

International **Comparative** Legal Guides



Practical cross-border insights into family law

Family Law **2022**

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Argentina

Estudio McEwan



Herberto Robinson

1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Under the Civil and Commercial Code, which came into full force and effect in 2015 (the “CCC”), the law of the last marital domicile determines the applicable law and court jurisdiction in cases of divorce and all matters in relation to marriage nullity. Argentina adopted a federal system of government where each of the provinces (23 provinces and the Autonomous City of Buenos Aires) has its own procedural law. Thus, the applicable law is always the CCC, and the court with jurisdiction is the provincial court where the last marriage residence was settled.

Marriage dissolution procedures are governed by the law of the spouses’ last marital residence. However, if the last marital residence was in a foreign country, the parties may file for divorce in that country and then register the resolution at the local register. The intervention of an Argentine judge is needed in receipt of all foreign certified divorce documents.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

After the sanction of the CCC, there are neither grounds for terminating marriage nor a required period of personal separation for filing a divorce.

The CCC has eliminated any form of fault-alleging by either of the spouses and therefore, the possibility of initiating claims for damages (against the other spouse) is not allowed. Either spouse may file, unilaterally or jointly, a divorce procedure. If a unilateral procedure has been filed, the parties may have an uncontested divorce. However, the judge will rule in the same way as in a joint procedure as there is no grounds for divorce. For more explanation, please see question 1.4 below.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a “private” divorce, i.e. without any court involvement?

In the case of an uncontested divorce, parties may need to attend court in case they have children under 18 years old to accept the communication regime requested and/or to confirm child custody, if petitioned. If no children are involved, a unilateral procedure may start and conclude uncontested with no need to attend court.

Private divorce is not allowed under Argentine law. However, private agreements (private mediation) may be reached between spouses regarding child maintenance, custody, contact, visitation and division of material assets.

1.4 What is the procedure and timescale for a divorce?

The divorce procedure is filed before a court (regarding the last marital domicile principle) by both spouses (joint petition) or by one of them (unilateral). As mentioned above, a divorce petition may be filed after marriage at any time as there is no personal separation time requirement nor any other grounds for filing divorce. In both procedures, if there is mutual agreement between the parties involved, the court may rule the divorce decree in a period of two to three months. The divorce takes effect upon registration of the court ruling in the Civil Registry in the jurisdiction where the marriage was celebrated.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Divorce cannot be finalised without an agreement of child arrangements (communication and maintenance). However, a matrimonial property regime (in case of community property regime) may be assigned by private agreement between former spouses or by separate court procedure once the divorce decree has been declared final and fully registered (accordingly with question 1.4 above).

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Foreign divorces are recognised when the sentence is issued according to the last marital domicile principle. Therefore, if the last marital residence is located in a different jurisdiction, spouses must register the divorce resolution before the Argentine Civil Registry with the intervention of an Argentine judge who will have received all certified divorce documents filed by the interested party.

1.7 Does your jurisdiction allow separation or nullity proceedings?

Under the CCC, there is no judicial process under which spouses can obtain a separation sentence, other than liquidation of marital assets. A separation of assets refers to a resolution by

which the communal marital assets are divided between the spouses, who continue to be married under a different marital asset system (the separated patrimony system).

A nullity procedure may be alleged when impediments to a valid marriage are present (i.e. marriage between direct blood relatives, marriage between siblings or half siblings, validity of a previous marriage of one or both spouses at the moment of marriage, or one spouse being the author, accomplice or instigator of attempted homicide against the other) and allows the declaration of absolute nullity due to infringement of public order rules (*normas de orden público*, as defined in the CCC).

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes, they can. Proceedings are usually stayed until jurisdictional dispute has been resolved. The CCC incorporates the international legal principle of avoiding contradictory rulings over the same matter passed by different courts.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

It is important to mention that the court's role in a divorce procedure is limited to supervision that rules of public order (*normas de orden público*) have not been infringed and to ensure, upon petition, a fair resolution of the unresolved effects of the divorce (either patrimonial or not).

