an agreement for shared custody stating that a judge should award shared custody except where it would be harmful to the child or seriously prejudicial to one of the parents³. Thus, an exception to the award of shared custody where parents have reached an agreement obviously exists in cases of domestic violence or when one parent has been accused of attacking the life, physical integrity, freedom, moral integrity or sexual freedom or indemnity of the other parent or the children living with them (Article 92.7 CC).

3.3. The exceptionality of shared custody in the Spanish Civil Code

Some of the greatest criticisms in relation to Spanish custody law are in relation to the difficulty a judge faces in attributing shared custody in cases where an agreement cannot be reached by the parents. Article 92.8 CC has proven to be most controversial in the current model of shared custody adopted by the Spanish regulations because it establishes that:

“Exceptionally, if the conditions required in the fifth paragraph are not possible, the judge, at the request of one of the parties, with a favourable report from the Public Ministry, will be able to award shared custody on the basis that it is only in this way that the best interests of the child be adequately protected”.

In these cases, Article 92.8 CC establishes the following requirements in order that a judge can exceptionally determine shared custody where a common agreement between the parents does not exist:

1. One of the parties applies for shared custody,
2. A favourable report from the Public Ministry exists,
3. The judge’s decision is founded on the basis that only by way of shared custody can the best interests of the child be adequately protected.

The demand for a favourable report from the Public Ministry where parents are in disagreement over custody has frustrated many cases where shared custody could have been appropriate. The restrictive nature of Article 92.8 has led to questions being raised about its constitutionality (SAP

³ “Los acuerdos de los cónyuges, adoptados para regular las consecuencias de la nulidad, separación o divorcio serán aprobados por el juez, salvo si son dañosos para los hijos o gravemente perjudiciales para uno de los cónyuges”.

Las Palmas, 13.9.2006) and on 14th April 2010 the Constitutional Court agreed to give consideration to the question of the constitutionality of the drafting of Article 92.8 CC in the 15/2005 Act (BOE n. 103, 29.4.2009).

Indeed, from the wording of this Article it appears that a double key system exists to the attainment of shared custody -one key is firmly in the hands of the Public Ministry and the other key in the hands of the judge. If the Public Ministry is in favour of shared custody then the judge normally follows, if the Public Ministry provides an unfavourable report the judge is unable to provide access to shared custody even if, in his view, it would be the most suitable outcome for the case at hand. Thus some judges feel that they are losing their power to dictate judgments freely because of the veto power that the Public Ministry holds.

Furthermore, Article 92.8 CC prescribes that the judge should only come to a decision to award shared custody (in the absence of the parents' agreement) on the basis that only in this way are the best interests of the child adequately protected. This requirement reiterates the extremely exceptional character of the award of shared custody in the absence of mutual agreement between the parents. The restrictions to the possible ways that an order for shared custody could be made without parental agreement envisaged by the legislator indicates that in practice it was considered that this would be a rare outcome. Such as has been highlighted, it does not try to demonstrate that shared custody is the "most convenient" alternative, but rather it requires positive evidence that it is in fact the only way that adequate protection of the best interests of the child can be guaranteed (LATHROP GÓMEZ, 2008, p. 457).

The exceptional nature of awarding shared custody in the absence of the parents' agreement, as well as excessive cautions and the requirement of a favourable report by the Public Ministry have frustrated the further development of shared custody in Spanish Family law. Nevertheless, as has been seen, recent case law demonstrates that the Higher Courts are giving much more consideration to the criteria that should be taken into account when deciding whether or not shared custody should or should not be awarded. Demands for judges to provide clearer explanations that are based on the best interests of the child show a movement towards shared custody as a preference. In addition, there are now clear signs of a movement in this direction in certain autonomous regions in Spain.

3.4. Movement towards shared custody as a preference

a. Aragon

On 20th May 2010 the autonomous region of Aragon voted to make shared custody the preferred option whenever separating or divorcing couples cannot agree on how they will care for their children (2/2010 Act, 26 May). The approval of this initiative is considered to be a social and political movement that will heighten the debate to modify the reformed 15/2005 Act in this area.

The new 2/2010 Act of Aragon gives preferential treatment to shared custody as it seeks to ensure that children separated from members of their family following the divorce or separation

of their parents, maintain the right to a relationship with both parents and their families and that both parents maintain their parental authority without restriction. In this way, both parents will continue making decisions in relation to the upbringing and education of their children and both will have the right to a regular and direct relationship with them.

Article 6 sets out the new rules in relation to child custody. According to paragraph 1 of the Article, each parent separately, or by common agreement, can apply to the judge for the exercise of custody of the children or disabled persons by way of shared custody by both of them or custody by one of them alone.

Most significantly, Article 6.2 of the 2/2010 Act provides specifically that shared custody will be given preferential treatment by the judge as it sets out the following:

“The judge will adopt shared custody by way of preference in the interests of the children, except where individual custody is more convenient, taking into account the family relations plan that should be presented by each parent and furthermore paying attention to the following factors:

- a) The age of the children,
- b) Social roots and family of the children,
- c) The opinion of the children that have sufficient judgment and in any case if the children are older than 12, with special consideration to the opinions of children over the age of 14,
- d) The aptitude and will of the parents in order to secure the stability of the children,
- e) Other circumstances of special relevance”.

The landmark effect of this paragraph is significant, as Aragon is the first autonomous region of Spain to give shared custody such preferential treatment. Thus, in cases of shared custody in this region, a living regime will be fixed for the children with each one of the parents adapted to the circumstances of the family situation that guarantees both parents the exercise of his rights and obligations in an equal situation. In cases of individual custody, a regime of communication stays or visits with the other parent will be fixed that guarantees the proper functioning of parental responsibilities.

