A study of

# THE PROCESS OF HEARING AND THE BEST INTERESTS OF THE CHILD

## Judicial review of family processes and protection measures

DEFENSOR DEL PUEBLO

SPANISH OMBUDSMAN


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# PREFACE

There are clearly differences between “hearing” as the effortlessly passive auditory faculty of perceiving sound and “hearing” as the consciously active mental skill of attentive listening in awareness and comprehension what is being expressed. It is this focused, attentive listening and hearing with regard to children when their personal and family situation is being dealt with before the courts that is the objective of the study which the Ombudsman is presenting herein.

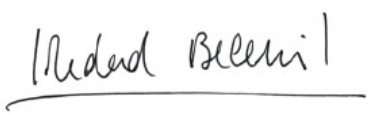
The Convention on the Rights of the Child adopted by the United Nations in 1989 sets forth that the views of a child be taken into account in administrative and judicial proceedings. There are different ways of “hearing a child”. There are also different ways of preventing or, on the other hand, of causing yet more pain and bewilderment for the children called to appear before the courts.

The judges who deal with family matters and, in many cases, matters involving children, have within their power the possibility of alleviating a child’s distress or to delve deeply into their perplexity and even their rejection of the environment around them. It would seem somewhat grave to say that judges have the children’s futures in their hands, but they do indeed have at least the ability to influence their future.

The family as an institution has evolved quite rapidly over recent decades in the Western world. The close relationships among the members of a family may nowadays be less lasting and subject to many more varying external circumstances than just a few short decades ago. On one hand, these Western countries can be said to now be stressing children’s rights to a greater degree and the States to be focusing particularly on ensuring the exercise of these rights. Nevertheless, children who are safeguarded under the legal system and whom the State must protect by law are often subject to environments unstable in personal relations and uncertain in their economic aspects. What is secure and stable for them today may not be so tomorrow.

This document, a result of complaints and situations put forth to the Ombudsman Institution, has been written in the hope of being useful for the purpose of contributing to better defending the rights of the child.

Madrid – 2014



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# Summary

# 1. STUDY TOPIC AND METHODOLOGY

## 1.1. The Convention on the Rights of the Child as a new approach to status as a minor

A concern about childhood has been stated in international conventions and declarations since the early 20th century, no major qualitative advancement however having been until 1989 involving the passage of a universally-oriented regulatory text. The aforesaid text, the Convention on the Rights of the Child (CRC)[1], adopted by the United Nations General Assembly by way of Resolution 44/25 of November 20th entered into effect less than one year following its passage (September 2, 1990)[2]. The large number of States party thereto, totaling 193 in all at present, is highly indicative of the broad-ranging consensus to which the idea as to children's rights having to be a top-priority objective is shared by all humanity.

This new juridical-social framework is set out under Organic Act 1/1996 of January 15th on the Legal Protection of Minors, a law which refers to children, in its explanatory statement, "as active, participation-oriented and creative subjects, possessing the ability to modify their own personal and social environment, to participate in seeking and meeting their needs and in meeting the needs of others".

Therefore, a child's ability to exercise her or his rights is then modulated in terms of each the development and degree of autonomy of each individual minor. The key to this new understanding lies in the term "development", which the Committee on the Rights of the Child describes as a "holistic concept embracing the child's physical, mental, spiritual, moral, psychological and social development" (General Comment [hereinafter GC] 5, § 12).

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[1] The terms "minor" and "child" are used interchangeably throughout this study. The former is more common in Spanish legislation, whilst the latter is used more by the United Nations.

[2] Save the Children Fund founder Eglantynne Jeeb promoted the Declaration of the Rights of the Child, which was adopted in 1924 by the League of Nations General Assembly as the "Geneva Convention", having served as the precedent for the 1959 Declaration of Rights of the Child. As of the founding of the International Labor Organization (ILO) in 1919, this organization has also promoted child welfare conventions by way of the protection of maternity or by regulating working conditions (minimum working age, night work, forced labor, medical examinations). Under the auspices of the United Nations Organization as of 1945, the Declaration of the Rights of the Child of 1959 was adopted, growing attention being focused child rights being reflected in treaties, declarations and instruments of differing scopes. Apart from the above, both the Universal Declaration of Human Rights (1948) as well as the International Pact on Economic, Social and Cultural Rights and the Pact on Civil and Political Rights (adopted in 1966, having entered into effect in 1976) having made it possible to expand the subjective scope of application to children, covering some specific rights. The International Humanitarian Law (Geneva Conventions of 1949 and their Additional Protocols of 1977) have also had children in mind as victims especially vulnerable to armed conflicts and their enlistment in armed groups and armed forces, which has been rounded out with the adoption of the Optional Protocol to the Convention of the Rights of the Child regarding children's participation in armed conflicts.

The idea of the evolving capacities of the child is introduced under Article 5 of the Convention, in which it is set forth that for the exercise of their rights, the child will need direction and guidance of their parents or legal guardians in keeping with the evolving capacities thereof, so that the same must progressively diminish as the child progressively grows.

Within the architecture of the Convention, Article 43 sets forth what is referred to as the "Committee on the Rights of the Child" for the purpose of examining the progress made by each one of the countries in complying with the aforesaid international instrument. In this task, in addition to keeping track of the national reports, what are referred to as "general comments" take on importance as authorized doctrine of this Committee, by way of which it systematically deals with different aspects related to the interpretation of the Convention, as well as the protection and promotion of the rights of children throughout the world. The Committee has published seventeen of these comments to date.

"General Comment No. 2, on the role of the independent national human rights institutions in the promotion and protection of the rights of the child", includes a broad-ranging list indicating the activities which these institutions should carry out in regard to the exercise of the rights of the child as a reflection of the general principles set out in the Convention.

The Ombudsman Institution carries out many of these activities as part of its customary tasks. This study falls within the framework thereof, more specifically within it mission of "preparing and publishing opinions, recommendations and reports … on any matters related to the promotion and protection of the rights of the child" [GC 2, § 19.c)].

This study also comes within the framework of the functions inherent to the Ombudsman Institution as attributed thereto under Organic Act 3/1981 of April 6th, allowing this Institution to prepare studies and set out recommendations on those matters considered thereby to possibly involve human rights violations.

The report by the Secretary General of the United National Assembly regarding the situation of the Convention, of August 2, 2013, states in Paragraph 52 thereof:

> A number of States parties have made efforts to incorporate the right of children to be heard into administrative and legal proceedings. However, insufficient clarity and limited practical application of legal provisions, including safeguards and mechanisms for ensuring children's right to be heard free of discrimination, manipulation or intimidation remain issues of concern… (A/68/257)

Regarding Spain, the final Comments of the Committee for the Rights of the Child set out on November 3, 2010 on the occasion of the review of the latest Spanish report, state under Paragraph 30 thereof:

> The Committee recommends that the State party continue and strengthen efforts to fully implement article 12 of the Convention and promote due respect for the views of the child at any age in administrative and judicial proceedings, including child custody hearings, immigration cases, and in society at large. The Committee also recommends that the State party promote the participation of children, assist them to effectively exercise this right and ensure that due weight is given to their views in all matters that concern them in the family, school, other settings, the community, national policy formulation and in the implementation and evaluation of plans, programmes and policies… (CRC/C/ESP/CO/3-4).

## 1.2. Setting the bounds of the study topic

On the basis of these premises, this study analyses how the participation of children and their being heard in the process of making decisions which affect them are being carried out with a view to safeguarding their best interests. This study is also aimed at contributing to one of the goals inspiring General Comment 12, which is to "propose basic requirements for appropriate ways to give due weight to children's views in all matters that affect them".

Of the long list of actions taken by the public authorities which could be dealt with in a study of this type, preference has been given to decisions which must be adopted within the scope of the courts of law.

The reason for above lies in the capacity which judicial proceedings have for serving as a guide and point of reference for all of the procedures carried out by the public administrations. In other words, it will be easier to move forward in achieving, in practice, the change in focus anticipated by the Convention if the judiciary branch is spearheading this change in trend.

Two procedures in which circumstances of special importance for the life of any minor are involved have been selected from among the wide variety of judicial proceedings in which children and their interests can be affected:

- The processes of contesting the administrative decisions on the subject of juvenile protection (the most typical being on the declaration of dependency) in which a review is made as to the pertinence of a protective measure involving parent-child ties being severed, when the family is, as recalled in the preamble to the Convention proper, "a fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community".
- Similar arguments have led to the election of the family processes, in which the experience provided by the complaints lodged with the Ombudsman Institution reveal that determining the framework of relations which will remain in existence following the family breakup often comprises one of the main and most long and drawn out causes of dispute.

By way of this contribution, this Institution aims to encourage the complex task of reconciling respect for the rules of procedure —which are set forth for the preservation of the guarantees of the parties— by way of attributing to the child the leading role called for by her or his position as the subject of the process and not merely an object thereof, in conjunction with her or his vulnerability. This entails the challenge of attaining more well-suited, readily enabling and encouraging processes in keeping with children's special needs.

## 1.3. Methodology

The preparation of this study commenced with the drafting of a document including an open-ended list of questions (provided in Annex I), the contents of which is the result of having drawn a comparison among the international standards on this subject and Spanish legislation, the complaints lodged on this subject with this Institution, as well as the ex officio actions undertaken with all of the juvenile protection entities.

This list was prepared for the purpose of planning and facilitating four meetings for discussions being held among the most outstanding players in the processes under study: judges, selected by the General Council of the Judiciary; public prosecutors, designated by the Public Prosecutor's Office; attorneys, selected by the General Council of the Spanish Bar, and representatives from the psychosocial teams assigned to judicial bodies, designated by the Ministry of Justice and by the autonomous communities having province over the personnel and material means of the Justice Administration. The aim was to avail of different points of view all encountered simultaneously in the aforesaid processes and on the same set of issues.

For this purpose, an invitation was sent out to the "Plataforma de Infancia" (Spanish Children's Rights Coalition), an alliance grouping together most of the entities working in this field, in order for representatives to be designated to attend a joint meeting with the representatives of the Bar.

The requests for collaboration included asking that the greatest possible degree of diversity of geographical origins be assured in the designation of representatives.

The meetings were held over the course of the month of October in 2013, the individuals listed in Annex II having been in attendance. The enriching discussions which arose round out and put into context the material under analysis, on which the Ombudsman, out of the independence of judgment resulting from the mandate thereof, has prepared this study.

# 2. RIGHTS OF THE CHILD TO BE HEARD AND FOR HER OR HIS OPINION TO BE TAKEN INTO ACCOUNT

## 2.1. Article 12 of the Convention

Article 12 is one of the most significant contributions which the Convention has made to international human rights law and to the child being considered a subject of rights. This means a transformation in the conventional approach, which attributes children the role of passive recipients of the care and attention of adults —who would be those in charge of making the most important decisions in their stead with regard to that which concerns them—, to recognize the child as playing an active leading role and therefore being called to take part in the entire process of taking such decisions. The child then comes to be considered an individual who has her or his own views which will have to be taken into account in accordance with the capacity and maturity of the child.

It is on the basis of this approach that the Committee on the Rights of the Child sets outs its doctrine in Article 12 by way of General Comment No. 12, devoted to the right of the child to be heard (made public in June 2009), which is completed by way of recent General Comment No. 14 (2013), on the right of the child to have her or his best interests taken as a primary consideration.

The right of the child to be heard in all matters affecting them and to her or his opinions being taken into consideration is proclaimed in two paragraphs of the same precept, although of differing scopes:

Three aspects are set forth under the first paragraph (Art. 12.1 CRC):

- The right of children to express their views freely in all matters affecting them and, presupposing this, that the opinions of the child be taken seriously. These rights are of both an individual and communal dimension (i.e. the students of a class, the children of a city/town district or of a country, the children with disabilities or the children of the female gender [GC 12, § 9]). The topic of this study deals with the individual dimension, given that it relates to two types of civil processes in which decisions are made concerning individual situations.
- The holder of these rights is any child who is in the position to form her or his own views without entailing any kind of discrimination. According to the Committee on the Rights of the Child, the starting premise must be that the child has the capacity to form her or his own opinions, without any age limit and including early childhood.
- The guarantee of this right is an obligation on the part of the States party to the Convention.

Apart from the above, the second paragraph (Art. 12.2 CRC) specifically states the right to be heard in administrative and judicial proceedings, setting forth a number of basic characteristics for the same:

- That such a right is of an individual dimension; it hence being stated that "the child shall in particular be provided the opportunity to be heard".
- The "principle of totality", by virtue of which no public decision-making scope with regard to individual situations are exempted from this obligation, as it refers to "any judicial and administrative proceedings affecting the child …".
- The "principle of suitability", referred to the way in which the child is to be heard, which must be in keeping with the child's subjective situation and the requirements of the specific procedure in question which is being substantiated (shall be heard either "directly or through a representative or an appropriate body"). Nevertheless, the Committee recommends that the child be heard directly whenever possible (GC 12, § 35).

The Committee on the Rights of the Child stresses in General Comment 12, Paragraph 2 that this precept must be considered "as one of the four general principles of the Convention, the others being the right to non-discrimination, the right to life and development, and the child's best interests being taken as a primary consideration, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights".