Having said that, upon petition, financial orders to enforce child support, as well as financial orders to liquidate and distribute marital assets, can both be made on divorce. Execution of a court's ruling may include seizure, lien or restraint of assets (depending on the local jurisdiction where the procedure has been filed).

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

Yes, matrimonial regimes exist. Under the CCC, there are only two regimes: the community property and the separate property regimes. As a principle, the community regime acts as the default regime if spouses keep silent on which regime they adopt. Marital regimes do not need to be addressed by the court on a divorce decree; parties can settle privately the specific liquidation of the matrimonial property assets and proceed to distribute between them, or, upon petition, a judicial liquidation and distribution procedure may be filed by either or both parties.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

The choice of orders on divorce is ruled in the CCC and in each of the provinces' Civil and Commercial Procedure Codes on how to obtain them from the courts.

The divorce decree shall rule in reference to the communication regime when minors are involved (under 18 years old) and the attribution of the family home (accordingly with the rules established in the CCC). The court will only order temporary and exceptional spousal maintenance or compensation obligations if petitioned.

Preventive measures on child support or custody may be filed by any spouse before or during the divorce procedure to ensure financial orders.

2.4 Is the position different between capital and maintenance orders? If so, how?

Please see the answer to question 2.6 below.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

Yes, they do. A unilateral or joint procedure must always be filed before a court in order to obtain a divorce decree. Also, when they have children (under 18 years old), the communication regime needs to be settled before a court.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

The CCC establishes spousal maintenance or economic compensation in exceptional and temporary circumstances, including: in case of illness, or where a clear economic disadvantage means a worsening of his/her situation and the marital bond and its breakdown is a likely cause; when experiencing difficulty in obtaining a job (generally in relation to the parent that holds custody of children); or in case of potential loss of pension rights, in which case they have the right to claim compensation. Compensation may consist of a one-time benefit, an income for a specified time, or, exceptionally, for an indefinite period. Financial compensation claims have a six-month statutory limit after the divorce decree has been issued.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, it is. The CCC includes two forms of marital estate: property earned or purchased by the husband or wife during the marriage. This marital property can then be classified as marital estate administered by the husband during the marriage, and marital estate administered by the wife during the marriage, regardless of who holds title over the specific good. This means that any spouse can hold title of a property and the property is still considered marital estate, although it will be administered by the spouse holding its title. The marital estate also comprises all assets under the names of companies or third parties that have been established using marital assets or because of the liquidation of marital assets.

When a marriage is terminated (due to death or divorce), the assets that qualify as shared/marital property are grouped together and, after the applicable liabilities and claims of each spouse have been worked out (which may include compensation for the differences in the value of the property), they are divided and distributed equally between the spouses (in case of divorce) or between the heirs and the surviving spouse (in case of death).

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Foreign nationals are not treated differently on divorce because of their nationality. Legal cases that are brought to court are treated as per their facts and under the application of jurisdiction rules.

2.9 How is the matrimonial home treated on divorce?

In general, children, and therefore the parent that holds custody, remain in the matrimonial home. The financial position of the spouses will determine whether a former matrimonial home is needed.

There is also a protection of the family home in regard to selling (i.e. mutual consent is required).

2.10 Is the concept of “trusts” recognised in your jurisdiction? If so, how?

Argentine law accepts the concept of a trust. Even though Argentina has not signed the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985, there are court precedents that recognise the existence and enforceability of foreign trusts provided that Argentine public order is not infringed (for example, where there are no infringements to the heirship rules of descendants and spouse). Regulations or by-laws of a trust shall not override the forced heirship rule. Since the forced heirship rule is a public order regime, any provisions or structures (trusts) used by the parties that conflict with the provisions under the regime can be judicially challenged. Argentine law provides for legal remedies in cases where a forced heir has been adversely affected in relation to the forced share that should be allocated to him or her. In this sense, any heir can file a *collatio bonorum* (joining together into a common fund) claim.