An exception to the preferential treatment of shared custody in the new Aragon legislation exists in cases of domestic violence (Art 6.6 of the 2/2010 Act). Article 7 of the Act further establishes that the judge will limit the attribution of the matrimonial home to one of the parents if the parties are not in agreement and this could include ordering the sale of the matrimonial home if this would benefit family relationships. The Act also contains retrospective effect to the extent that those cases already decided within three months of the Act’s entry into force can be revised in line with the current legislation

In response to this new legislation, Isidro NIÑEROLA, president of the *Asociación Española de*

Abogados de Familia, one of the organizations that have been calling for changes to the law has commented that “Spanish society is changing little by little” (RÍOS, 2010). However, according to the National Institute of Statistics, over 100,000 marriages end in divorce, separation or annulment each year in Spain and only about 4% of the current custody arrangements involve shared custody⁴. Therefore despite the change in Aragon legislation change is likely to be slow in a country where the exceptionality of shared custody is ingrained into its national civil code. Nevertheless, it is the preferential treatment that the Aragon Act now gives to shared custody that is the reason behind its landmark effect. As the first autonomous region in Spain to establish this right it is hoped, by fathers associations, the Spanish Association of Family Lawyers and the Aragon Party alike that this decision will have a “domino effect” on the rest of Spain. Indeed, other autonomous regions in Spain with their own civil law have already either implemented or are considering similar measures.

b. Catalonia

On 29th July 2010, the 25/2010 Act was approved. The new Act in Catalonia does not go so far as to explicitly state the preferential award of shared custody in the same way as the Aragon Act, however there is an implied preference to shared custody as the Act requires that if there is no agreement between the parents the judge should award custody according to the shared nature of parental responsibilities.

As Catalonia has legislative competence over its own civil law, judges have always had the freedom to decide cases on shared custody without being bound by the Public Ministry report when Catalan law is applied. However, previously there was no express recognition that the principle to be applied by the judges in Catalonia was that of shared parental responsibility. The new Act now makes this principle clear.

Article 233-8 of the 25/2010 Act requires the continuation of shared parental responsibility after a family breakdown and that these responsibilities shall be exercised jointly as far as possible. As far as the exercise of custody itself is concerned Article 233-10 provides that if an agreement has not been reached or an agreement is not approved the judicial authority has to determine the way of exercising custody according to the joint nature of parental responsibility. Nevertheless, the judicial authority can assign individual custody if this is in the best interests of the child.

Therefore, the text specifies that separation does not alter the responsibilities of parents to their children and as a consequence, these responsibilities maintain their shared character and have to be exercised jointly as far as possible. This does not imply a 50-50 share of the child’s time living with each parent.

Article 233-11 of the 25/2010 Act sets out the criteria to be taken into account when determining the exercise of custody. The list of criteria includes:

⁴ Source: *Instituto Nacional de Estadística*, Social indicators 2009.

- a) The emotional link between the children and each one of their parents, as well as their relationships with other people living in their respective homes;
- b) The aptitude of the parents in order to guarantee the well being of the children and the possibility of securing a suitable environment, in accordance with their age;
- c) The attitude of each parent in cooperating with the other in order to guarantee the maximum stability for the children, especially in order to adequately guarantee the relationship of the children with both parents ;
- d) The time that each one of the parents had dedicated to the attention of the children before the breakup and the tasks that they had effectively exercised in order to guarantee the children's wellbeing;
- e) The opinion expressed by the children;
- f) Agreements adopted in anticipation of the breakup or before the initiation of proceedings;
- g) The location of the parents' homes and the timetables and activities of the children and their parents⁵.

This list provides useful guidance for the judge in order to assess the method of custody that is appropriate in each given situation. Interestingly, the criteria set out in the 25/2010 Act are very similar to those set out in the American Law Institutes Principles of the Law of Family Dissolution: Analysis and Recommendations (henceforth ALI Principles). Thus it is evident that reform in Catalonia has taken guidance from comparative law in order to achieve a more principled approach to shared custody and shared parenting in general.

In particular, the criteria that requires the time that each parent dedicated to the attention of the children before the breakdown of the marriage and the tasks that they effectively carried out to achieve their children's well being to be taken into consideration can be recognized as having been directly influenced by § 2.08 of the ALI Principles that provides the following:

⁵ "Criterios para determinar el régimen y la forma de ejercer la guarda.

1. Para determinar el régimen y la forma de ejercer la guarda, es preciso tener en cuenta las propuestas de plan de parentalidad y, en particular, los siguientes criterios y circunstancias ponderados conjuntamente:

- a) La vinculación afectiva entre los hijos y cada uno de los progenitores, así como las relaciones con las demás personas que conviven en los respectivos hogares.
- b) La aptitud de los progenitores para garantizar el bienestar de los hijos y la posibilidad de procurarles un entorno adecuado, de acuerdo con su edad.
- c) La actitud de cada uno de los progenitores para cooperar con el otro a fin de asegurar la máxima estabilidad a los hijos, especialmente para garantizar adecuadamente las relaciones de estos con los dos progenitores.
- d) El tiempo que cada uno de los progenitores había dedicado a la atención de los hijos antes de la ruptura y las tareas que efectivamente ejercía para procurarles el bienestar.
- e) La opinión expresada por los hijos.
- f) Los acuerdos en previsión de la ruptura o adoptados fuera de convenio antes de iniciarse el procedimiento.
- g) La situación de los domicilios de los progenitores, y los horarios y actividades de los hijos y de los progenitores".