Organic Act 1/1996 of January 15th on the Legal Protection of Minors, deals with this matter under the first paragraph of Article 9 in the following terms:

> 1. The child has the right to be heard, both within the family setting and in any administrative or judicial proceedings in which the child is directly involved which leads to a decision affecting the child's personal, family or social sphere.
>
> In the judicial proceedings, the child's appearances shall be made in a manner adapted to the child's situation and evolving development, taking care to preserve the child's privacy.
>
> […]
>
> 3. When the minor asks to be heard directly or through a representative, the reasons for the refusal of the hearing shall be set out and notified to the Public Prosecutor's Office and to former.

The Spanish "right to be heard" legal approach differs somewhat from the concept of the Convention, which places the emphasis on the process of hearing. In Spanish legal tradition, "being heard" implies mainly a proceeding from which the obligation of assuming the position of the person heard is not inferred. The concept of hearing within the framework of the Convention is more exacting, given that in addition to paying close attention to that which is heard, the reasons for a decision straying from that which has been said by the child must be set out.

Nor is any reference made under this Article to the obligation of the views of the child being giving due weight in accordance with the age and maturity of the child. Under our legal system, examples may be found of a more exacting attention to this duty of hearing, such as in the case of adoption, in which Article 177 of the Spanish Civil Code (CC) sets forth that the child under consideration for adoption who is over twelve years of age must render her or his consent before the judge in order for the adoption to be made final.

Nevertheless, the legislative line favorable to hearing out the child is not uniform. Hence, this same Code sets forth, under Article 92.6 thereof —following the reform enacted by way of Law 15/2005 of July 8th on the reform of the Civil Code and the Code of Civil Procedure (LEC)—, for the guardianship and custody, in the cases of annulment, separation or divorce, that the judge must "hear the children who have sufficient judgment when deemed necessary, ex officio or at the request of the prosecutor, parties or members of the Judicial Technical Team, or of the child proper, to assess the allegations of the parties set out in the appearance and the evidence presented therein, and the relationship which the parents have with one

another and with their children in order to determine the suitability thereof with the guardianship regime". In Decision 163/2009, the Constitutional Court stated that, in this wording introduced by Organic Act 15/2005, "hearing the child is no longer conceived as being of an essential nature, it thus being that the knowledge of the views of the child can be substantiated through certain individuals (Organic Act 1/1996, Article 9), and shall solely be mandatory when so deemed necessary ex officio or at the request of the prosecutor, parties or members of the judicial technical team, or of the child proper".

More in line with the Convention and with General Comment 12 is the second paragraph of aforesaid Article 9, related to how children's judicial appearances must be adapted to their situation and degree of maturity.

The third paragraph of Article 9 of Organic Act 1/1996 makes reference to when a child "asks to be heard directly or through a representative, the reasons for the refusal of the hearing must be set out and notified to the Public Prosecutor's Office and to the former". The precept is formalistic, given that it places the focus on a procedural activity without taking into consideration that the child is not party to the proceedings per se —as a result of which the child neither has an attorney nor will it customarily be simple for the her or him to appear in court— and additionally has not been informed —because no provision is made for such a formality— as to her or his rights, particularly the right to be heard with regard to all matters affecting them.

## 2.2. Notes characterizing the right of the child to be heard

The view which the Committee sets out regarding the right of the child to be heard specifically takes the form of a number of characterizing notes, which can be excerpted from the aforesaid General Comment and which, with regard to that which is of interest for the purposes of this study, may be summarized as follows:

- The child, however, has the right not to exercise this right. "Expressing views is a choice for the child, not an obligation" [GC 12, § 16 and 134.b)].
- Any child who is in the position to form her or his own views must be heard. This being said, one must base oneself on the presumption that the child is in the position of forming said view and it not being befitting to set any minimum age limits, but rather that this must be determined on a case by case basis. For early childhood, the recognition and respect for the non-verbal forms of communication, such as play, body language and facial expression and drawing and painting, by means of which the youngest children demonstrate understanding, choices and preferences, must be taken into consideration as a suitable option for these purposes. In the Spanish legal system, there is no homogenous line in existence with regard to this matter, given that precepts have been introduced which link the hearing process to the child's degree of maturity (Spanish Civil Code Art. 92.6 ), whilst in others a reference to chronological age is maintained (Spanish Code of Civil Procedure Article 770.4). Within the logic of the Convention, the determining factor will be the child's degree of maturity, defined as "the capacity of a child to express her or his views on issues in a reasonable and independent manner" (GC 12, § 20, 21 and 52).
- For the evolution of the capacity to form her or his own views it is not necessary that the child have comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter (GC 12, § 21).
- States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. Children with disabilities should be equipped

with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language (GC 12, § 21).

- The right of a child to be heard presupposes the absence of pressures. In other words, this right must be exercised freely. Such freedom must grant the child the initiative to "to highlight and address the issues they themselves identify as relevant and important" [GC 12, § 22 and 134.d)].
- The hearing modalities should abide by the principle of prudence with regard to their number in order to prevent victimization due to unnecessary reiterations. Nevertheless, the Committee is of the understanding that the aforesaid hearing process must be "understood as a process, not as an individual one-off event". This implies that those who must conduct the proceedings have to assess the need and advisability of the hearing acts, without this permitting the elimination of this duty (GC 12, § 25 and 133).
- The child must also be informed about the reason for the hearing, the matters which will be dealt with and the consequences of whatever decisions are adopted. The Committee calls for the process to be "transparent and informative" [GC 12, § 23 and 134a)].
- The environment in which the hearing is held must be amicable. In the words of General Comment 12: "A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age", which implies changes not only in the physical spaces and elements, but also in the attitude of the players involved in the process (§ 34).
- Safety for the child and a proper assessment of the risk which the fact of expressing her or his views may have for the child must be a priority of the entire hearing process. This involves, within the context of this study, the advisability of setting out strategies for the protection of children which recognize the particular risks which may exist, for family, group or social reasons [GC 12, § 134h)].

## 2.3 The hearing itinerary

Under the heading of "steps for the implementation of the child's right to be heard", the Committee sets out in General Comment No. 12 a number of steps necessary in order for the aforesaid right to be suitably realized.

— **Preparation.** It is fundamental that the child be informed about her or his right to express her or his views, about the options for doing so (directly or through a representative or an appropriate body) and as to the possible consequences involved therein, as well as about as to how, when and where the hearing will take place (GC 12, § 41).

The experts consulted by this Institution stressed the difficulties involved in finding out what information the child already has concerning the legal proceedings affecting her or him, whether a protection or family process. This information often either has not been furnished or has been provided to her or him in a biased manner in situations of the family dispute being dealt with in the case in point.

Regarding the intervention of a representative, the need of preventing conflicts of interest between these individuals and the children must be taken especially into account. In the Spanish legal system, Organic Act 1/1996, Article 9, Paragraph 2 takes two situations into consideration: that the child who, having sufficient judgment, designates a representative and the child who cannot make such a designation or makes a designation which is deemed not to be in her or his interest. In such a case, the law stipulates that she or he be represented either by her or his legal repre-

sentatives —provided that there be no conflict of interests— or by "other persons who, due to their profession or especially close relationship with her or him, is capable of conveying it objectively".

In the cases analyzed in the present study, the possibility of attributing the representation to whose vested with the same according to law is problematical a priori, given that the parent-child relations or guardianship function are what is in question.

Recently, the European Convention on the Exercise of Children's Rights made in Strasbourg on January 25, 1996 and promoted by the Council of Europe has been taken to Spanish Parliament[3] for the ratification thereof. This instrument, which includes several precepts under the heading of "the rights of a child in legal proceedings", makes provision for a list of rights under Article 5 regarding which the States must examine the advisability of the implementation thereof, aimed both at assuring the capacity of the child to be heard as well as her or his opinion actually being taken into account:

a) The right to request to be assisted by an appropriate person of their choice in order to help them express their views.

b) The right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer.

c) The right to appoint their own representative.

d) The right to exercise some or all of the rights of parties to such proceedings.

– **Hearing.** The hearing must be conducted within the framework of what the Committee terms an "enabling and encouraging context". There is a clear preference for the confidentiality of this act, and the possibility is pointed out as to this hearing having the format of a talk more than a one-sided examination (GC 12, §42 and 43).

Under Spanish procedural laws, no details are provided as to the manner in which this right to be heard must be exercised. Solely general references are made as to the child being heard under the best conditions for safeguarding her or his interests, without interference from other persons or as to the need of these proceedings being held in a suitable setting.

This gives rise to some major differences in legal practice, made even greater by the measures taken by specialized courts and others dealing with general matters. This situation —which was stressed at the meeting held with members of the judiciary in preparation of this study— has been attempted to be overlooked by way of consensus documents. One example thereof are the "Proposed conclusions on the examination of minors from the Seminar on auxiliary instruments in the field of Family Law" held in the General Council of the Judiciary of February 17-19, 2010[4].

This document is based on the idea that examination is not a means of proof but rather a judicial proceeding, which is coherent with the perspective of situating the child as an active subject and not as a mere object of a procedure. Other similarly positive aspects set out include the will that the decision-maker not stray from the process of hearing out the minor, given that although the hearing through a psychosocial team be accepted, it is stipulated that it must not be generalized; the stipulation that the repetition of examinations is to be avoided; as well as the guideline as to this procedure being scheduled as soon as possible so as to avoid the "stress of waiting" for the child.

However, other proposals are further from the logic of the Convention. Hence, the principle is set forth as to the children having to be heard whenever the judge deems necessary and not in every

[3] Boletín Oficial de las Cortes Generales, *[The Official Gazette of the Spanish Parliament (BOCG)]*. Parliament Section, 10th Legislature, Series A: Parliamentary Activities. No. 241. Initiative 110/000114 (House of Deputies).

[4] Proposed conclusions on the examination of minors from the "Seminar on auxiliary instruments in the field of Family Law" held in the General Council of the Judiciary of February 17-19, 2010, p. 5 and 6.

case, which is not in keeping with the configuration of the hearing as a right of the child. In fact, it is considered that the finding of a possible future detriment will afford the possibility of not hearing the child, when the obligation is to protect the child, but not go without hearing her or him.

The trend noted to exist in practice of considering it unnecessary to hear the child in proceedings by mutual consent or in which there is no dispute as to the parent-child relations is apparently taking root, without giving thought to the fact that, if the child is not heard, it will hardly be possible for non-evident conflicts to come to fore, nor will it be assured that her or his best interests have been properly determined.

As regards the enabling and encouraging setting, the discussion with the experts brought to light that, in many cases, there are no suitable spaces in which the child can feel comfortable, as the examination is conducted most often in the judge's chambers or even in the visiting rooms.

– **Assessment of the child's capacity.** This question is of crucial importance with regard to the matters dealt with in this study. Judging maturity is not a legal evaluation as such, and the person making this judgment will therefore often require technical support for these purposes[5]. The psychosocial teams should also implement and respect the approach of the Convention and the Committee and the elements characterizing the right of the child to be heard, especially the presumption of existing capacity to form their own views. The Committee sets forth the reminder that "The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of that child" (GC 12, § 30).

  Apart from the above, the Committee categorically states that "If the child is capable of forming her or his own views in a reasonable and independent manner, the decision maker must consider the views of the child as a significant factor in the settlement of the issue" (GC 12, § 44).

  The experts consulted by this Institution were all in agreement as to the importance of the child not getting the impression that her or his views are decisive for the judgment which the judge has to issue in the end. The reason given is that of safeguarding the child from the weight of the responsibility which would stem from her or his position being perceived as determining. Such praxis involves employing a criterion differing from that resulting from the Convention, viewed in the light of General Comment No. 12, given that "considering the views of the child as a significant factor" means just the opposite, that is to say, valuing the importance which, before the fact, must be given to what the child thinks regarding that which affects her or him.

  It is true that the judge must surely weigh all of the rights in dispute and, in this regard, the views of the child may not be determining in the end, but the remedy must not involve trivializing the act of hearing the child or the consequences thereof, but rather making her or him understand the specific circumstances that are at stake and must also be taken into consideration in the process of making a decision.

– **Informing the child as to the outcome.** The hearing process does not have a passive dimension nor is it exhausted in itself, but rather the person in charge of making the decision in question must inform the child as to the outcome of the process. This brings to bear, once again, what the child thinks as a player in the process and who must therefore be entitled to react to the decision made: "The information may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint" [GC 12, § 45 and 134.i)].

[5] In this task, within the bounds of aiding the judge in determining the maturity, of interest is that which is set forth under Paragraph 5 of the "Proposals of conclusions on the intervention of the technical teams and on the taking of the expert evidence in family proceedings" of the aforementioned "Seminar on auxiliary instruments in the field of Family Law", which states: "… generally speaking, it is not advisable to require the technical teams to follow any certain methodology or carry out any certain specific measures in the process of issuing the report …".

In Spain's internal laws, no provisions have been set forth in this regard. This is due to the fact, to a good extent, of this being an advanced consequence of the new vision of the child and of the child's capacity to take part in the matters affecting her or him, which is additionally projected on a field —that of laws of civil procedure— in which nearly everything revolves around the legal status of being a party to the process.

In the light of the information gathered by this Institution, standard practice in this field has been focused on determining what information can be provided to the child without causing her or him any detriment. The experts consulted made no mention as to this information being furnished directly to the child, the issue rather having been focused on taking care as to what elements of whatever is said by the child are transferred to the final decision and in what terms. No uniform criteria exist on this subject, the preparation and sensitivity of the decision-maker therefore being a determining factor in this regard.