There are precedents from Argentine courts where forced heirship claims have been admitted against trust assets where the legitimate portion of one of them was infringed. In *Vogelius, Angelina y otros c/Vogelius, Federico y otros*, the Supreme Court of Argentina ruled that, despite the fact that a trust was constituted in the UK (with assets based in the UK), the succession must be governed by Argentine local civil law. The court resolved, regarding the *collatio bonorum*, that a trust created with a view to gratuitously benefitting a forced heir of the settlor might be deemed a gift to the heir made before the death of the deceased, and so goes into the accounting of the estate, because its content and significance exceeds that permitted under inheritance law. Regarding matters of private international law, the court established that even though the trust was governed by UK law, the succession was subject to Argentine law because the deceased was last domiciled in Argentina.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

First, a foreign divorce decree needs to be recognised in Argentina, for which summary information known as an “*exequatur*” must be made in which an Argentine judge, once he has verified that all the requirements are met (i.e. no breach of public order rules and does not oppose another decree passed in Argentina), orders the registration of the divorce in the corresponding Argentine Civil Registry. If bilateral international treaties have been signed, said rules shall apply.

Financial claims may be related to immovable assets located in Argentina and to enforcing child maintenance.

It is important to mention that a foreign financial decree duly certified in its jurisdiction can be enforced if the defendant (or paying party) is domiciled in Argentina, or if the defendant's (or paying party's) property is located in Argentina.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Financial settlements must go through a prejudicial mediation process before filing in court. If no agreement is reached, filing the complaint in court is permitted. There is no arbitration in family law matters.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Under the CCC, marital agreements (conventions) are accepted under Argentine law. For such agreements to be valid, the marriage must be celebrated, and they are required to determine: (a) an inventory of assets of each spouse; (b) donations between spouses before marriage; and (c) the adoption of one of the matrimonial property regimes. Said agreements need to be signed by public deed. Under the CCC, there are only two regimes: the community property and the separate property regimes. The community regime acts principally as the default regime if spouses keep silent on which regime they adopt. Also, spouses may change the matrimonial property adopted (only from a community regime to a separate regime and *vice versa*) within a year of marriage or after a year since the last change. In case foreign prenuptial agreements have been made, they need to follow CCC rules and be filed before the Civil Registry if the marriage celebrated in another country has also been registered in Argentina.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

For (pre-)marital agreements to be enforceable, they must have been celebrated by public deed and the content must deal with the requirements provided by law (as mentioned in question 3.1 above).

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Marital agreements do not cover financial claims on divorce, maintenance, compensation or financial claims regarding children. Said matters may be settled in previous mediations or private agreements, or during or after the divorce procedure.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

Under the CCC, a cohabitant with no children who suffers a clear imbalance in his/her economic situation (as a result of the end of the cohabitation) may claim economic compensation before the court.

4.2 What financial orders can a cohabitant obtain?

Upon petition, to ensure financial orders regarding enforcement of child support or economic compensation, the execution of a court's ruling may include seizure, lien or restraint of assets.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

The CCC recognises certain rights for cohabitants, provided they have been together for at least two years. Through the means of "cohabitation agreements" (*Pacto de Convivencia*), domestic partners shall be able to regulate different aspects of their life together, such as economic aspects for distributing property and other responsibilities. The CCC also provides protection for the family home and, if one partner dies, the survivor is granted the right of free housing in the home they shared, for a period of two years. The law recognises other partial effects on partners (i.e. social security and pension rights); however, the legal recognition provided for them is restricted. Partners or cohabitants do not have inheritance rights; therefore, a testator/testatrix may dispose his or her wealth to the partner up to the disposable portion ($\frac{1}{3}$ of the estate).