“Unless otherwise resolved by agreement of the parents, the court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents’ separation”.

The so called approximation standard proposed by the ALI Principles has been incorporated by the Catalan legislator not as the sole criteria for the allocation of custody, but as one of the circumstances among others that the judge has to take into account when assigning custody (GARRIGA GORINA, 2008, p. 3).

4. The English position – Shared residence orders

4.1. Background to the law

The English position in relation to shared custody provides an interesting comparison to that of the Spanish position as, as LOWE has recognized, despite having started from the same type of scepticism, the courts now take a very different approach (LOWE, 2009 p. 2).

By way of background to the English position in relation to shared custody, or shared residence as it is termed in the UK, it is important to understand the transforming effect of the Children Act 1989 and the historical approach of the courts before the implementation of the Act. Before the enactment of the CA 1989, the Law Commission identified a number of problems which needed rectifying. First, the law itself was considered to be “bedevilled by complications and duplications”⁶ to such an extent that it was unintelligible in its effects on parental rights and duties. Secondly, there was a tendency amongst parents, their lawyers and the courts respectively to seek and make orders as a matter of course where there was an application on a child’s upbringing, thus leading to litigation and conflict. Thirdly, there was wide variation in individual judges’ views about the legal effect and use of custody and joint custody orders, with some judges making extensive use of joint custody orders while others rarely if ever made them (HARRIS and GEORGE, 2010, p. 169).

In seeking to remedy the above problems the Law Commission adopted the “fundamental principle (...) that the primary responsibility for the upbringing of children rests with their parents” and that the state, including the courts, “should intervene only where the child is placed at unacceptable risk”⁷. With this in mind, the legislators created the CA 1989 which introduced the concept of parental responsibility for the first time. The CA 1989 provided that those with parental responsibility could exercise it without the agreement of anyone else, and that the courts

⁶ THE LAW COMMISSION (1986), “Review of Child Law: Custody”, *Law Com*, n. 96, § [1.2].

⁷ THE LAW COMMISSION (1988), “Law Commission’s Report on Guardianship and Custody”, *Law Com*, n. 172, § [2.1].

should interfere only when it could be positively shown that an order about some concrete issue would benefit the child more than no order at all (HARRIS and GEORGE, 2010, p. 170).

The CA 1989 also introduced the concept of *residence orders* being one of the new court orders under Section 8 which were intended to “concentrate the minds of the parties and of the court on the concrete issues relating to the day-to-day care of the child”⁸. Under Section 8 (1) of the 1989 Act a residence order “(...) means an order settling the arrangements to be made as to the person with whom the child is to live”.

The relevant provision dealing with shared residence orders is Section 11 (4) which provides:

“Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned.”

Therefore although CA 1989 does not make express reference to shared residence orders, because of the general presumption under the Interpretation Act 1978 (c.30) that words appearing in a statute in the singular include the plural and the implication of Section 11 (4), clear provision is made to provide for a child to live with both parents even though they do not share the same household (LOWE, 2009, p. 4).

Shared residence orders can vary from one end of the spectrum where the child spends half their time with each parent, to the other end of the spectrum where the child spends weekdays with one parent and weekends with the other or term time with one parent and school holidays with the other, this being the more common situation. Rather than having to reflect these arrangements by making a residence order in favour of one parent and contact in favour of the other, the Law Commission believed that “it would be a far more realistic description of the responsibilities involved (...) to make a residence order covering both parents”⁹.

However, whilst there can be no doubt that the Law Commission had intended to permit the making of shared residence orders, in so doing, they were not advocating that children should share their time between their parents, (an arrangement which they thought would rarely be practical for the child’s benefit), but they were recommending the reversal of a pre-children Act decision *Riley v Riley*, which held that courts could not as a matter of principle make what is now known as a shared residence order.

Therefore, at the time the Children Act first came in into force it was contemplated that there could be shared residence orders, but as the Department of Health’s Guidance and Regulations stated they were not expected to become a common form of order “because most children still

⁸ [Children Bill \[Lords\] HC \(1989\)](#), Vol. 151, col. 1114.

⁹ THE LAW COMMISSION (1988), “Law Commission’s Report”, Law Com, n. 172, § 4.12.

need the stability of a single home, and partly because in the cases where shared care is appropriate there is less likely to be a need for the court to make any order at all"¹⁰.

Given the negative tone of these passages it is unsurprising that authorities shortly after the coming into force of the legislation revealed an unwillingness to make shared residence orders. However, as case law has evolved in the English courts, it appears to be the case that the shared residence order has transformed from a rare species to a 'must have', particularly for the non-resident parent and irrespective of whether the children's time is divided equally between the homes (HALE and WOOD, 2007, p. 11).

4.2. The developing case law

Indeed as DOUGLAS and LOWE have acknowledged the English courts' approach to making shared residence orders has been an evolving one (LOWE and DOUGLAS, 2007, p. 517). The early case law following the implementation of the Act suggested that such orders should only be made in exceptional circumstances. In *Re H (A Minor) (Shared Residence Order)*, the unmarried parents of a 14 year old boy had never spent any appreciable time together under the same roof. But the boy had been looked after by both of his parents until the mother stopped contact between the boy and his father. A shared residence order was refused, it being held that the "establishment, of two competing homes only leads to confusion and stress and would be contrary to the paramount concept of the welfare of the child himself".