– **Appeal procedures.** As a result of the foregoing, the legal system must provide for specific channels for appeals when the child is of the opinion that her or his right to be heard and to have her or his views taken into account has not been respected (GC 12, § 46 and 54).

  At this point in time, it is not conceivable in internal Spanish law that a child avail of an appeal procedure independent from the procedural position of her or his parents or legal guardians by way of the "judicial defender" figure. However, the conceptualization of this figure under Article 299 of the Spanish Civil Code in connected to cases of conflicts of interest, thus being insufficient for the purpose of guaranteeing direct appeal procedures for the child which are based on discrepancies with the court decision on which her or his best interests are to be served, or with the interpretation of what she or he has said. More correct for these purposes, although encompassed solely with the bounds of adolescence, is the solution adopted under Article 113.2[6] and Article 123.3 of the Autonomous Community of Catalonia Law 14/2010 of May 27th governing the rights and opportunities of childhood and adolescence.

  Another relevant aspect is that of the way in which the proceedings in which the child has been heard are documented, given that the principle of the documentation of the proceedings conditions the scope of the supervision by a superior court. In this regard, different practices co-exist: from literal acts written by the court clerk, to formalities in which it is solely stated that the examination or formalities have been carried out, written by the judge proper, in which the assessments and impressions thereof, but no literal phrases, are included.

  Also noted is the fact of it being impossible to guarantee the child total confidentiality as to the statements made thereby, given that, even when some judges employ the practice of keeping the child's views in a sealed envelope and their not being furnished to the parties in first instance, the parties are entitled to request access to this information in subsequent reviews or it may be necessary to hear the child once again.

  The need of reconciling the interests of the child with the rights of the parties, who may allege defenselessness on not being able to gain access to the contents of the examination, makes it necessary to strike a delicate balance[7], in which the fundamental aspect will be the individualized assessment of the risk involved for the child regarding her or his statements being made known.

[6] "The protest on the part of the adolescent requires that the judicial authority previously have appointed a judicial defender. For such purposes, once the decision has been notified, the adolescent states, in due time, her or his disagreement and wish to protest, the competent body which has assumed the guardianship must promote the judicial appointment thereof".

[7] The Public Prosecutor's Office has mediated in this matter by proposing an amendment of Article 770.4 of the Spanish Code of Civil Procedure (LEC) worded as follows: "A detailed certificate shall be issued of the outcome of the examination of the children and, whenever possible, shall be recorded in audiovisual format". Reports of the Prosecutors' Council to the bill for the Law on the exercise of joint parental responsibility in the case of annulment, separation or divorce, September 13, 2013, p. 53.

# 3. RIGHTS OF THE CHILD TO HAVE HER OR HIS BEST INTERESTS TAKEN INTO PRIMARY CONSIDERATION

## 3.1. The best interests of the child

The right of a child to be heard and his or her views taken seriously in addition to having their own dimension are closely linked to another of the Convention's fundamental principles: the idea that the child's interest must be understood as her or his best interests and primary consideration therefore being given thereto in the processes of adopting decisions affecting the child (Art. 3.1 CRC). As the Committee proper states, Articles 3 and 12 of the Convention play complementary roles, such that the former cannot be properly put into practice if the requirements of the latter are not fulfilled. It is not possible to correctly determine the child's best interests without respecting the elements of her or his right to be heard. Similarly, the child's best interests require that their essential role in all of the decisions affecting their lives be respected (GC 12, § 74).

As was the case concerning Article 12 of the Convention, the first paragraph of Article 3 has been the subject of a general comment in which the scope of this precept is expanded upon and put into context. General Comment No. 14 "on the right of the child to have her or his best interests taken as a primary consideration" was approved by the Committee on the Rights of the Child in 2013.

The analysis of this comment regarding those aspects of greatest interests for the object of this study affords the possibility of providing some parameters on the "the child's best interests" concept:

- The Convention is based on a radical principle: The best interests of the child must be considered paramount to the other interests at stake, the exigibility thereof not being left to the discretion of the States. The emphatic nature of this postulate results from the baseline position of children, who have fewer possibilities than adults of forcefully defending their own interests in some decision-making settings which are not conceived for their participation. From the sociological standpoint, the Committee states that "if the interests of children are not highlighted, they tend to be overlooked" (GC 14 § 6.a) and 37).

  The far-reaching importance of this principle leads to Article 11.2 a) of Organic Act 1/1996 considering it to be one of the governing principles of the actions taken by the public powers and, as such, is referred to in many internal rules.

- This is a complex and not unequivocal concept which must be determined on a case-by-case basis. The Committee refers to this being a concept which is "flexible and adaptable … taking into account their personal context, situation and needs" (GC 14, § 32).

  The psychosocial burden gravitating on the notion of the child's best interests and the presence of non-rational elements making this a vaguely-outlined legal concept to which our Constitu-

tional Court has referred, in its Decision 55/1996, as an "area of uncertainty or a shadowy area". This entails the main difficulty with which the authorities who are making decisions in this field are faced. Some autonomous community laws[8] nevertheless attempt to approach the task of objectively dealing with this concept.

- Added to the inherent difficulty involved in determining the best interests of the child in each case is the risk of abuse thereof on the part of the authorities as a result of determinations entailing no priorities for ideological reasons or due to priorities in the allocation of public resources; by the parents or legal guardians, in defense of their own interests; or by the professionals involved, who may fail to fulfil the obligation of taking into account the best interests due to considering it to be of no importance or due to undergoing limitations of means making it complicated for them to take this task upon themselves. The duty of hearing the views of the child is a guarantee countering this risk (GC 14, § 34).

  In this regard, the Constitutional Court has stated that "on the public powers and, quite especially, on the judicial bodies, weighs the duty of overseeing the exercise of these powers by their parents or legal guardians, or by whomever has their protection and defense attributed to them, be done in the interest of the child and not serving other interests which, regardless of how lawful and respectable they may be, must be passed over in view of the paramount "best interests of the child" (Spanish Constitutional Court Ruling 141/2000, FJ 5).

- Specifically determining the child's best interests in a case in particular involves two steps. First, an evaluation must be made of the elements which are relevant for the purpose of determining which are going to be the interests at stake. The Committee warns as to the advisability of the person in charge of making the decision having the collaboration of a multidisciplinary team for carrying out this task. The second step, the determining process, must be understood as a structured process with strict guarantees (GC 14, § 6b) and 47).

  To guarantee the right of the child to be heard, due attention to her or his views, as well as the child's best interests, all of the people who have responsibilities in these processes must avail of specific training in skills for dealing with children[9]. But beyond personal training, given that there is a convergence between the judicial and other disciplines in this field, special mention must be made of the importance of the technical teams for these purposes. This being said, the organization of these teams —commonly referred to as "psychosocial teams"— is neither uniform nor, in several areas, specific for civil courts, which is conducive to approaches being heterogeneous, in addition to problems with expeditiously dealing with the workload.

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[8] For purposes of example, Article 4.1, Paragraph 2 of Law 3/2005 governing the care and protection of early childhood and adolescence in the Autonomous Community of the Basque Country can be quoted where it sets forth "For the process of determining these interests, attention is to be placed, firstly, on the needs and rights of minors, taking into account their views and wishes stated with sufficient judgment, and their individuality within the family and social framework shall be taken into consideration".

[9] In the conclusions to the "Meeting with the Bar Specialized in Family Law", organized by the General Council of the Judiciary on October 24-26, 2012, the following was stated: "It is specifically considered that judges, public prosecutors, court clerks, lawyers and judicial personnel should all undergo training on the following subjects: […] Knowledge of basic psychology, pathologies and behavioral anomalies, developmental psychology, psychology of the transformational family processes; analysis of dynamic interpersonal conflicts and the role of the judge in settling and overcoming such conflicts, safeguarding the interests of public order; acquisition of the essential skills for intervening as a judge in these conflicts; respect, active listening, empathy; knowledge of the auxiliary procedural instruments such as mediation, neutral assessment, typical psychiatric, expert and psychosocial tests; knowledge of the social services system working in the field of conflicts of a family or personal nature (juvenile and incompetent protection); capacity of intervention in the "legal proceedings" and in the process of "seeking the solution to the conflicts" in neutrality and effectiveness, in guarantee of the basic human rights".

Additionally, there is no standard composition of these teams, thus meaning different working procedures being employed in practice and that the team sometimes ceases to be multidisciplinary[10]. The lack of a common protocol for action so as to prevent disparity in the contents of the reports also became evident.

Another relevant question, stemming from the limitation of human means, is the length of the waiting time until the psychosocial team can see the child. According to the data furnished to this Institution, the situation varies from one territory to another. Whilst in the Autonomous Community of the Basque Country, for example, the child is scheduled to be seen within the two or three-week period commencing as of the request being placed by the judge, and it taking on the average of 30-40 days for the report to be prepared and delivered; however in the Autonomous Community of the Canary Islands, it takes around a year to be seen.

- The participation of the child is required in all cases in the task of making an evaluation. "As the child matures, his or her views shall have increasing weight in the assessment of his or her best interests" (GC 14, § 44).
- The courts of law are directly invoked among the authorities upon whom a special obligation is incumbent of seeing to providing for the best interests of the child in all of the decisions made thereby. This provision is of particular importance in a constitutional regime in which the courts are responsible for the control of the activities of other powers of the State. Referring to the civil side, in addition to setting out a reminder as to the aforementioned general obligation, the Committee significantly adds that "they must demonstrate that they have effectively done so". This idea is connected not only to procedural aspects, but also the requirement that the reasons for the acts be individualized and sufficient (GC 14, § 6.c) and 29).

## 3.2. Procedural guarantees

The process of determining the best interests of a child does not commonly require the need of taking recourse to official processes, given that it is carried out by parents, legal guardians, teachers or other persons in an everyday setting. This being said, in those cases in which the situation calls for a public intervention, the process requires greater structuring. Therefore, the Committee states that, in the task, the authorities concerned —for the purposes of this report, the judicial authorities— must focus special attention on the following safeguards:

- **The right of the child to express her or his own views.** A vital element of the process is communicating with children to facilitate meaningful child participation and identify their best interests. The practical modality for guaranteeing the child expressing her or his views must fulfill the requirements previously discussed on studying Article 12 of the Convention (GC 14, § 89-90).
- **Establishment of facts.** For establishing the relevant facts and information, it may be necessary to take recourse to professionals, persons close to the child and witnesses, if any. This information must be verified prior to being used in the child's best interests assessment (GC 14, § 92).
- **Time perception.** The passing of time is not perceived in the same way by children and adults, as a result of which delays in or prolonged decision-making have particularly adverse effects

[10] At the meeting held with technical personnel from the psychosocial teams, significant differences as a result of the human means available in each community became clear. Hence, in those communities which have more means, although the examination be made by one person, the assessment is then made jointly by several technicians. However, in others, both the examinations and the assessments are made individually without corroborating with other professionals.

on children as they evolve. This takes the Committee to call for prioritized and completed in the shortest time possible. This different perception of time must have some major consequences in practice on the order of examining the regime for the review of the decisions once adopted (GC 14, § 93).

- **Qualified professionals.** The need of interdisciplinary interventions is insisted upon, given the heterogeneity of the characteristics and needs of the children (GC 14, § 94).
- **Legal representation.** The Committee calls for the children to avail of lawyers who look out specifically for their interests in the judicial and administrative procedures (GC 14, § 96).
- **Legal reasoning.** "In order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary consideration has been respected, any decision […] must be motivated, justified and explained. The motivation should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests. If the decision differs from the views of the child, the reason for that should be clearly stated. If, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result. It is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry greater weight in the particular case must be explained. The reasoning must also demonstrate, in a credible way, why the best interests of the child were not strong enough to outweigh the other considerations. Account must be taken of those circumstances in which the best interests of the child must be the paramount consideration …" (GC 14, § 97).

  In our legal system, the duty of motivation of the decisions is require under the Constitution (Art. 120.3) which the jurisprudence of the Constitutional Court has linked to the right to actual judicial guardianship. The Spanish Code of Civil Procedure requires, under Article 218, congruency and thoroughness in the contents of the judicial decisions. Nevertheless, the requirement, in light of the Convention, has to be greater and more specific and is not exhausted with the drafting of a document, but rather includes furnishing the child with explanations in an appropriate manner.
- **Mechanism to review or revise decisions.** In addition to the existence of appeal procedures, such mechanisms must be available to the child "and be accessible by him or her directly or by his or her legal representative" (GC 14, § 98).

# 4. OPPOSITION TO JUVENILE PROTECTION MEASURES

## 4.1. Administrative juvenile protection measures

Parents have the obligation of assisting and protecting their children. The Constitution takes this premise as a basis and sets forth, under Article 39 thereof, as a task of the public powers, that of assuring the social, economic and legal protection of the family. For its part, the Convention within the same conceptual scheme, assumes under Article 9 that children do not have to be separated from their parents against the children's will and submits the decision as to separating them —considering it a lesser evil— to a threefold requirement: that it be necessary for the best interests of the child, that the process be governed by law and that judicial review of whatever decisions are adopted be possible in all cases.