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Argentine law has recognised marriage between same-sex couples since 2010, so the same marital property regime will apply in such cases. Adoption is also allowed for same-sex couples under the same terms as those required for heterosexual couples. Same-sex marriage and cohabitation have been recognised and enforced since 2015 with the sanction of the CCC.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

Pursuant to the *Convención Americana sobre Derechos Humanos* (American Convention on Human Rights), Argentine law does not make a distinction between children within or outside of marriage. The law treats them equally. However, the CCC treats siblings and half-siblings differently (i.e. if a person dies and is survived by a half-brother/sister and a whole brother/sister, the half-brother/sister will take half of what the whole brother/sister will take, and if the survivors are all of half blood, they will take a full share as if they were of whole blood).

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child maintenance is calculated considering the life standard that the minor led during the family life or similar. With the agreement of the parents, or by judicial decree, maintenance may be modified (increased or decreased as the case may be) according to the needs of the child and the income of the parent responsible for the support.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Financial claims can be filed by any parent against the other on behalf of his/her children up to the age of 21, or between 21 and 25 years old in circumstances where the son or daughter is studying, or does not work and still cohabits with his/her parent.

5.4 Can capital or property orders be made to or for the benefit of a child?

No, they are not allowed in divorce.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

The parent who has custody receives and deals with the alimony payment, legally representing the children, until they reach 18 years old. Between the ages of 18 to 21, when the alimony right terminates, the non-custodial parent may make payment directly to the child as he/she is no longer a minor. If, during an alimony legal filing, a child turns 18, he/she is no longer represented by his/her mother, and is therefore expected to stand in court and to continue proceedings against his/her father for the alimony to which he/she is entitled.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

The CCC refers to parental responsibility exercised by both parents. Whether married or not, it is presumed that the acts carried out by one parent have the agreement of the other, with a few exceptions where express consent needs to be expressly given (i.e. when the child travels or decides to change residence abroad). Also, parental responsibility is not affected by a divorce; however, they need to decide the regime of communication and where the children will live.

If they do not agree, the court must decide which parent the child will live with, without prejudice to the other to have adequate visitation and educational supervision.

6.2 At what age are children considered adults by the court?

Children are considered adults by the court at 18 years old. However, under the CCC, when they turn 13, they can exercise certain acts that are allowed by the legal system, and in situations of conflict of interest with their parents, they can intervene in their own legal assistance.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Children orders can be made until they turn 18 years old. However, the obligation to provide financial maintenance to

children extends to the age of 21, except in situations where the parent is able to prove that the child at 18 has sufficient resources to provide for him/herself.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

The court can make communication regime orders, custody orders, maintenance orders, parental responsibility orders, right of access orders, relocation orders, medical orders, and payment orders of reimbursement of extra costs and expenses made on the child's behalf and not included in the maintenance obligation assumed by a parent.

Upon disagreement between parents, a court will issue an order stating which parent can decide in this specific matter (i.e. religious issues, medical treatment, surgery, choice of school, and vacations).

The court must automatically make a child arrangements order in the event of divorce. The Minority Officer is always heard in judicial proceedings, acting on behalf of the interests of the children and their wellbeing.

6.5 What factors does the court consider when making orders in relation to children?

First, the court considers the child's best interests and all decisions shall try to maintain the original home life of the child.

The Court shall always hear the child needs. As mentioned, a child over the age of 13 years can be heard in court and be assisted by a lawyer, and serious consideration to his/her will must be considered by the judge when making a decision on the subject of custody/parental responsibility.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

In general, all decisions are agreed between parents when filing a divorce. A child can be taken abroad if agreed, and if the parent has a power of attorney given by the other parent.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

Yes, there is a presumption of an equal division of time between separating or divorcing parents.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Yes, unmarried parents are treated equally in relation to parental responsibility and personal care of their children.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

All decisions taken by the judge regarding children must have the approval of the Minority Officer. Also, meetings with children shall be held if needed as well as the provision of welfare reports.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

A Minority Officer always represents the interests of children. However, children over 13 years old can be assisted by lawyers in cases of conflicts of interest with a parent.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Yes, according to provisions set forth in the CCC. Mediation is the only method of dispute resolution permitted by law.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