Later, in *A v A (Minors) (Shared Residence Order)*, in upholding an order dividing equally the time the children were to live with each parent outside of school term, BUTLER-SLOSS LJ considered that it had to be demonstrated that there was a positive benefit to make what she referred to as "an unusual order". This perhaps marked a gradual change in approach away from the expression *exceptional circumstances* (EVANS, 2010, p. 7).

Nevertheless, it took nearly 10 years after the enactment of the CA 1989 for a decisive change in attitude towards shared residence orders to take place. This change in attitude was made abundantly clear by HALE LJ in the case of *D v D (Shared Residence Order)* in which she stated that she "would not add any gloss on the legislative provisions, which are always subject to the paramount consideration of what is best for the children".

Thus, *D v D* marked the beginning of a departure from the old, more restrictive approach (HALE and WOOD, 2007, p. 11). From then on it was no longer necessary to show that exceptional circumstances or unusual circumstances existed, nor that a positive benefit could be identified before a shared residence order could be granted (HALE and WOOD, 2007, p. 10). The change in attitude towards shared residence orders made it clear that shared residence orders are no

¹⁰ DEPARTMENT FOR CHILDREN, SCHOOLS AND FAMILIES, *The Children Act Guidance and Regulations*, Vol. 1, Court Orders, § 2.23.

different to other types of orders and the sole test provided by the CA 1989 is the paramountcy of the child's welfare as required under Section 1 of the CA.

Despite the clear statement in *D v D* there have been further attempts to limit the making of shared residence orders. Indeed in *Re W (Shared Residence Order)* it was argued that unless the time spent in each household is to be roughly equal, shared residence orders should only be made in *unusual circumstances*. However, WILSON LJ helpfully clarified the position. Citing paragraphs [31]-[32] of HALE LJ's judgment in *D v D*, his Lordship commented:

"[...] for the last 8 years the better view has been that, whilst of course a need remains for the demonstration of circumstances which positively indicate that the child's welfare would thereby be served, there is no such gloss on the appropriateness of an order for shared residence as would be reflected by the words *unusual* or indeed *exceptional*".

Apart from clarifying the application of the paramountcy principle, it should be noted that *D v D* also demonstrates the readiness of the English courts to make shared residence orders even where the parents are in conflict. In the case itself the Court of Appeal upheld a decision to make a shared residence order where the children were in effect living with both parents, having homes with each of them and were coping well with the arrangements. The parents on the other hand were in conflict over these arrangements and had frequently resorted to court proceedings. The hope was that the shared residence order would reduce the conflict between the parents. According to LOWE this probably goes beyond what the CEFL had in mind in Principle 3.20 (2)(b) (LOWE, 2009, p.6).

Nevertheless, both *D v D (Shared Residence Order)* and *A v A (Shared Residence)* establish that a harmonious relationship between the parents is not, as it was once considered to be, a prerequisite to making a shared residence order¹¹. In *A v A* the children were happily spending half of their time with each parent but the adults themselves were incapable of working in harmony. In Wall J's view this was a prime case for a shared residence order as it reflected the reality of the children's lives who were already dividing their time equally between their parents (*A v A (Shared Residence)*).

The Court of Appeal in *Re P (Children)* allowed the father's appeal against the refusal of the trial judge to make a shared residence order where the child was spending roughly equal time with each parent. In overturning the judge's decision Wall LJ stated that:

"Where a child in M's position lives for nearly 50% of the time with her father, it seems to me [...] firstly that a shared residence order is most apt to describe what is actually happening on the ground; and secondly that good reasons are required if a shared residence order is not to be made."

¹¹ See eg. *H v H (A Minor)* n. 2 (forum conveniens).

Interestingly, despite the observations made by the HM Government in the [Green Paper, Parental Separation: Children's Needs and Parents Responsibilities](#) (p.16, § 13), which preceded the Children and Adoption Act, a presumption of shared residence was specifically ruled out (HALE and WOOD, 2007, p. 13). However, on 13.7.2010 a [Private Member's Bill](#) on shared parenting was presented to the House of Commons. The purpose of the Bill is to provide for the making of shared parenting orders following separation or divorce and to create a legal presumption that such orders enhance the welfare of the child unless certain exceptions apply. It would also provide appropriate safeguards for cases where shared parenting is not the best solution.¹² The Bill received its formal first reading on the 13.7.2010 and will not be debated until 17.6.2011. It therefore remains to be seen how the proposed shared parenting legislation might affect shared residence in England and Wales.

Nevertheless, it appears that even without a legislative presumption of shared residence or even shared parenting at this stage the English Courts of their own volition appear to be finding creative ways in order to ensure that the most likely outcome of a residence application in the majority of cases will be a shared residence order, absent of a very good reason why not, although the equal division of time between two homes remains a rarity.

A good example of the courts creative approach is demonstrated in *Re F (Shared Residence Order)*. In this case the mother worked part-time and the father had resigned from the navy before trial, meaning that his plans were fluid. The mother proposed to relocate to Edinburgh, Scotland from the South of England, the father considering that if she were to do so, he may also relocate to facilitate the sharing arrangements. The trial judge made a shared residence order, acknowledging the Mother's freedom to move to Edinburgh and laying down a flexible pattern of contact which provided for a number of alternative future developments each of which would enable care to continue to be shared even if the mother relocated and the father did not.