Article 172.1 of the Spanish Civil Coe, as worded by virtue of Organic Act 1/1996, attributes to the public entity, to which the protection of juveniles is entrusted in each territory, the guardianship thereof when they are found to be in a situation of dependency. The logic of this precept is that of establishing a fast, executory regime of action, under the protection of the need of minimizing a risk which is deemed to exist for the child and, at the same time, to establish a clear line of responsibility for the Administration which hinders the inhibition. This is also the philosophy underlying the definition of dependency which is set out under the same rule of law in quite open-ended terms ("impossible or inappropriate exercise of the duties of protection", "privation of moral or material assistance", etc.); an opening that the autonomous community legislation has maintained on the order of not restricting a capacity of action which is conceived as a safeguard of last resort.

When it is deemed that some parents or legal guardians are not adequately fulfilling their obligations, provision has been made for the administrations to deploy a number of mechanisms for monitoring and supervising the situation. In the initial stage of these proceedings, the leading role falls to the social services system, who, in first term and unless in cases of social emergency, must ensure remedying the problems detected by means of social-family intervention plans. When this procedure is not feasible or does not achieve the desired results —either due to the parents failing to fully complying with the established plan or due to circumstances having arisen making it impossible to take care of their children– the Administration must subsidiarily intervene by adopting juvenile protection measures, at all times in the best interests of the child.

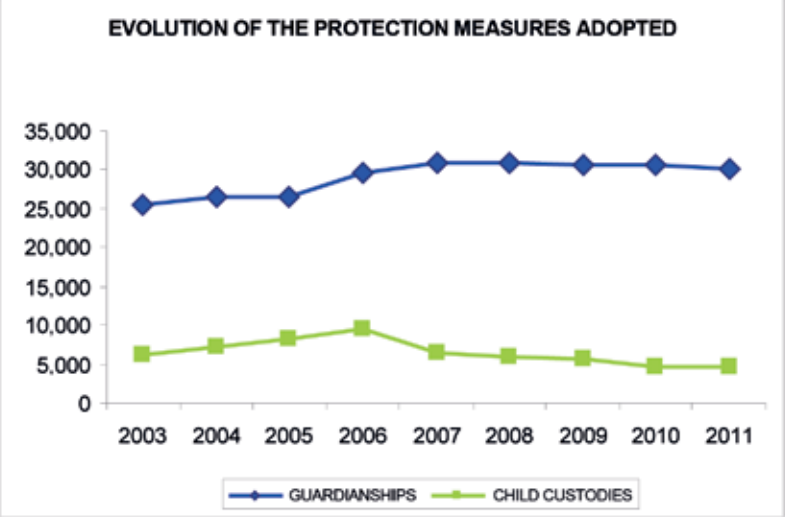
This study has been conducted in most cases without administrative formalities, as there is no formal declaration of the risk situation in most of the autonomous communities, as a result of which the parents are unaware of the far-reaching importance and possible consequences which the failure to fully comply with the plan proposed by the social services may have. This may have implications in the source of the conflict situations of legal indefiniteness and insecurity, even of defenselessness. In the cases in which the social-family evolution is not positive, the information is conveyed to the juvenile protection services of the respective autonomous community for the purpose of firmer measures being taken. The time

frames and formalities which are to be met in the protection case vary from one community to another (i.e. one-year time frame for investigation in the Autonomous Community of Catalonia and three months, extendable for a further two months in the Autonomous Communities of Rioja or Madrid).

A time-related perspective is provided in the following table and graph concerning the number of protection measures adopted as a whole nationwide. The data was gathered by this Institution in 2012 within the framework of ex officio measures taken with the protection agencies. At the point in time of the writing of this study, more recent data is not available.

| | EVOLUTION OF THE PROTECTION MEASURES ADOPTED | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
| Guardianships | 25,589 | 26,438 | 26,614 | 29,497 | 30,818 | 30,792 | 30,629 | 30,637 | 30,057 |
| Child Custodies | 6,109 | 7,208 | 8,321 | 9,598 | 6,536 | 5,834 | 5,694 | 4,693 | 4,537 |
| **Total measures** | **31,698** | **33,646** | **34,935** | **39,095** | **37,354** | **36,626** | **36,323** | **35,330** | **34,594** |

Note: Without data from Elvissa-Fomentera in 2011

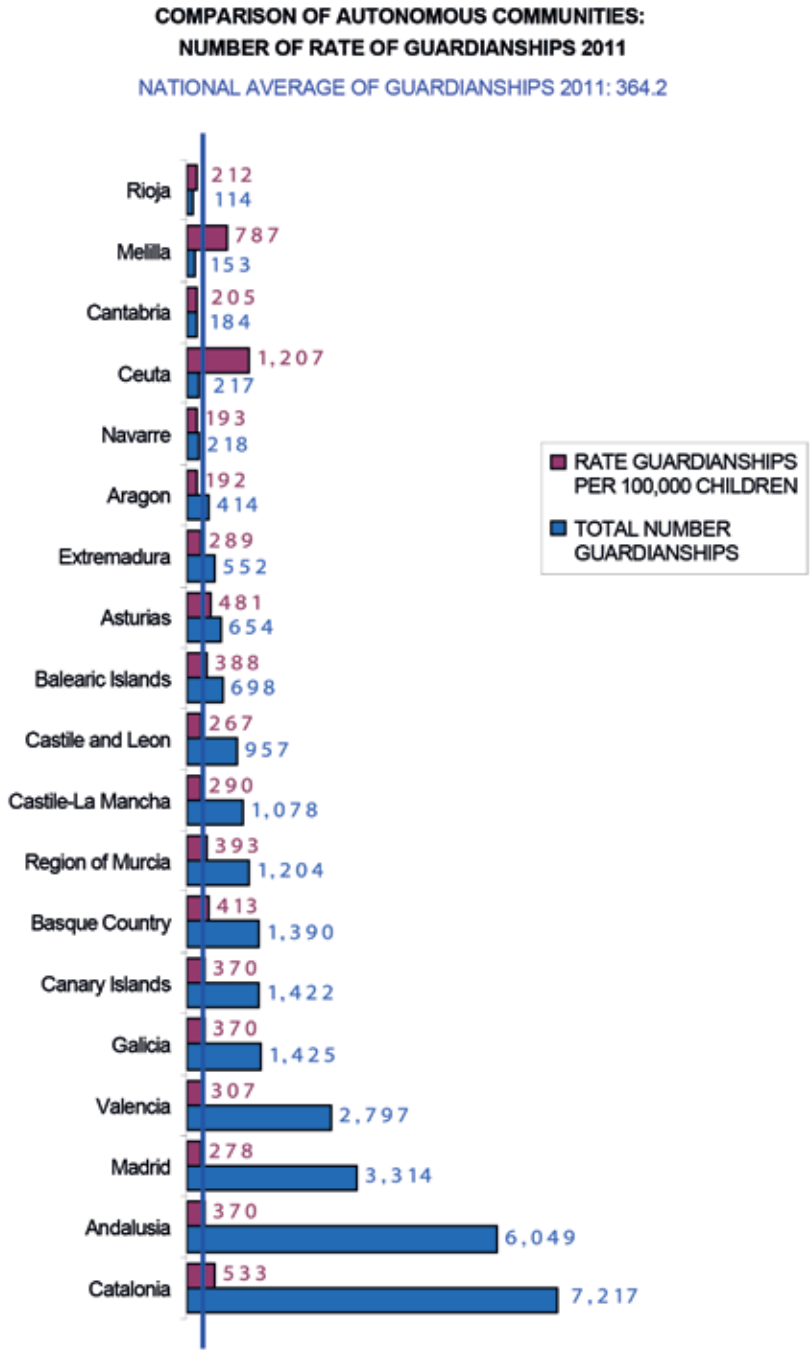



The data above is provided in the table in following below as a rate per 100,000 children for the purpose of making it possible to weigh the impact on the juvenile population as a while in our country.

| Rate per every 100,000 children | EVOLUTION OF THE PROTECTION MEASURES ADOPTED | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
| Guardianships | 342.3 | 350.0 | 348.5 | 381.6 | 391.5 | 383.5 | 376.4 | 373.5 | 364.2 |
| Child Custodies | 128.9 | 110.1 | 109.2 | 124.7 | 83.2 | 72.7 | 71.3 | 57.3 | 55.1 |
| **Total measures** | **471.2** | **460.1** | **457.7** | **506.3** | **474.7** | **456.2** | **447.7** | **430.8** | **419.3** |

Note: Without data from Eivissa-Formentera in 2011

Lastly, a graph is provided making it possible to compare the number and rate of guardianships adjudged in 2011 —this being a measure involving a legal shifting of the responsibility inherent to the parental rights—, to the autonomous communities and autonomous cities, given in ascending order by the absolute number of guardianships, as well as the national average of guardianships.



The actual current situation of protection in Spain is confronting a number of problems which, although outside of the bounds of the scope of this study, must be borne in mind in order to fully understand the context in which the judicial proceedings on this subject have to be carried out:

- Insufficient protection structures for appropriately dealing with the workload.
- The strictness of the public authorities recognized in this field, which, although designed as an instrument to serve the best interests of the child, may be conducive to grave decisions difficult to reverse.
- Exceedingly lengthy administrative proceedings.
- The lack of information and legal aid for the biological families from the initial point in time of the administrative intervention, which hinders their reacting in view of the decisions which are progressively made.

In view of the administrative decisions adopted in juvenile protection, the remedy for which provision is made is a process termed "opposition to the administrative decisions on the subject of juvenile protection". This is a civil process governed under Article 780 of the Spanish Code of Civil Procedure. This procedure however retains the structure inherent to a contentious-administrative process, inhibiting, most certainly, the need for prior complaint in administrative jurisdiction before initiating the process. The process is initiated by way of a brief setting out the opposition[11], which gives way to the request on the part of the court of the administrative proceedings for protection so that the petitioning party may have access thereto and put forth their complaint. As of this point, the process follows the steps of the oral hearing procedure.

## 4.2. The monitoring duty of the State Public Prosecutor's Office

The Public Prosecutor's Office has as one of its functions that of promoting justice being served before the courts, an important extrajudicial function within this scope of juvenile protection. In accordance with Article 174 of the Spanish Civil Code, "it is incumbent upon the public prosecutor to monitor the guardianship, foster care or custody of juveniles…".

The rule of law sets forth a threefold role for the public prosecutor: monitoring the situation of the juveniles, periodic control checks of their situation (a six-month periodicity is stipulated) and promotion of the judicial protection measures deemed necessary thereby[12]. In essence, this rule of law is of the understanding that the public prosecutor's position is that of a supervisor of the administrative proceeding.

The question to be explained is that of the contents and scope of this monitoring, the function of which is ordered to guarantee the respect for the bests interests of the child.

In the Public Prosecutor's Office's Report presented in 2013, the following is stated:

> The coordination of the Public Entities with the Public Prosecutor's Office for reaching a consensus regarding strategies and overcoming diverging opinions and the non-existence of independent technical teams at the disposal of the Protection Prosecutor explain why the total

[11] The time period for filing is that of the three-month period commencing as of the notification of the decision aimed at being contested when involving a declaration of dependency, and a two-month period for all other measures.

[12] As an example of the growing commitment on the part of the Public Prosecutor's Office within this scope, mention may be made of the recent publication of the work by MADRIGAL MARTÍNEZ-PEREDA, Consuelo. "El fiscal y la protección jurídica de los menores de edad. Guía práctica" [The public prosecutor and the legal protection of juveniles. A practical guide]. Valladolid, Aequitas Foundation and Aranzandi-Lex Nova Foundation, 2013.

> number of protests filed by the Public Prosecutor (10) is so small, as compared to those filed by private citizens (1,450). Rarely does the Public Prosecutor disagree with the administrative criterion regarding the need of separating a child from her or his parents, it being possible for the Public Prosecutor to differ in regard to the suitability of extended family foster care or with the regime of communications and visits …[13]

In order to fully understand how the action taken by the Public Prosecutor's Office within this scope is conceived, one must give some thought to the substance of the first paragraph of Article 174.2 of the Spanish Civil Code, which sets forth that the public prosecutor shall be informed as to "the news of new arrivals" in the protection system; the administrative decisions and "the documents for the process of formalizing the constitution, variation or cessation of the guardianships, custodies and foster care"; as well as any new aspect of interest in the circumstances of the child.

The opinions requested by this Institution from the members of the Public Prosecutor's Office all agree as to the aforesaid rule of law configuring mainly a system for the control of legality, given that the Public Prosecutor's Office does not generally have its own technical means in order to be able to supervise the social-family situation which is the source of the conflict or the interventions deployed by the protection services. What makes its way to the public prosecutor is a decision of dependency or of a protective measure of another type which has been resolved in favor of by the administrative authority and not the child's complete case file. The control which is primarily possible to be made under these circumstances has to do with the sufficiency of the motivation.

State Public Prosecutor's Office Circular 8/2011 on the criteria for the unity of specialized action on the part of the Public Prosecutor's Office on the subject of juvenile protection[14] calls attention to the possibility of the State Public Prosecutor's Office proper being the one to promote the protective activity of the public entities, by informing on any situation of possible future risk and taking action in view of administrative failure to act. Within this framework, provision is made for the public prosecutor's office requiring notification both of whatever resolutions in which protective measures are adopted and also of those others in which the measures in question are denied.

The provision of the civil rule of law regarding resolutions and not the case file being furnished to the State Public Prosecutor's Office implies a lack in principle regarding the full comprehension of the problem. Mention must be made here, as a best practice, of the solution adopted in the Autonomous Community of Aragon, in which the public prosecutor has direct access to the Administration's computer system, where all of the information and follow-up on the juveniles is shown.