No, they cannot.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

No, they cannot.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

Factors that are taken into account are:

- The child's best interests, and the "centre of living" (defined by the CCC as "*the place where the child has lived the greatest part of his/her existence*").
- The habitual residence of the child.
- The type of relationship between the non-resident parent and the child, including whether they see each other regularly or sporadically and whether the resident parent is actively involved in the upbringing of the child or is an absent parent.
- The Minority Officer's report.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

Please see the answer to question 7.3.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

It will depend on a case-by-case basis. In general, without mutual agreement of both parents, relocation is more difficult when children are under the age of 12 years old. The nationality of the parents is also considered when filing relocations.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Argentina ratified its participation in the international abduction treaty signed in 1980 and is therefore a party to the Hague Convention. The country firmly supports the principles set forth in the Hague Convention and the judicial system always acts accordingly.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

There have been no major changes to family law in the last two years. The only change was introduced at the end of 2020 in the regime of donations, in particular with regard to the action of reduction in donations to forced heirs. The reform promotes the protection of third-party sub-acquirers of immovable assets who acquired them in good faith and who have had as their antecedent the acquisition of an asset through a donation contract. These include immovable assets that have imperfect titles and are thus restricted for sale.

Major changes in family law in Argentina were introduced with the sanction of the CCC in 2015. In line with global demand, Argentina introduced deep but incomplete reforms to its legislation regulating the legal relationships of persons, families and their estates, both in the civil and commercial fields. The main goal was to adapt and update domestic legislation in light of the cultural, social, economic and technological advances and changes that Argentine society, in particular, was facing, in keeping with the global trends in different jurisdictions.

At the same time, there has been an attempt to reflect, as a governing principle, autonomy of will for matters of private law (civil and contractual), allowing the parties (always in compliance with public order regulations) to enjoy broader freedom, while personal and even contractual relationships were being

regulated. Based on these principles (which will surely require revision in the near future), we consider that the current legislation offers much more modern and flexible ways to implement effective estate planning for those persons and families with residence and assets located in different jurisdictions.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

Throughout 2020, local courts have been mainly closed with only urgent cases being attended to. Parents have had to readapt their right of access with the other parent, as well as their child communication regime due to lockdown policies.

Implementation of virtual procedures took longer than expected. However, both the Supreme Court and the Civil National Court of Appeals issued resolutions ordering paperless processes, providing also that all hearings should be held via virtual platforms, and that electronic notifications should replace paper notifications and those served in person. All of these amendments are likely to remain after the COVID-19 crisis has passed. However, the implementation of these changes has been uneven across the different courts; some have implemented the measures quickly and effectively while others have been resistant to change, thus causing unnecessary delays for people seeking justice or resolutions.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

The legal procedure for adoptions should be amended, as the current process is very long and complex and therefore discourages people from pursuing this honourable route.

Finally, Argentina should amend the forced heirship rule in line with the amendments of the CCC.



Herberto Robinson is a civil and corporate law attorney, with more than 15 years of experience representing families and their companies in a variety of cross-border transactions in Argentina and Latin America. Herberto collaborates with individuals and families on structuring matters arising out of the management of wealth during life and after death. He also assists clients in estate planning and family-business succession planning, and has a wealth of experience in family litigation matters.

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Estudio McEwan was a pioneer in the provision of legal and tax services to private clients in Argentina. The firm has extensive experience in the field of UHNWIs and their families, and is highly regarded in the areas of estate and tax planning. Its professionals (lawyers and accountants) assist private clients (individuals and families) as well as banks, private bankers, family offices, trust companies, investment banks, and private equity funds. The team at McEwan practice in all areas related to civil law and tax fields affecting UHNWIs. In addition, they have a wide knowledge of family law and they are recognised for their work on succession and complex tax litigation, with expertise in handling matters involving complex family conflicts.

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