Thus a shared residence order is not reserved only for circumstances in which the children will be spending their time equally nor does it appear to be the case that the English courts are particularly constrained by the CEFL Principle 3.20 (2)(c) which recommends that the distance between the residences of the holders of the parental responsibilities and to the Child's School should be taken into account by the authorities when considering *alternating residence*. The key message is that a shared residence order must reflect the underlying reality of the children's lives.

An example of where a shared residence order would be inappropriate was illustrated in the case of *Re A (children) (shared residence)*, which concerned three children, two girls who lived with their mother and a boy who lived with his father. The boy was unwilling to see his mother and was not doing so and there was also some uncertainty about one of the girls' contact with her father. HALE LJ emphasized that since a residence order was about with whom a child is to live it was

¹² Family Law (2010), Shared Parenting Bill Presented in the House of Commons (<http://www.familylaw.co.uk/articles/shared-parenting-bill-presented-in-the-house-of-commons>).

difficult to make a shared residence order 'about a child who is not only not living with one of the parents but is for the foreseeable future, unlikely even to visit that parent'. This decision reflects the CEFL Principle 3.20 (2)(a) under which the competent authority should take the child's age and opinion into account (LOWE, 2009, p.8).

A further instance in which a shared residence order would not be considered appropriate is when a parent has an improper motivation for wanting an order [see *Re K (Shared Residence Order)*]¹³. Furthermore, in some cases the behaviour of a parent during an existing arrangement may make an order impossible. In *Re M (Children) (Residence Order)*, for example, an order was made unworkable by the father's domestic violence, rigidity and failure to co-operate over arrangements for the children, and his manipulation of the children by involving them in inappropriate discussions (GILMORE, 2010, p. 291).

CEFL's perception that alternating residence is an emerging arrangement between parents that ought to be sanctioned by the courts is very much reflected by the English position in the context of what is known as shared residence orders. Having considered the developing case law it is evident that English law has moved from a position of scepticism to a much greater willingness to make such orders even to the extent of making such orders in the face of conflict between the parents or where parents are living far apart.

5. Comparative Analysis

Having considered both the English and Spanish positions separately in relation to shared custody some interesting comparative observations can be made. Firstly, it is evident that initially both countries were sceptical about shared custody arrangements and based their concern on the premise that such arrangements undermine children's key need for a stable home. Thus, historically both countries had traditionally awarded custody to one parent, usually the mother, with a regime of contact or visiting rights to the non-resident parent.

Nevertheless, social changes and a greater recognition being placed on the importance of a child's continuing contact with both parents led to a rising trend in the concept of 'alternating residence' in Europe. Following this trend, both countries set about implementing extensive reforms with the intention of clarifying the legal position in relation to shared custody. In England, the CA 198 intended to deal with the lack of uniformity between the courts in the use made of joint custody

¹³ WILSON at § [21] : "[A Shared Residence Order] is sometimes viewed by a parent intent upon interfering with, or disrupting, the other parent's role in the management of the child's life, as a useful vehicle by which to do so; and I have experience of cases in which parents, although allowed to have substantial contact with the child, are nevertheless rightly refused shared residence on the basis that their motivation seems to be to strike at the other parents' role in the management of the child's life. In any application for an order for shared residence, the court should in my view be alert to discern such malign motivation".

orders that varied widely from one court to the next, whereas in Spain, the 15/2005 Act introduced the notion of shared custody into the Spanish legal system for the first time. In both jurisdictions reference is now made to shared physical custody of a child with both of their parents, either explicitly as in Article 92.5 CC or implicitly under Section 11 (4) CA 1989.

5.1. The best interests of the child

Under English law there is now only one factor to be taken into account in shared residence applications -the child's welfare- this shall be the court's paramount consideration as Section 1 of the CA reigns supreme. The welfare principle requires the courts to accord overriding importance to the best interests of the child¹⁴. Under Section 1 of the CA 1989, the welfare checklist provides a number of criteria that a judge is to take into consideration in deciding whether shared custody is considered to be in the child's best interests:

- "a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- b) his physical, emotional and educational needs;
- c) the likely effect on him of any change in his circumstances;
- d) his age, sex, background and any characteristics of his which the court considers relevant;
- e) any harm which he has suffered or is at risk of suffering;
- f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- g) the range of powers available to the court under this Act in the proceedings in question".

In Spain, the best interests of the child are also considered to be important when considering whether a shared custody order should or should not be awarded. As already seen, under Article 90 II CC a judge can deny awarding a shared custody arrangement agreed between the parents if he believes that this would violate the best interests of the child or cause prejudicial or serious harm to one of the parents. Furthermore, Article 92.8 CC provides the judge should award shared custody "only when in this way the best interests of the child are adequately protected", the Spanish Civil Code thus establishes that the best interests of the child should be treated as a priority (ALASCIO CARRASCO and MARÍN GARCÍA, 2007, p. 9). However, unlike in English law where a *welfare checklist* is provided under the Children Act 1989, the Spanish Civil Code does not contain a list of criteria that permits the judge to determine in each concrete case what circumstances should be taken into account in order to justify the best interests of the child in cases where discrepancies exist between the parents (STS, 1st, 8.10.2009).

¹⁴ While Statutes in the UK use the term "welfare", the dominant term in North America is "best interests". Both terms are used synonymously in the literature in the UK.

Nevertheless, both Spain and England have ratified the CRC which gives children procedural rights. Article 12, paragraph 1, of the Convention provides that:

“State Parties assure to the child who is capable of forming his own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”.