In the course of the meetings held in preparation for this study, the coexistence in the juvenile Divisions of the provincial public prosecutors' offices[15] of the matters regarding underage offenders and minors under protection limits the possibilities of taking action is the latter of these two realms, given the limitation of officers and the preferential nature of the actions within the criminal order.

## 4.3. From the administrative procedure to the judicial process

In the legal configuration, the process of Article 780 of the Spanish Code of Civil Procedure follows a number of administrative proceedings for intervention in the life of a child.

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[13] "Memoria elevada al Gobierno de S.M. by el Fiscal General del Estado" [Report raised to the Government of H.M. by the State Public Prosecutor], Madrid, Center for Legal Studies, Ministry of Justice, 2013, p. 432.

[14] Made public on November 16, 2011, p. 51.

[15] State Public Prosecutor's Office Instruction 1/2009 of March 27th on the organization of the Protection Services of the Minors Divisions.

Children, the central figures in the preliminary administrative proceedings, must be informed and heard throughout the course thereof. The juvenile protection laws of the autonomous communities include this right with some modulations[16] (in most cases, it is established that those over 12 years of age are to always be heard, and those under 12 years of age, if they were to have sufficient judgment).

The essential nature of the hearing process in this administrative stage is readily inferred from the configuration as a right in all autonomous community rules of law. This being said, in most cases, specific systems of guarantee[17] are established in the face of the failure to heed this right on the part of the Administration.

The technicians of the psychosocial teams consulted pointed out that no protocol exists facilitating approaching the child for conveying thereto the information allowing her or him to be fully aware of her or his rights and the importance of her or his participation. The experience conveyed to this Institution both by representatives from entities which work with childhood-related matters and also by legal operators is that, generally speaking, juveniles under protection are not provided with sufficient information concerning their situation and expectations as to the evolution thereof. In fact, it was stressed that said information is rarely compiled fully in the protection case file, given that major aspects are often lacking therein (i.e. all of the preliminary measures carried out by the baseline social services) and that document mix-ups and systemization errors often occur.

These premises reveal that a child with sufficient judgment who entertains differences as to how the hearing process has been carried out or who even dissents as to the advisability of the protection measures decided upon is going to encounter serious problems regarding putting forth such discrepancies before the judicial authorities.

To deal with this problem, one much commence by ruling out the possibility of the minor being able to act in the process through her or his parents, regarding whose proper performance of the obligations stemming from the parental rights are dealt with in the administrative proceeding in point. Nor should it apparently be through the Administration, which has set a position with which the minor cannot be in agreement. In theoretical terms, there would be three alternatives left: 1) that the child directly access the judge, even prior to the protest being set out, stating her or his discrepancy and at any point in time during the process, and that this may give rise to the appointment of a "judicial defender" 2) that the State Public Prosecutor's Office, in addition to the role currently recognized as pertaining thereto by virtue of the monitoring which it must carry out —and which may lead it to initiate a procedure by proxy—, were to take a more direct role upon itself as a procedural representative of the minor who were to so demand, in this case not by proxy but rather as a case of extraordinary legitimation and 3) that the minor be assigned a legal aid lawyer.

The first two of these alternatives entail problems as regards ready access on the part of the child and, with regard to the public prosecutor, it would be necessary for there to be an express provision of law in force as to the form of legitimation.

[16] The nuances added to the third paragraph of Article 20 of Autonomous Community of Valencia Law 12/2008 of July 3rd on the integral protection of childhood and adolescence is of interest for these purposes, according to which: "Minors have the right to be provided with all of the information concerning their interests, rights and their personal, emotional and social welfare in a language which is appropriate and comprehensible in keeping with their evolving development and maturity. The exercise of this right shall be responsibly carried out under the guidance of their parents, legal representatives or custodians".

[17] Autonomous Community of Navarre Law 15/2005 of December 5th on the promotion, care and protection of childhood and adolescence sets forth under Article 22, devoted to the right to be heard, the provision as to the refusal of the hearing requested by the child or by the person representing the same shall be motivated and notified to the State Public Prosecutor's Office and to those having requested the same, and that an action against the same before the civil jurisdiction "without the need of any preliminary administrative appeal".

The third alternative is that of facilitating the child contacting a lawyer. Said contact may make up for some of the lacks of information which are being detected, as well as making the access to the judge or to the public prosecutor in appropriate terms feasible.

For carrying out this function, it seems indispensable that the professional who must provide this assistance possess the adequate training and be specialized, which entails the training of specific court-appointed lawyers in juvenile protection.

## 4.4. The role of the child in the opposition process

The annual data available on the ex lege declaration of guardianship by all of the protection entities as a whole, compared to those published by the State Public Prosecutor's Office, allow it to be said that a significant percentage of the administrative protection-related decisions are submitted to judicial review by means of the opposition governed under Article 780 of the Spanish Code of Civil Procedure. One must not overlook the fact here as to objective difficulties existing in order for this number to be higher, most especially as a result of the aforementioned lack of advice to the family members from the very beginning of the administrative procedure.

In this report, it is aimed to focus the analysis as to how this rule of law conceives the participation of the child in the process and the actual situation in which this process is carried out.

The requirement of the hearing process stems from the general clause of Article 9 of Organic Act 1/1996. Article 780 of the Spanish Code of Civil Procedure refers to the ordering the process to the formalities of what is termed an "oral hearing" which does not provide for the hearing of the minor —in procedural terms, it is customarily termed "examination"— as a specific process, nor does it stipulated when this has to be carried out.

- The process of hearing the child must not coincide with that of the formal hearing, termed in this process "trial proceedings", in principle because that point in time does not afford the possibility of providing the child with an "enabling and encouraging context", nor would it be easy to guarantee a confidential atmosphere for the child.
- What is referred to as an encouraging and enabling setting makes it necessary to adapt the physical space and even the number of people present and their attitude during the process of carrying out the act to the degree of maturity of the child. For this task, the specialized judicial bodies have, a priori, more possibilities and habits for meeting these requirements.
- The hearing process, which must be carried out by the judge, is a key point in time for fulfilling the right which the child has to being informed regarding both the process per se and the nature thereof as a right and not an obligation and the consequences thereof, and on the possibilities which the minor has for ensuring that her or his views will be appropriately taken into account.
- The Committee on Rights of the Child is committed to the process of hearing the child being carried out more as a talk than as an examination, hence the term "examination" conventionally used in Spanish rules of law governing procedural aspects is not the most appropriate, given that it refers back to the idea of the minor as an object of the process and not as an active subject thereof. The talk approach will facilitate the child being able to take the initiative to lead the conversation in the direction of the issues she or he feels most important.
- One initial critical question is to determine the degree of freedom of the child is to be heard or, in other words, her or his degree of exposure to possible future pressures and the impact which they may have. Correctly assessing the risk to which she or he may be exposed presupposes

the need of whoever is going to hear the minor availing of all of the relevant information. This is one of the reasons why the fact of availing of the child's complete, orderly, updated case file takes on importance. In some cases, determining the risk will require the aid of technical teams. Taking into account the configuration of the right to be heard, which is a choice made solely by the child, the existence of a risk must entail a safeguarding strategy but not the elimination of this process, as the pressure would have achieved its goals as a result of such an elimination.

- The other critical issue is determining the degree of maturity of the child, given that this directly affects the degree of attention which has to be paid to the views of the minor with a view to process of adopting the final decision. Once again here, for the least evident cases, the court will require specialized technical support. This being said, as it must be presumed from the start that all children are in a position to form their own views, the automatic application of age-related criteria for inhibiting, before the fact, the hearing process is inadmissible. Similarly, the decision of not hearing the minor which may be notified would require a technical report which were to objectively set out and state the reasons for the lack of maturity of the child in question.
- One of the problems which a process focused on hearing the minor might face is that of the repeated talks or hearing processes, especially if the intervention of a multidisciplinary technical team is deemed indispensable[18]. Given that the repetition of these processes should be prevented insofar as possible, recourse may be taken to coordinated proceedings or the use of technical means making it possible to concentrate the hearing processes and for them to be of a sufficient duration.
- The process as a whole must be for the purpose of supervising whether the measures adopted by an Administration have been adopted in the child's best interest. After hearing the child, the next step specifically takes the form of the judgment process. At this hearing, the admissible evidence must be presented and the conclusions set out. Logic dictates that what the judge has heard from the minor must be compared with the proceedings which taken place at the aforesaid process within a framework of contradiction between the parties. At such a decisive point in time, prior that at which the decision is made, it is paradoxical that the child not be present. The State Public Prosecutor's Office, which has the mission of seeing to the best interests of the child being provided for, can surely enforce what it deems advisable for said interests. Nevertheless, if the State Public Prosecutor's Office has not taken part in the hearing process, it can hardly know what the child thinks and wants. This is one of the reasons why the advisability of facilitating legal aid for the minor which will see to the suitable defense of her or his positions in the process has been defended.
- As previously mentioned, the passing of time is not perceived by children in the same way as by adults. The passing of time in childhood bears a faster influence and is more decisive than in adulthood. The harmonious, integral and balance development of a child's personality must be or prime importance on considering her or his best interests. The longer the settlement of the dispute by way of which a child has been separated from his biological family takes, the more consolidated her or his new situation will have come and the more traumatic it will be to break the new emotional ties. A situation is sometimes consolidated which creates irreparable detriments for the children and their parents[19]. Article 779 of the Spanish Code of Civil Procedure

[18] He specialization of judicial bodies and the assigning of technical teams makes it possible for this support to be provided in a more free-flowing manner more closely akin to the premises stemming from the Convention and from the general comments thereon.

[19] European Human Rights Court Decision of June 18, 2013, R.M.S. versus Spain (Complaint No. 28775/12).

formally fulfils the requirement of prioritizing these processes, as called for by the Committee on the Rights of the Child.

Another question is that of the expeditiousness involved. No comparative data exists as to the length of the processes of contesting the decision of dependency. However, the legal operators consulted by this Institution all agreed as to these procedures being exceedingly lengthy, even going so far as to take longer than two years in first instance[20].

- The problem of the admissible length of a procedure of this kind leads to examining the procedure model. This issue, although totally unrelated to the perspective of this study, also has a special impact regarding the guarantees of the parties to the process, particularly the parents. It is true that in the system currently in place, the supervision which is done by the State Public Prosecutor's Office makes it possible for it to petition that the dependency be revoked or for the judicial protest to be presented, if it deems the circumstances to have changed substantially. But his possibility must overcome, in practice, the supervising difficulties which have come to fore on dealing with the public prosecutor's position with regard to the protection of minors.

  The legal articulation of the protection system is based on the existence of some administrative bodies with specialized means and some quite emphatic authorities. In comparison thereto, a conventional way to go would be the adopting of precautionary measures on the part of the court. However, such a possibility is not taken into account in practice, given that it is construed that this would be getting ahead of the underlying decision without availing of sufficient knowledge of the issue, when the crux of the debate may require the support of technical teams which need time to issue their opinion.

  This leads to posing the question as to whether a change in model would be advisable in which the jurisdiction must supervise and uphold, in any case, the decision of dependency adopted by the competent Administration following the lapse of a prudential time period (i.e. 3-6 months) so that the judicial authority may uphold, modify or declare said decision null and void.

- The change is the way in which the position of the child in the process is conceived comes to mean a stricter demand being placed on the decision-maker, in which reference is made to the duty thereof of motivating the decisions. This stricter demand encompasses setting out all of the circumstances in fact of relevance for the child, the aspects which are to be considered pertinent for the assessment of the child's best interests and the way in which they have been weighed.

  For the case in which the decision made differs from the child's view, the judge must explain the reasons which have led her or him to adopt said decision and when, for exceptional reasons, the judge must issue a judgment against the child's best interests (i.e. because it enters into conflict with another child's best interests), the decision-maker must make certain to explain how said interest was taken into primary consideration in the thought process having led to the decision.

- Spanish rules of law do not make provision for the person in charge of making the decision within this scope informing the child as to the outcome of the process. The decision is notified solely to the parties, and the child will learn of what has been decided through the Administration which is exercising the guardianship thereof or from whomever has custody of the child. As

[20] One of the causes of delay, in addition to the workload of the courts, was pointed out as involving the reports which the Administration must furnish being incomplete and disorderly in many cases, which takes a longer time to complete them. The report issuing delays on the part of the court's psychosocial team as a result of their lack of means was also the cause in many cases of the need of suspending or rescheduling the hearing.

previously mentioned, no provision is made under Spanish law for a general procedure so that the child in question can take exception to the decision made, and even less so for becoming a sort of party thereto as of the notification of the sentence of instance. The implementation of these measures requires a new vision of the procedural position of the child and of her or his possibilities of taking action in any stage of the procedure without requiring the child to hold status as a formal party from the beginning.

- As has been pointed out in this study, for the Committee on Rights of the Child, “the hearing must be understood as a process, not as an individual one-off event”. Therefore, in those cases in which the appeal stage is reached, the right of the child to be heard has been be understood, a priori, to have been fulfilled by the formality carried out in first instance, most especially when the appeal takes place a considerable length of time after the decision. The right of being heard must therefore be placed above the reductionist approaches of the scope of the second instance given that what is relevant at this point is the best interests of the child which may vary over the course of time.

# 5. DECISIONS CONCERNING CHILDREN IN FAMILY CRISES

## 5.1. Family processes when there are children involved

Civil and procedural rules of law configure a number of processes grouped in the Spanish Civil Code under the heading of "marital and child processes" (Art. 769-781), devoted to governing the systems for judicially settling family crises. This procedural regulation is round out in some points with provisions of the Civil Code (Arts. 81-107).