Thus, in the English courts when shared residence is being considered it is mandatory for a court to give regard to the “ascertainable wishes and feelings of the child concerned (considered in light of his [or her] age and understanding) [Section 1 (a) CA 1989]. It is established that judges have the power to interview children in private but in line with general opinion this practice is not readily undertaken. It is a matter entirely at the judge’s discretion. The views and wishes of older children are seen to be more relevant and persuasive (REŠETAR and EMERY, 2008, pp. 68-69).

In Spain, the Law on the Legal Protection of Children (1/1996 Organic Law, 15th January, on the Legal Protection of Children reforming the Civil Code and Civil Procedural Code; BOE n. 15, 17.1.1996) provides for integral protection of the minor and the best interest of the child, in accordance with the CRC. Accordingly, Spanish law now recognizes the child’s *right to be heard* in any judicial or administrative process affecting the child (GORIENA LEKUE, 2007, p. 96). However, it should be noted that Article 92.6 b) CC does not make it obligatory for a child to be heard in custody proceedings.

In addition to these procedural rights the CRC states at Article 9 § 3 that:

“Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”.

Shared custody permits both parents to exercise care together after a divorce or separation and is arguably more in harmony with the consideration of the child’s best interests respecting one of the most basic shared principles of child law in both jurisdictions.

In view of this, optimistic commentaries were initially provided after the implementation of the 15/2005 Act in Spain maintaining that shared custody would constitute, with the passing of time, the principle model for custody, as it is the best response to the needs of our modern society in which men and women share roles and responsibilities which should be carried out equally. Nevertheless, according to GUILARTE MARTÍN-CALERO (2010, p. 10), 5 years on from the implementation of the Act little has changed. In considering the recent judgements handed down by the Supreme Court on 10.3.2010 and 11.3.2010 she argues that these contribute to the acceptance of a model of custody that is considered unfavourably and to which the indisputable test to show that shared custody is the only way in which to protect the best interests of the child is an open door for the denial of shared custody applications.

Tellingly, although there is movement towards a greater acceptance of shared custody in Spain, only one autonomous region has been prepared to give this model of custody explicit preferential treatment in its legislation. Therefore, although the new law in Aragon marks a clear movement towards the recognition of shared custody in a more favourable light, it is likely to be a slow process before the rest of Spain will follow suit.

Nonetheless, the new Act in Catalonia now provides helpful guidelines for judges in Catalonia to take into account when deciding on custody matters advocating the assignment of custody according to the shared character of parental responsibility and it is not only the courts in Catalonia and Aragon that are looking to such guidelines. The Supreme Court of Spain is also advocating the use of comparative law to seek out guidelines in order to help judges across Spain decide on the outcome of custody applications. It remains to be seen whether the State will follow the examples provided by Catalonia and Aragon and implement these guidelines into national legislation through reform of the Spanish Civil Code.

Of course, shared custody is not always in the best interests of the child in all cases and DIDUCK and KAGANAS (2006, p. 547) have questioned whether the extent to which shared residence orders might be used by the courts is not so much because they benefit the children but because they benefit the parents and because they 'radiate' the message of co-operation and shared parenting. After all in any sharing arrangement it is the child who has to move, often on a weekly basis, pack and unpack and have the wrong clothes in the wrong home at the wrong time.

As an alternative, an interesting possibility for consideration is that the child stays in one house and the parents move in and out (HERRING, 2007, p. 492), this was an arrangement recently awarded in Spain in the region of Asturias (SJPI Gijon 3.10.2008). In this case the judge at first instance awarded the matrimonial home exclusively for the use of the children, giving shared custody to the parents who were ordered to reside with the children in the family home on an alternating basis of 6 months for each parent. At the end of a 6 month term it is the parent that is required to pack their suitcase and move from the family home to the family flat when their term is over, the intention of the judge being to guarantee the stability and the security of the children

Clearly, despite offering a creative solution the 'bird's nest' scheme is difficult in practice and is not a suitable arrangement for every family, not only due to the cost of the need to maintain up to 3 separate properties at a time, but also in terms of practicalities for parents that are working and living far away from one another.

5.2. Restrictive vs. flexible approach

The Spanish Civil Code distinguishes between two forms of shared custody. One in which the parents consent to a shared custody arrangement, which is the favoured form for awarding shared custody. The other, considered to be the exceptional form, can be ordered by a judge in the absence of the agreement of the parents only if a favourable report from the Public Ministry is provided and where it is considered to be the only way to adequately protect the interests of the

children. In both circumstances, a judge is required to provide his seal of approval on the arrangements for child custody regardless of whether the parents have reached an agreement or not. However, where the parents have reached an agreement for shared custody the judicial authority cannot deny authorization of the agreement, unless the result would be harmful to the child (Article 90 II CC). The list of criteria that the judge must observe is set out in Article 92.6 CC where the parents have reached an agreement and Article 92.8 CC where the parents are unable to reach an agreement, in both cases, the judge is required to obtain a report from the Public Ministry before reaching his decision.

In contrast, in England, while it remains open for courts to invoke their powers in uncontested cases, as expressed under the so called *no order principle* [Section 1 (5) CA 1989]¹⁵, they should only do so where this would be in the best interests of the child. According to the LAW COMMISSION parents are considered to be the best judges of their children's best interests and there would have to be cogent reasons for setting aside an agreed plan¹⁶. A study by HARRIS and GEORGE (2010) has recently raised doubts as to the application of the no order principle in practice in the English courts. Nevertheless, where a court decides that it should exercise its power the welfare principle requires the courts to accord overriding importance to the child's best interests. There is no concept of the Public Ministry in English law therefore English judges are left to apply the welfare principles at their own discretion.

As has been seen, it is often argued that the Public Ministry in Spain has a restraining effect on the judges' power to grant shared custody orders because a judge is bound to follow the decision of the Public Ministry if an unfavourable report in relation to shared custody is produced. Nevertheless, this is not the only factor that has restrained the development of shared custody in Spain. It is evident that prejudices towards shared custody arrangements remain, particularly in the lower courts (SSAAPP Oviedo 2.11.2007, Alicante 8.5.2006, Valencia 15.1.2007) although the higher courts appear now to be making it their mission to eradicate such prejudices, advocating the use of comparative law in order to develop criteria in relation to whether or not a shared custody order should be awarded and requiring the lower courts to provide good reasons if shared custody has not been ordered (STS, 1st, 8.10.2009, STS 10.3.2010, STS 11.3.2010, STS 1.10.2010).

Interestingly, despite having started from the same type of scepticism as referred to above, the English courts now take a very different attitude towards shared custody and following the decisive case of *D v D* have embraced the concept of shared custody with much more ease than the Spanish courts. As case law has evolved the English courts have left behind the old restrictive

¹⁵ "Where a court is considering whether or not to make one or more of the orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all".

¹⁶ THE LAW COMMISSION (1988), "Law Commission's Report on Guardianship and Custody", *Law Com*, n. 172, § 3.9.

approach and are now reaching the position where “good reasons are required if a shared residence order is not to be made [*Re P (Children)*]. In stark contrast, in Spanish law where a common agreement cannot be reached between the parents, very good reasons are required to show why a shared custody order should be made as Article 92.8 CC requires the judge’s decision must be founded on the basis that shared residence is the only way by which the best interests of the child can be adequately protected.

5.3. Co-operation between parents

The emphasis placed on cooperation between parents by the Spanish courts in order for a shared custody arrangement to be agreed can be contrasted against the English position where a harmonious relationship between the parents is not a prerequisite of shared care but, in fact likely to result in no order being made at all in line with the no order principle. Some authors have argued that one benefit of a shared residence order is that it may minimize the conflict between parents and rebut the all too common perception that disputes over custody involve a winner and a loser (LAUROBA LACOSA, 2010, p. 1487). On the other hand, some express concern that a shared residence order is an ideal compromise for the two parents but not for the child, who can find it artificial and alienating (HERRING, 2007, p. 493).

The *exceptional* character of shared custody orders in Spain where parents are not in agreement, reflects the position in English law after the implementation of the CA 1989 in 1991 and for the remainder of the 1990’s where shared residence orders were seen to be restricted to cases where exceptional circumstances existed [see *Re H (A Minor) (Shared Residence)*] or where there was something unusual about the case which justified making a shared residence order as being in the best interests of the child with the court looking for a positive benefit [see *A v A (Minors) (Shared Residence Order)*]. This gloss was removed by HALE LJ and now the only test to be applied by judges in shared residence applications is the welfare principle. In this respect, it can be argued that Spanish law is lagging behind English law in its ability to remain flexible to an increasing call for the ethic of justice by way of shared parenting.

5.4. Preferential treatment of shared custody

Indeed, calls for a presumption of shared custody are becoming more amplified globally. This is largely attributable to the efforts of pressure groups representing fathers (DIDUCK and KAGANAS, 2006, p. 328). In the UK, in submissions made by three organizations, including Families Need Fathers, to the consultation on Making Contact Work, it was argued that there should be a presumption of shared parenting, although not necessarily in the form of a 50:50 split. A presumption, according to these groups, would counter the idea that *winner takes all* and promote parental involvement by means of the least adversarial method, it would amount to the recognition of the importance of both parents, and, if it were to become the norm, would *set the tone* for negotiations and would *remove obstacles* to contact (DIDUCK and KAGANAS, 2006, p. 329).

Despite the British Government declaring itself unwilling to introduce a statutory presumption of shared parenting in 2004¹⁷, the issue has been raised again by way of a Private Member's Bill on shared parenting presented to the House of Commons on 13.6.2010. Similar to the recently approved legislation in Catalonia, the [Bill](#) proposes a presumption of shared parenting as opposed to shared custody. However, the Bill proposes that when making a shared parenting order, the court must apply a presumption that the child should spend a substantial and significant amount of time with both parents. The Bill received will not be debated until this summer therefore it remains to be seen whether the British Government is prepared to change its stance in relation to a legislative presumption in this area.

In Spain, fathers groups have also been making calls for a presumption of shared custody. Indeed, shared custody since the very implementation of the 15/2005 Act has stood out as being one of the institutions most in need of reform. The new Acts in Aragon and Catalonia show that in certain parts of Spain, despite the generally restrictive application of shared residence orders in absence of the parents' agreement, there is now clear legislative reform that seeks to give shared custody preferential treatment. Most significantly, in Aragon the new Act makes it quite clear that the judge will adopt shared custody in the interests of the children in a preferential way (Art 6.2 of the 2/2010 Act). By specifically legislating preferential treatment for shared custody Aragon is not only the first region in Spain to favour shared custody in this way, but it has also gone further than England in the promotion of shared custody whose government has previously refused to legislate a presumption of shared custody.

In Catalonia, although the word preferential is not used there is a requirement that the judicial authority should award custody according to the shared character of parental responsibilities where no agreement between the parents can be reached (Art 233-10 of the 25/2010 Act). Thus there is an implicit if not explicit preference for shared custody.