As far as the purposes of this study are concerned, a distinction can be made among a number of processes:

- The contentious process of annulment, separation and divorce (Art 770 Spanish Code of Civil Procedure – LEC)
- The process of separation and divorce by mutual agreement (Art. 777 Spanish Code of Civil Procedure – LEC)
- The determining, which may take place a different points in time during the process, of measures regarding the children (Arts. 771 to 776 – LEC).

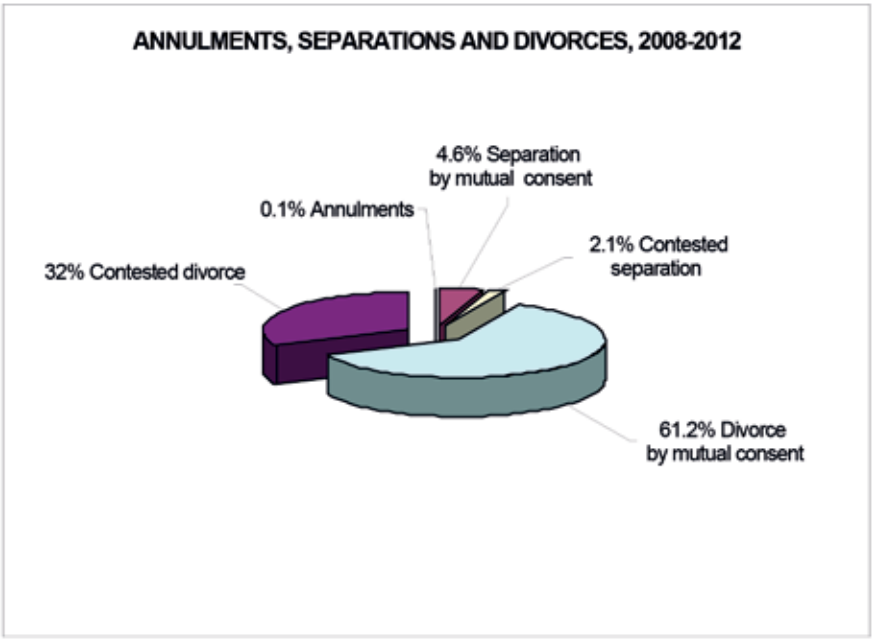
The two keys of these processes are: 1) the agreement or disagreement of the parties[21]; 2) that that the process affect children or not. As for the opposition process, this is not a matter of making an analysis of the aforesaid procedures, but rather solely of examining the processes so that the right of the child to be heard, to her or his views being taken into account and, in short, to her or his best interests being duly served.

The immediate consequence of the fact of a judicial decision within this scope affecting minors is an intervention, of a mandatory nature, of the State Public Prosecutor's Office in accordance with Article 749.2 of the Spanish Code of Civil Procedure. The public prosecutor is called into the process as of the point in time at which minors are found to be affected, even in view of the request for measures prior to the filing of the complaint (those known as "super-provisional measures").

[21] For the purpose of facilitating agreed alternatives and prevent the minor from having to become involved in the stress their parents are experiencing and experience a conflict of loyalties, what is referred to as intrajudicial mediation was incorporated into the Spanish legal system by way of Law 15/2005 of July 8th, by virtue of which the Spanish Civil Code and the Code of Civil Procedure were amended on the subject of separation and divorce. Article 770, rule 7, Spanish Code of Civil Procedure (LEC), sets for the possibility of interrupting the judicial proceedings so that the parties may submit to a mediation process. The "Guide for the practice of intrajudicial mediation" published in 2013 by the General Council of the Judiciary, includes a specific protocol for family mediation (pgs. 41-86).

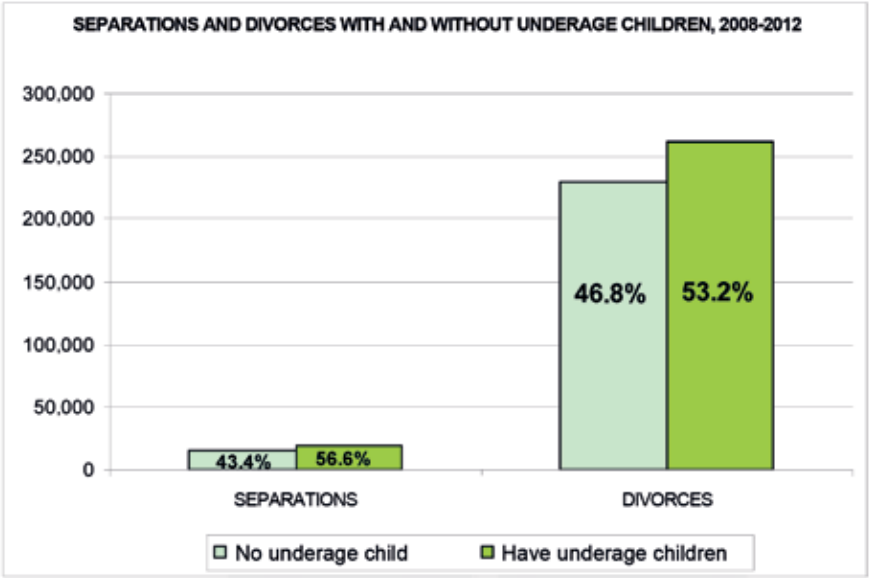
The official statistics[22] show a large percentage of litigation regarding marital issues, although more moderate than in the preceding five-year period, and a marked trend on the part of the spouses to adopt agreed settlements.

| FAMILIAR CRISES | TOTAL 2008-2012 |
|---|---|
| Annulments | 674 |
| Separation by mutual consent | 25,469 |
| Contested separation | 11,504 |
| Divorce by mutual consent | 340,870 |
| Contested divorce | 178,324 |




In the following graph, devoted to analyzing the presence of underage children in the family crises, this fact is found to be involved in more than half of the breakups. No data is available as to how many of these procedures are contentious and how many are by mutual consent.

[22] The following graphs and tables have been prepared by this Institution on the basis of data from the Spanish National Institute of Statistics (INE). [Inebase. Security and Justice. Statistics on annulments, separations and divorces]. <http://www.ine.es/jaxi/menu.do?type=pcaxis&path=/t18/p420/p01/&file=inebase>
The 2008-2012 annulments, separations and divorces graph includes the statistics related to marital processes of same-sex and different-sex couples.




This actual situation is dealt with by way of a system in which there are both courts of first instance which deal with general issues and others specialized in family matters coexisting with one another, which, in terms of the territorial jurisdiction of the judicial bodies may mean unequal treatment, which should not detriment the rights of the child.

In this regard, the General Council of the Judiciary has pointed out the following:

> The specialization of Courts for taking cognizance exclusively of certain matters…, may be taken as a measure appropriate for achieving expeditious, effective ad quality Justice which Spanish society demands… In fact, submitting the cognizance and trial of certain matters to judicial bodies headed, as a result of the specialization of said body, by a person in the position of possessing a specific, in-depth training and experience in these matters can be, in certain cases, a guarantee not only of quality of the judicial solutions but also of the greater expeditiousness with which the decisions are handed down and unified criteria are formed on settling identical matters or matters of the same kind, which works, in short, in favor of legal security[23].

This specialization must not be considered, generally speaking, as an absolute advantage, but rather the possible future loss of flexibility in the judicial system as a whole which may be involved therein must be weighed. Additionally, the advantage which the generalization of certain specialized bodies may provide requires not only availing of well-trained judicial professionals, but with sufficient, ideal means of support[24].

Nevertheless, within a scope so closely connected to children, the decision-makers will thus clearly required —in addition to training in not specifically legal fields— the need of supporting technical teams. If the court does not avail of such supports, it will hardly be able to take upon itself the task which the Convention imposes thereupon, and even less with the necessary expeditiousness.

From another standpoint, specialization is also a means for making fulfilling the requirements related to the enabling and encouraging setting for the child more economically feasible.

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[23] Report of the General Council of the Judiciary Meeting held on October 13, 2005, on the proposed bills for an Organic Act in amendment of the Organic Act of the Judiciary in order to proceed to the creation of the family jurisdiction, which reproduces that issued on February 12, 2003, p. 9.

[24] It is thus set out in the Document "Judicial Reform in Europe. Part II. Guidelines for Effective Justice Delivery 2012-2013", prepared by the European Network of Councils for the Judiciary s, § 15 and 16.

## 5.2. The role of the child in these processes

In view of a marital crisis, the first source of information which the children must have concerning their situation and regarding the prospects will come from their parents. In a setting of marital disputes, there is a risk, in many cases, of this information being partial and biased, in an attempt to win the child over to the side of whoever is conveying the information. The best interests of the child, always present within the framework of parental responsibility, takes on, if possible, yet greater importance in the situations of family conflict. In particular, the judicial authorities have the responsibility of assuring that the child is fully aware of her or his rights of taking part in the process and of her or his opinions being taken into account.

The experts consulted by this Institution all agree as to the aforesaid situation of attempting to use the child is frequent, especially in the contested marital processes, and that the information with which the children come in concerning the situation affecting them is, generally speaking, scarce and hazy. Therefore, one of the major challenges of judges, public prosecutors and technical teams lies is guaranteeing that the children avail of true, complete and objective information.

The first measure which may be approached in this type of processes is the petitioning of provisional measures preliminary to the filing of the complaint (Art. 771 Spanish Code of Civil Procedure – LEC). This is a procedural remedy designed for subjective emergency situations in which, a priori, it is not anticipated that there will be an agreement reached between the spouses. This petition can be filed without the need of availing of a lawyer or solicitor. The measures which may be petitioned include those related to the children from among those for which provision is made under Article 103 of the Spanish Civil Code[25].

This procedural rule does not seem to be thinking about the hearing of the minor at this point in time preliminary to the process. In fact, it is set forth that following the filing of the petition, an appearance be held at which the spouses and the Public Prosecutor's Office must be present. Provision is made in these formalities for the possibility of presenting evidence whenever necessary, but the hearing of the child is not evidence.

The requirements of Article 12 of the Convention of the Rights of the Child and Article 9 of the Organic Act 1/1996 do not allow the hearing of the child to be eliminated from this setting, although within a context of provisional measures said hearing process may turn out to be more complicated.

This is certainly a decision of a scope limited in time, but this does not detract from its importance or capacity to affect the life of the child, given that no appeal whatsoever may be filed against the same according to law, and the effects thereof may extend over the course of time up to the final decision, it thus being, according to the Spanish National Institute of Statistics (INE) that the average length of the divorce processes in 2012 was of 5.18 months, and one tenth of the procedures having taken

[25] These measures include "1 Determining, in the interest of the children, with which of the spouses those subject to the parental authority of both are to be left and take the appropriate provision in accordance with that which is set forth under this code, in particularly the manner in which the spouse who is not exercising the guardianship and custody of the children will be able to fulfil the duty of watching over them and the time, manner and place in which the same swill be able to communicate with them and have them in her or his company. Exceptionally, the children may be entrusted to the grandparents, parents or other persons who were to so consent and, were there to be none, to an ideal institution, conferring thereto the legal guardianship functions which will be exercises under the authority of the judge. When a risk exists of the child being abducted by either one of the spouses or by third persons, the necessary measures may be taken, in particular the following: A) Prohibition of leaving the national territory, save prior judicial authorization. B) Prohibition of issuing the passport to the minor or withdrawal thereof were it to have already been issued thereto. C) Submittal to prior judicial authorization of any change in domicile of the minor. 2. Determining, taking into account the family interest more in need of protection, which of the spouses is to continue living in the family home…, as well as also the precautionary measure advisable for preserving the right of each one. 3. Setting the contribution of each spouse to the burdens of the married couple… The work which one of the spouses will devote to taking care of their shared children subject to parental authority shall be considered a contribution to said burdens (…)".

longer than a year. For reconciling this requirement with the difficulties on a practical order, it may be permitted for the hearing modalities to be modified with regard to their setting, but not with regard to the fact that that the child must be heard.

At this point, it is now befitting to examine the possibility the child has of taking part in the contested processes and those by mutual consent.

- In these procedures, the three fundamental precepts regarding the hearing process are Spanish Civil Code Article 92, Paragraph 6, as well as Spanish Code of Civil Procedure Article 770, Paragraph 2, Rule 4 and Article 777, Paragraph 5. The keys common to these 3 precepts set forth that: 1) The children who have sufficient judgment must be heard, and solely for the contentious process, twelve years of age is established as an objective assumption of such a situation. 2) The hearing is not considered an inexcusable act, but rather shall be carried out "whenever deemed necessary". 3) The initiative for conducting this hearing may be agreed upon ex officio or on the basis of the petition of the public prosecutor, the parties, members of the judicial technical team or the child herself or himself.

  This rule of law does not conceive the hearing of the minor as a right, but as a judicial power subject to the principle of appropriateness. Proof of this is that, with substantially identical precepts, the experts consulted by this Institution indicated that there are very few examinations of children in processes by mutual consent. Such provisions go beyond the exception of to this right which sets forth, with a clearly restrictive criterion, under Article 9.1 of Organic Act 1/1996, according to which "when the child requests to be heard … the refusal of the hearing shall be motivated…". As will be noted, this is a matter of a protectionist provision, not attributing the judge with the possibility of not hearing[26].