5.5. Financial consequences

In terms of the financial consequences that decisions in relation to child custody can have, although in England it is good practice that the financial aspects of a divorce are kept separate to any child law proceedings ([Resolution Code of Practice](#)) it is unavoidable that custody has an impact on the family home and finances as well as the children

Historically, in Spain the attribution of custody to one of the parents entailed the assignment of the use of the family home to that parent (usually the mother¹⁸) making the negotiating position

¹⁷ HM GOVERNMENT (2004), "Green paper, Parental Separation: Children's needs and parents' responsibilities", p. 19 § 42.

¹⁸ In Catalonia the use of the family home is assigned with preference to the custodial parent (Article 233-20 of the 25/2010 Act). This is not an automatic assignment as it is in Article 96 CC. Therefore the position of the custodial parent in Catalan law is not as strong as it is not 100% guaranteed that he will be awarded use of the family home.

of the parent with custody stronger. However, according to ALASCIO CARRASCO and MARÍN GARCÍA (2007, p. 15), shared custody has broken the mould of assigning the use of the home and balanced the negotiating position. Even so, they recognized that this can produce the following perverse incentives:

“The father applying for shared custody in order that the mother is not awarded the use of the matrimonial home; the mother giving up part of the marital assets provided that sole custody is awarded to her”.

In English Law, a clean break order is a resolution through which the judge tries to settle once and for all the parties' financial responsibility towards each other and to end their financial interdependence to enable them to leave their past behind them and to begin anew (DUFFIELD *et al.*, 2005, p. 68)". The court can award a clean break order taking into account the criteria set out in s25 of the Matrimonial Causes Act 1973. It will never be appropriate to have a clean break between a parent and child, as a parent can never sever his responsibility towards a child of the family. It is possible, however, to have a clean break between the parties even where there are children involved. In cases where the court has jurisdiction to make orders for children, it might award less than it would otherwise do because the parent with whom the children are residing has agreed a clean break settlement. There are various ways in which a clean break can be executed: by way of lump sum, property transfer or, if a clean break is not possible immediately, a lump sum adjustment order on an application for variation or discharge of an existing periodical payment or secured periodical payment order. This type of agreement is appropriate in cases of short marriages without children and where resentment between the spouses exists. They are inappropriate in the case of a long marriage, or when uncertainty exists about the economic future of one of the spouses.

Thus, as ALASCIO and MARÍN (2007, pp. 19-20) explain, although shared custody does not have a direct relationship with clean break orders in the sense that clean break orders regulate the financial aspect of marital breakdown and shared custody regulates the personal aspect, the regulation of custody arrangements foresees certain financial consequences. Therefore, shared custody favours an arrangement in which the ex-spouses keep their finances separated, whilst maintaining their emotional ties to their children.

6. Conclusion

Shared custody is a subject matter that has produced much debate across Europe and the rest of the globe and there can be little doubt that there is now a rising trend towards shared custody arrangements in Europe. Nevertheless, as this comparative study has demonstrated, there are certainly variations between the ease and speed with which shared custody has been accepted as a legal model for child custody in different jurisdictions. England and Spain provide a useful comparison because, having both started out with the same scepticism, the English courts have been able to adapt with much more ease to accepting the shared custody model, whereas the

Spanish courts have found this transition more difficult. This is due to barriers in place for the award of shared custody in Spanish legislation, in particular, the *exceptionality* criteria of the award of shared custody where the parents are not in agreement and the need for a favourable report from the Public Ministry as well as the prejudices of individual judges themselves. Nevertheless, as this paper has shown, recent case law shows a marked movement away from the traditionally restrictive approach towards shared custody in Spain as judges, in the higher courts in particular, are doing their utmost to encourage a greater acceptance of shared custody arrangements throughout the national courts. In addition, the bold legislative reform in Aragon goes further than the English position to shared custody to the extent that this autonomous region of Spain now gives preferential treatment to shared custody. Likewise Catalonia has approved an Act that means that a judge has to award custody according to the joint nature of parental responsibility. Thus, little by little changes are starting to take place, however the 'domino effect' that certain associations in Spain are hoping for may be over ambitious. A serious overhaul of national legislation in this area is needed before any significant impact can be made in terms of removing the *exceptionality* requirement that is set out in the Spanish Civil Code.

The English position in relation to shared custody has developed in a way that has enabled judges to be flexible and creative in their approach to shared custody. Although stopping short of a presumption of shared custody, the readiness of courts to make these orders in England has been demonstrated by the award of shared custody to parents that are in conflict as well as to those that are living far apart, thus going beyond the recommendations of CEFL Principle 3.20. As the British Government pointed out in its Green Paper on parental separation, there is no one size fits all solution. Nevertheless, by giving paramountcy to the welfare of the child, English law provides a good model for maintaining flexibility in relation to shared custody without rigid restrictions or enforced presumptions. It will be interesting to see whether Spain develops its legislation along similar lines.

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AP Las Palmas, Civil s 5, 09.13.2006	--	<i>Mónica García de Yzaguirre</i>
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<i>Re H (A Minor) (Shared Residence Order)</i>	[1994] 1 FLR 717
<i>A v A (Minors) (Shared Residence Order)</i>	[2001] 1 FLR 495
<i>A (Children) (Shared residence)</i>	[2002] 1 FCR 177
<i>D v D (Shared Residence Order)</i>	[2001] 1 FLR 495
<i>Re F (Shared Residence Order)</i>	[2003] 2 FLR 397
<i>Re M (Children) (Residence Order)</i>	[2004] EWCA Civ 1413
<i>A v A (Shared Residence)</i>	[2004] 1 FLR 1195
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