- In these processes, leaving aside the cases of marriage annulments, the intervention of the Public Prosecutor's Office has as ground the defense of the interests of affected individuals who are in a delicate positions (i.e. children, in this case). One may wonder whether this provision suffices for the purposes of the child availing of legal aid in the sense of General Comment No. 14, Paragraph 96. The institutional position of the public prosecutor is one of impartiality, which does not fit in well with a representation of individual interests, although the public prosecutor's obligation of protecting the child's best interests has to modulate this construction of principle.

  Once the views of the child are known by means of the hearing process, the Public Prosecutor's Office can see to these views being duly taken into account in most cases. Otherwise, in those cases in which the Public Prosecutor's Office does not consider the views of the child to be in keeping with her or his interests, a situation of discrepancy would come to bear, which should be remedied along the line pointed out by the Committee of Rights of the Child in the aforesaid General Comment and paragraph by means of designating whomever were to be able to specifically see to her or his interests, which in our legal system is provided for by means of the appointment of a judicial defender. This need may be found to exist at any point in time during the procedure, including the appeal.

- The capacity of initiative on the part of the child for gaining access to the judge and to the public prosecutor in the marital process will depend to a major degree on her or his age, capacity of judgment and the true (or deficient) information furnished thereto by her or his

[26] One must also bear in mind that which is set forth under Article 23 of European Council Regulation 2201/2003 of November 27, 2003 regarding province over, recognition and enforcement of court decision on the subject of martial matters and parent responsibility, which sets forth: "The decision on parent responsibility shall not be recognized: (…) b) if they were to have been handed down, except in cases of emergency, without having provided the possibility of hearing the child, in violation of fundamental principles of procedure of the member State required".

parents. Although judges and public prosecutors consulted by this Institution pointed out that the access on the part of children does not entail any practical difficulties, both by means of letters and directly (going to the judicial offices and asking to be seen), the lawyers and representatives of the entities who work with juvenile issues did not agree with this impression. Regardless of the degree of access there may be in each case, the relevant aspect will be the method for assuring that this access generally take place early along —as otherwise it will not be possible to detect possible future conflicts of interests in time— and standardized as part of the planned order of the process.

- Respect for the requirements regarding the enabling and encouraging setting, the manner in which the hearing of the child is to be conducted, the special care which must be taken on determining the child's degree of freedom and her or his exposure to possible future pressures, the assessment of the potential risks she or he is facing, as well as determining the child's degree of maturity do not involve any specialties concerning what has already been set out in this study, given that this is a matter of transversal principles. Within this scope, particular attention must be focused on the conflict of loyalties which the child may be experiencing as a result of the confrontation of her or his parents. The type of process chosen, whether contentious or by mutual consent, is also significant for these purposes.
- Given that the child must be heard when a decision is adopted affecting her or him in the precautionary stage of the process, prudence for preventing unnecessary repetitions of the hearing processes might make it advisable not to call the child again when the petitions of the parents on the basis of which the decision has to be made do not differ in the substantial aspects from those adopted provisionally, unless the child so requests. This being said, when new elements are introduced, the views of the child must not be left out of the debate, regardless of the stage at which the process is at that point in time.
- At the point in time of the decision being made, the more stringent demand for the decision-maker must be applied, in that which is related to the duty thereof of motivating the decisions, to which reference has previously been made in this study, especially with regard to that which is related to the justification of the reasons why the child has not been heard —which can solely be based on the grounds of lack of own judgment or on the waiver on the part of the child— and with regard to the reasons explaining a decision which strays from the views of the child. It is necessary to underline here that although the judge not be bound by the views of the child, it must indeed be assured that these views are especially weighed. What the child says, in light of her or his degree of maturity, must be integrated in an outstanding manner into the thought process which must be carried out and must be stated in detail in the underlying reasons on which the decision is based.
- As has been said, Spanish laws do not make provision for the person in charge of making the decision within this scope informing the child as to the outcome of the process. In these processes, such a task falls primarily to the parents, although in those cases in which the process has revealed that the child still has views differing from that which has been decided, the judge or the public prosecutor should take this task directly upon themselves.
- The family organization agreed following a couple breaking up tends to be quite changeable, especially in the cases in which there are children. Spanish Code of Civil Procedure Article 775 deals with the modification of the measures, "provided that the circumstances taken into account on approving or resolving in favor thereof have varied substantially". The procedure will vary in depending on whether or not the parents come to an agreement. The contentious marital processes show a larger number of compliance-related incidents. Under these circumstances, all of that which has been said regarding the hearing and participation of the child must be considered equally applicable here.

At the meetings called for the preparation of this study, the difficulties sometimes involved in the enforcement of the measures adopted with regard to the children were posed, normally involving adolescents, when these children maintain a reticent stance. The legal remedies for failure to comply with the measures (Spanish Code of Civil Procedure Art. 776 – LEC) do not make any provision for this case. The remedy for these cases, more than considering coercive measures which can turn out to be disproportionate if not unfeasible, must lie in the possibility of the child consenting to set out her or his opposition to the measures affecting her or him and the reasons on which said opposition is based. The law allows not only the parents but also the Public Prosecutor's Office to urge this modification of measures, but in order for this to be an effective remedy, the child or adolescent must fully trust in her or his opinion being heard and taken into account. For this purpose, the experience which has been gain in the preceding process will be essential.

# 6. CONCLUSIONS

1. The Convention on the Rights of the Child marks a substantial change in the approach to the position of children with regard to the decisions affecting them. It is recognized that they have their own views, which must be taken into account in keeping with their capacity and maturity and that they are therefore called to take part in the processes of adopting such decisions, especially in all administrative and judicial proceedings.
2. The right to be heard comprises part of the main core of the Convention, in conjunction with the right to life, the right to non-discrimination and the right to primary consideration being given the bests interests of the child. In addition to the foregoing, the right of the child to be heard and to her or his views to be taken seriously must also be understood as an essential principle for determining the best interests of the child, considered paramount.
3. The holder of the right to be heard and to her or his views being taken into account is any child, as a result of which the hearing process must be adapted to the individual circumstances of each child.
4. The child must always be heard unless the child proper waives her or his right to be heard or is found to be lacking her of his own judgment. Nevertheless, one must base oneself on the assumption that all children are in a position to form their own views. Automatically enforcing age criteria for inhibiting the hearing process is inadmissible.
5. In view of the existence of a risk for the child resulting from the fact of stating her or his views, the configuration of the right to be heard as renounceable solely at the will of the child entails provision having to be made for a protective strategy but not the elimination of the hearing. The same can be said regarding the measures for preventing the victimization which could arise due to the repetition of hearing processes.
6. For the trial of the two processes examined in this study, there are courts of first instance which deal with general matters and other courts of first instance which are specialized, the latter being termed “family courts”. In a setting so closely linked to children, the decision-maker will require, in addition to training in fields not specifically legal, availing of technical teams for support. It must also be taken into account that in the bodies dealing with general matters, it is more difficult to avail of suitable spaces and protocols for taking action for facilitating the child being able to feel comfortable. The extension of the judicial bodies specialized in this field would assure a more suitable and expeditious treatment as a whole nationwide.
7. The Spanish legal approach of “right to be heard” differs from that employed by the Convention, which emphasizes the hearing process, given that in Spain’s legal tradition, “being heard” implies fundamentally the formalities from which the obligation of assuming insofar

as possible the position of the person heard does not follow. The concept of hearing within the framework of the Convention is stricter, given that in addition to paying attention to what is being heard, the reasons for the decision must be set out if it strays from that which has been expressed by the child.

8. The rules of law governing the family crisis processed do not conceive the process of hearing the child as a right, but rather as a judicial power subject to the principle of appropriateness.

9. No provision is made for a method for assuring that the discussion between the child and the judge and with the public prosecutor takes place generally, early along and standardized, as part of the planned order of the process.

10. In the proceedings of the protection entities, children are generally not provided with sufficient information regarding their situation and prospects for future developments therein. It is therefore difficult for a child, who has discrepancies as to how the hearing process has been carried out or who even dissents as to the fittingness of the protection measures decided upon, to be able set out his discrepancy before the judicial authority.

11. The difficulty involved in a child putting forth her or his discrepancies with the administrative measures which may have been adopted by a protection entity before the judicial authority may be remedied by way of different channels: 1) Appointment of a "judicial defender" following the child having gained direct access to the judge. 2) The Public Prosecutor's Office taking upon itself to represent the minor in court. 3) The minor being assigned a legal aid lawyer. In keeping with the degree to which ready access is available for the child and the advisability of not blurring the institutional profile of the Public Prosecutor's Office, the third of these alternatives seems to be the most feasible.

12. For the family processes, the function of guaranteeing access to the process of the views of the child may fall to the Public Prosecutor's Office. But in the cases in which the public prosecutor and the child disagree, the most suitable solution can be the appointment of a "judicial defender". This need may arise at any point in time during the procedure, including the appeal.

13. Under Spanish rules of law governing procedures, no details are set out as to the way in which the right a hearing must be exercised. Solely general references are made to the child being heard under ideal conditions for the safeguard of her or his interests, without interferences from other persons or the need of these processes being carried out in an appropriate setting. From the practical standpoint, there are no common protocols for conducting the process of hearing the child.

14. A tendency has been found to exist toward telling the child that her or his views are not decisive for the decision which is adopted in the end for the purpose of taking the weight of the responsibility of her or him. However, the Convention advocates highlighting the importance of what the child thinks about that which is affecting her or him. Although the judge is to weigh all of the rights in conflict and, in this regard, the decision of the child may not turn out to be decisive in the end, the solution does not entail trivializing the process of hearing the child, but rather making her or him understand the specific circumstances which are at stake.

15. The change in the way the position of the child is viewed in the process means a greater demand being placed on the decision-maker in the duty thereof of motivating the decisions, especially when handing down a decision against the views of the child or other interests also the object of special protection must be guaranteed.

16. The processes of informing the child as to the decision adopted, which is important so that the child can react and even appeal, if she or he so desires, is not provided for under the

rules of national law. To a good extent, this is so because the rules of procedure revolve around the judicial status of being a party to the process. The child is solely considered as such when she or he avails of a “judicial defender”, a concept conceived in principle as a response to a conflict of interests and not as an ordinary channel for reacting or appealing.

17. The problem of assumable duration for a protection procedure leads to examining the procedural model. The legal system of protection is based on some administrative bodies with specialized means and very strict and hardly reversible authorities due to the impact they have on the life of the child. In view thereof, the adopting of precautionary measures is not provided for in practice, given that it is understood that this would be getting ahead of the underlying decision, without availing of sufficient knowledge of the issue. This leads to posing the question as to whether a change in the model would be advisable in which the jurisdiction must supervise and ratify or modulate, following the lapse of a prudential time period, the decision of dependency adopted by the Administration.

18. The legal system must make provision for specific appeal procedures when the child considers that her or his right to be heard and to have her or his views duly taken into account has not been fulfilled.

# 7. RECOMMENDATIONS

To carry out the legislative and organizational reforms necessary on civil, procedural and juvenile protection issues:

## 7.1. Recommendations to the Secretaría de Estado de Justicia [Secretary of State for Justice]

1. Configure the process of hearing the child as a right of the child, not subject to criteria of need or appropriateness. This means hearing the child and taking into consideration which she or he says.
2. Eliminate the criteria of age regarding the right of the child to be heard, replacing it with the assumption of the capacity of the child to form her or his own views.
3. Establish that the impression of a lack of maturity for these purposes must be backed by a technical report from the psychosocial team assigned to the court, which must bear in mind the approach in this regard of the Convention and the Committee on the Rights of the Child.
4. Introduce the benefit of free legal aid for those children who, independently of their parents or legal guardians, wish to have their views heard in processes dealing with matters affecting them.
5. Along the line of that which is set forth under Article 5 of the European Convention on the Exercise of the Rights of the Child, to recognize new rights of participation for the child in those processes which deal with matters affecting her or him, in particularly the possibility of exercising the rights of the parties, in full or in part. Similarly, to amend the regulation of the judicial defender in order to facilitate the access and representation of the child in the process.
6. Introduce for the family processes the provision for the appointment of a judicial defender when the public prosecutor and the child disagree as to which is advisable for her or his best interests.
7. Incorporate the principles which are to govern the processes of hearing the child, in particular on regarding the confidentiality of the process, the way in which it is to be conducted, the setting in which it is to be carried out, the degree of importance which can be placed on the views of the child or the capacity of the child for dealing with issues considered pertinent thereby.
8. Establish a duty of strict motivation of the judicial decisions, particularly when the judge

strays from the views expressed by the child or when the child has not been proceeded to be heard.

9. Take under consideration the process of informing the child as to the judicial decision adopted regarding that which affects her or him. Similarly, grant her or him specific appeal procedures, even which she or he were not to have been party to the process of first instance.
10. Promote the generalization of courts of first instance as specialized family courts. Similarly, in cooperation with the Autonomous Communities to whom the authorities over human and material means serving the Justice Administration have been transferred, to promote spaces being adapted to the special needs of children and these specialized courts being assigned their own psychosocial teams.
11. Reinforce the allocations of the Public Defender's Office so that it may increase the number of public prosecutors specialized in the civil field of children.
12. Examine the procedural model for taking exception to the administrative measures for protection for the purpose of notably shortening the processing times and, in the event that it be deemed possible without curtailing the rights of the parties, vary the aforesaid model toward a system of mandatory judicial examination and ratification of the administrative decisions.

## 7.2 Recommendations to the Secretaría de Estado de Servicios Sociales e Igualdad [Secretary of State for Social Services and Equality]

1. To configure the process of hearing the child as a right of the child, not subject to criteria of necessity or appropriateness, this meaning hearing the child and taking into consideration what she or he says.
2. To order the remittal to the Public Prosecutor's Office of the complete administrative case file of those minors placed under means of protection at the point in time at which the decision of dependency is notified to thereto.
3. To promote, in cooperation with the State Public Prosecutor's Office and with Public Juvenile Protection Entities, the measures necessary for facilitating online access of the public prosecutors to the administrative case file and to the follow-up reports on the minors placed under protective measures.
4. To promote, in coordination with the Public Prosecutor's Office and the Public Juvenile Protection Entities, the adoption of a common protocol for the harmonization of children's case files with regard to the minimum contents of the reports, documents to be incorporated, measures for informing the child, accreditation of the child having been heard by the administrative authorities, views of the child and other incidents which must necessarily be set out in the aforesaid case files.
5. To establish, in coordination with the Ministry of Justice, general access of all minors placed under protective measures to free legal age from the point in time of their declaration of dependency.

# ANNEXES

## Annex I: Open-ended list of questions to be considered at the meetings held in preparation for this study

### I. Judicial guarantees in relation to the measures for the protection of minors in a situation of dependency

#### *A. General questions*

A.1. The right of the child to be informed and heard (Art. 12 CRC and Art. 9 OA 1/1996): Incidence of the age.

- At what point in time is the child furnished with information on the procedure affecting her or him, in both the administrative as well as the judicial jurisdiction?
- How and by whom is this information furnished? Orally and/or in writing? Possible information guides and orientation on the appropriate channels for the defense of the interests of the child.
- In what way and at what time can the child request to speak with the judge, public prosecutor or technical team?
- The access of the minor to a lawyer.
- Way in which the child is heard and provided with guidance on the part of the public prosecutor, the technical team and, wherever applicable, the lawyer.
- Incidence of special circumstances.

A.2. The monitoring on the part of the Public Prosecutor's Office (Art. 3 Organic Statute of the Public Prosecutor's Office [EOMF] and Art. 174 Spanish Civil Code).

- What documentation does the Administration remit in conjunction with the decision of dependency and other possible measures affecting the child? What other documentation would it be advisable to place at the disposal of the public prosecutor so that she or he may assess the child's situation?

- When and how is the conversation held with the child, with the parents or other family members? Ex officio or at the request of a party?
- What type of information and orientation is provided to each of them?
- Check-up on the situation of the child every six months. How is the follow-up on this situation carried out? Reports, conversations, visits.
- What are the circumstances which are notified to the public prosecutor concerning the situation and evolution of the child? (Modification of visits, offering foster care in extended family, change of center, etc.).
- Type and frequency of the measures proposed to the judge from the State Public Prosecutor's Office?

A.3. The best interests of the child. How the existence thereof is justified and motivated in each specific case.

***B. The process of Spanish Code of Civil Procedure (LEC) Article 780***

B.1. Initiating the process for opposing the administrative decisions on the subject of juvenile protection.

- What preliminary orientation and information is provided to the parents, the children and other family members, if any?
- Brief initiating proceedings (Article 780.2 Spanish Code of Civil Procedure – LEC). Formal requirements: Need of procurator and lawyer. Who can file it? (parents, child, other family members, those providing foster care).
- Compliance with the twenty-day time period for remitting the administrative case file to the competent Court.
- Filing the complaint. Formal requirements: Need of procurator and lawyer. Capacity of the child to take exception. Possibility of appointment of the judicial defender. Capacity of other family members and those providing foster care. Possibility of taking exception to the measures and the role thereof in the process.

B.2. Questions which arise in the opposition process.

- Preferred processing procedure and incidence of possible delays.
- Ex officio evidence frequently presented.
- Opposition to specific measures (visiting regime, change in family /residential foster care measures, change of center, etc.).
  - Role of the public prosecutor (opposition).
  - Court taking cognizance of the incident. In practice, does dispersion take place? In the event that it does, what mechanisms are in place for detecting and preventing it?
  - Length of processing procedure time.
  - Situation of it not being possible for a decision to be issued until a criminal decision has first been issued.

- Subsequent processes due to change in circumstances: cases and time frames.

B.3. Court and Public Prosecutor's Office technical teams

- What role do they play in the process?
- Professional profile of those comprising these teams.
- Degree to which the personnel and material assigned thereto is sufficient in relation to the workload.
- Cooperation with technical teams of the Administration.
- Average length of time for being called in for a conversation and for the preparation of the report.
- Type of assessment which is made: psychological, social, emotional, physical, cognitive, etc. Protocols for taking action.
- How and where does the examination of and interview with the child take place? Length.
- Number of technical team members who assess the child, during the same interview or in more than one.
- Guidelines for evaluating what is expressed by the child.
- Party-requested reports: assessment.

B.4 Appropriate setting for the child being heard before judges, public prosecutors and technical teams. Possibility of combined interview.

## II. Participation of children in the marital processes

### *A. General questions*

A.1. The right of the child to be informed and heard: Incidence of the child's age.

- The role of the parents
- At what point in time is the child provided with information concerning the procedure affecting her or him?
- How and by whom is this information provided? Orally or in writing? Possible information guides.
- How and at which point in time can the child request to speak to the judge, public prosecutor or technical team? Before or after the formal proceedings?
- Incidence of special circumstances.

A.2. Action taken by the Public Prosecutor's Office in these civil processes ex Article 3 of the Organic Statute of the Public Prosecutor's Office (EOMF) and Article 749.2 of the Spanish Code of Civil Procedure (LEC).

- When and how is the interview held with the child, the parents or other family members? Ex officio or at the request of the party?

- What type of information and guidance does the State Public Prosecutors' Office provide to child?

A.3. Best interests of the child: How is the existence thereof motivated in each specific case in particular?

***B. The hearing of the children***

B.1. The direct involvement of the child in the adoption of provisional measures prior to and at the same time of the filing of the complaint.

B.2. The hearing of the child by the judge (Spanish Code of Civil Procedure (LEC) 770.4, Paragraph 2).

- At what point in time in the process is the hearing of the child held? Does the judge have the report form the technical team at that point in time?
- In what cases is the aid of technical team members sought? Are the public prosecutor and/or the court clerk present? Might a hearing being held with the judge, public prosecutor and a member of the technical team all combined help the judge to gain a more overall view of the situation of the child?
- Is a written record or an audio/video recording made of the hearing of the child? Access of the parties.
- Is there an appropriate setting for the hearing of the child?
- Is it considered necessary that the judge and the public prosecutor possess specific training for interviewing the children? Are there protocols for action in place in this regard?

B.3. The "opinion of duly qualified specialists" under Article 92.9 of the Spanish Civil Code and the report from the judicial technical team on children (Spanish Code of Civil Procedure Art. 770.4 – LEC).

- What role do they play in the process?
- Professional profile of those comprising these teams.
- Degree to which the personnel and material assigned thereto is sufficient in relation to the workload.
- Consideration given to other technical reports. Which ones? Average length of time for being called in for a conversation and for the preparation of the report.
- Type of assessment which is made: psychological, social, emotional, physical, cognitive, etc. Protocols for taking action.
- How and where does the examination of and interview with the child take place? Length.
- Number of technical team members who assess the child, during the same interview or in more than one.
- Guidelines for evaluating what is expressed by the child.
- Party-requested reports: assessment.
- Assessment by the judge of the reports remitted by the meeting point which is supervising the visiting regime.

B.4 Special aspects involved in separation and divorce by mutual consent (Spanish Code of Civil Procedure Art. 777.5 – LEC in connection with Spanish Civil Code Article 92.6).

- In what cases and at what age is the child asked for her or his views?
- How can the child request to be heard in the process?

B.5 Special aspects involved in family mediation (Spanish Code of Civil Procedure Art. 770.7 – LEC).

B.6 Preferred processing procedure and incidence of possible delays. Average length of processing time.

# ANNEX II: Participants in the meetings held in preparation for the study

| PARTICIPANTS | POSITION | DAY |
|---|---|---|
| Lourdes Acero Rico | Meniños Foundation | 1 |
| Pascual Aguelo Navarro | Attorney. General Council of Spanish Bar Associations | 1 |
| M.ª Jesús Alcaide Lagares | Psychologist assigned to the family courts (Las Palmas) | 2 |
| Gloria Alonso Ballesteros | Senior Member of Civil Section Public Prosecutor's Office of Madrid | 3 |
| Irene Arce Fernández | Juvenile Attorney. Principality of Asturias | 2 |
| Concepción Ballesteros Vicente | Technical Secretary. Spanish Children's Rights Coalition | 1 |
| Soledad Becerril | Defensora del Pueblo [Spanish Ombudsman] | * |
| Consuelo Benavente Palop | Deputy Coordinator, Juvenile Section, Public Prosecutor's Office, Valencia | 3 |
| Juana M.ª Biezma López | Psychologist assigned to family court. Navarre | 2 |
| Malena Burguera Garcías | Security and Justice Area Technical Staff Member. Spanish Ombudsman Institution | * |
| María Isabel Cadenas Basoa | Judge Magistrate. Court of First Instance No. 6. Jerez de la Frontera | 4 |
| Cristina Cañadas Pérez-Ugena | Health and Social Policy Area Technical Staff Member. Spanish Ombudsman Institution | * |
| L. Carlos Chana García | Red Cross | 1 |
| Concepció Ferrer i Casals | Adjunta Segunda del Defensor del Pueblo [Second Deputy Spanish Ombudsman] | * |
| Isabel Gómez Reyes | Attorney. General Council of Spanish Bar Associations | 1 |
| M.ª Dolores González González | Psychologist. Forensic Medicine Institute in Ourense | 2 |
| Sergio Gutiérrez Mateo de Domingo | Diagrama Foundation | 1 |
| Amelia Hernández Rogado | SOS Children's Villages Spain | 1 |
| Rosa M.ª Hernando García | Public Prosecutor. Juvenile Protection Section. Public Prosecutor's Office Madrid | 3 |
| Vicente José Ibáñez Valverde | Psychologist assigned to the Family Courts of the Autonomous Community of Madrid | 2 |
| Andrés Jiménez Rodríguez | Technical Chief of Security and Justice Area. Spanish Ombudsman Institution | * |
| Ana María Lanuza García | Senior Member of Civil Section, Public Prosecutor's Office of Valencia | 3 |
| Carolina Macías Reyes | Attorney. General Council of Spanish Bar Associations. | 1 |
| Serafín Martín Corral | Psychosocial Team Coordinator. Directorate of the Justice Administration. Basque Government | 2 |
| Silvia Martín Honrubia | Health and Social Policy Area Technical Staff Hember. Spanish Ombudsman Institution | * |
| M.ª Teresa P. S. Martín Nájera | Judge Magistrate. Court of First Instance No. 29 of Madrid | 4 |
| Bartolomé José Martínez García | Technical Chief of the Health and Social Policy Area. Spanish Ombudsman Institution | * |

| PARTICIPANTS | POSITION | DAY |
|---|---|---|
| Marta Martínez Sierra | Attorney. General Council of Spanish Bar Associations | 1 |
| Leticia Mata Mayrand | ANAR [Help for Children and Adolescents at Risk] Foundation | 1 |
| Elena Mayor Rodrigo | Judge and Advisor to the Office of the Secretary of State Justice | 2 |
| Luis Carlos Nieto García | Judge. N Juvenile Court. 1 of Ávila | 4 |
| José María Paz Rubio | Prosecutor. Civil Chamber of the Supreme Court | 3 |
| Filomena Peláez Solís | Attonery. General Council of Spanish Bar Associations | 1 |
| Juan Antonio Ponce Garrido | Head of the Legal Protection of Minors. Board Andalucía | 2 |
| María Luisa Roldán García | Judge. Head of Training Services Section Continuing Judicial School. General Judicial Council | 4 |
| Pilar Ruiz Rodríguez | Technician from Psychosocial Team assigned to the Family Court Logroño. La Rioja | 2 |
| Itziar San José Martínez | Psychologist assigned to the Juvenile Prosecutor. Aragon | 2 |
| Benito Soriano Ibáñez | Chief Juvenile Prosecutor. Provincial Prosecutor of Teruel | 3 |
| Margarita Tortajada | Ministry of Interior and Justice. Valencia | 2 |
| Esther Vallbona Borgas | Team Coordinator Civil Technical Advisory Barcelona-Counties. Department of Justice Government of Catalonia | 2 |
| Teresa Velasco Castrillo | Social Worker of the Institute of Legal Medicine. Cantabria | 2 |
| María Ángeles Velasco García | Judge. Court of First Instance number 25 of Madrid. Advocate of the General Council of the Judiciary | 4 |
| María Dolores Viñas Maestre | Judge. Section # 18 of the Provincial Court of Barcelona | 4 |

**SESSIONS**

* Participating in four days of the conference.

1. Session with representatives of the legal profession and civil society organisations working with children, held on 2 October, 2013.
2. Session with technical representatives of psychosocial teams attached to courts held on 4 October, 2013.
3. Session with representatives from the State Prosecutor General, on 8 October, 2013.
4. Working Day with judges appointed by the General Council of the Judiciary, held on 28 October, 2013.


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