# New Developments as Regards the Right of the Children to be Heard in Civil Procedures in Spain

Prof. Dr. Dr. h.c. mult. Carlos Esplugues
LLM (Harvard), MSc (Edinburgh)
Professor of Private International Law
University of Valencia (Spain)

相關文獻

## Abstract

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## I. Introduction[1]

The right of the minor to be heard in civil procedures involving him or her is very well enshrined in Spanish legislation both national and international to which Spain is a party. The

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[1] Most used abbreviations: Art.: article; BOE: Boletín Oficial del Estado (Spanish Official Journal); CE: Spanish Constitution; CPA: Civil Procedure Act; GM: Gaceta de Madrid (Former name of the Spanish Official Journal); LOPJ: Organic Act of the Judiciary Power; p./pp.: page / pages; STS: Judgment of the Supreme Court; TOL: Tirant on line.

principle is fully accepted and the obligation for judges and legal operators to be aware of it is perfectly drafted. Nevertheless, reality shows that the principle lacks a straightforward implementation in Spanish legal practice. The principle misses a clear, uniform and unanimous understanding and several issues relating to its practice are growingly under controversy. The analysis of the existing Spanish case law fosters the understanding of the right of the minor to be heard in all proceedings affecting him or her to be still "under construction" needing further interpretation and development of its exact meaning and scope.[2] This has a negative impact on the effectivity of the principle and may affect the minor and the necessary preservation of his or her best interest.

## II. The recognition of the right of the child to be heard in civil proceedings in Spain

Article 12 of the Convention on the Rights of the Child, of November 20, 1989 makes an explicit reference to the right of the minor to be heard in any procedure that affects her / him. Paragraph 1 of the provision states that "*Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child*". For this purpose, adds paragraph 2 of article 12, "*the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law*."

This principle is reproduced with more or less accuracy and extension in many other Conventions, of different origin and scope, affecting the rights of the children: article 24 of the Charter of Fundamental Rights of the European Union;[3] no. 8.14 of the European Charter of Rights of the Child;[4] articles 7 and 23 of the Convention on the Rights of Persons with Disabilities, of December 13, 2006;[5] article 13 of The Hague Convention on Civil Aspects of International Child Abduction, of October 25, 1980;[6] article 4 of The Hague Convention regarding Protection of

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2 To this respect, note C. NUÑEZ RIVERO & A. ALONSO CARVAJAL, *La protección del menor desde un enfoque del Derecho Constitucional*, in *Revista Derecho UNED*, 2011, no. 9, pp. 275-275.

3 *OJ* C 326, of 10.26.2012.

4 *OJ* C 241, of 09.21.1992.

5 https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html, last accession 08.20.2021.

6 https://www.hcch.net/en/instruments/conventions/full-text/?cid=24, last accession 08.21.2021.

Children and Co-operation in Respect of Intercountry Adoption, of May 29, 1993;[7] article 6 of the European Convention on the Adoption of Children of November 27, 2008[8] or article 6 of the European Convention on Exercise of the Rights of Children, January 25, 1996.[9] And it is also embodied in other more general instruments: article 31 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, October 25, 2007.[10]

In fact, in the European Union, the new Council Regulation (EU) 2019/1111 of June 25, 2019 on jurisdiction, recognition and enforcement of decisions on matrimonial matters, on matters of parental responsibility, and on international child abduction[11], that will replace Regulation (EC) no. 2201/2003, of November 27, 2003, concerning jurisdiction and the recognition of judgments in matrimonial matters and in matters of parental authority, repealing Regulation (EC) no. 1347/2000[12] from August 1, 2022 states in article 21(1) that when exercising their jurisdiction under the Regulation, "*the courts of the member states shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body*."[13] Paragraph 2 of the provision adds that where the court, in accordance with national law and procedure "*gives a child an opportunity to express his or her views in accordance with this article, the court shall give due weight to the views of the child in accordance with his or her age and maturity*". According to article 26 of Regulation 2019/1111, these solutions "*shall also apply in return proceedings under the 1980 Hague Convention*".

In line with these Conventions and instruments, Spanish national legislation fully supports the right of minors to be heard in civil proceedings affecting her or him. Thus, the Spanish Civil Code

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7 https://www.hcch.net/en/instruments/conventions/full-text/?cid=69, last accession 08.21.2021.

8 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160?module=treaty-detail&treatynum=202, last accession 08.21.2021.

9 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160?module=treaty-detail&treatynum=160, last accession 08.21.2021.

10 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160?module=treaty-detail&treatynum=201, last accession 08.20.2021. Also consider, The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, of 11.23.2007 (*OJ* L 93, of 04.07.2011) and its Protocol (https://www.hcch.net/en/instruments/conventions/full-text/?cid=133, last accession 08.22.2021), The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of parental authority and measures to protect children, of 05.28.2010 (https://www.hcch.net/en/instruments/conventions/full-text/?cid=70, last accession 08.21.2021).

11 *OJ* L 178, of 07.02.2019.

12 *OJ* L 299, of 11.18.2003.

13 As regards this new situation, note M. GONZALEZ MARIMON, *Menor y Responsabilidad Parental en la UE. Del Reglamento Bruselas II Bis al Ter*, Valencia, Tirant, 2021, p. 458 ff.

of July 24, 1889[14], envisages the hearing of the minor as regards different proceedings to be developed in the field of family law:[15] for instance, marital crisis cases –art. 92(6)- in which the obligation of the judge to hear the minor "*when deemed necessary*" refers only to the care and custody system and is subject to the ascertainment of the sufficient maturity of the minor; parental authority cases –arts. 154(III) and 159-; adoption –art. 177(3)(3)-; guardianship –arts. 231, 237(II) and 280- and child fostership –art. 173-.

In addition to the Civil Code, article 777(5) of the Law 1/2000, of January 7, 2000 on the Civil Procedure Act[16], as amended, sets forth special rules for those cases –in general- in which minor children are involved in separation or divorce proceedings concluded by mutual agreement (or consent of one spouse to the request of the other). Also, article 778 *quinquies*(8) of the Civil Procedure Act sets forth a rule specifically as regards International Child Abduction. In any case, and in accordance to article 770(I)(4) *in fine* of the Civil Procedure Act, should the judge decide, on his/her own or at the request of third persons or the minor himself/herself, to hear him/her in the course of the proceeding, the judge herself/himself "*shall ensure that any questioning of minors in civil proceedings is conducted under suitable conditions to safeguard their interests without interferences from other people, exceptionally making use of the help of specialists wherever necessary*"[17].

Finally, this general principle is further developed and broadened in the Legal Protection of Children and Young People Organic Act 1/1996, of January 15, 1996[18], as amended. Article 2(2) of the Act embodies several criteria to be taken into consideration for the purposes of interpreting and applying, in each case, the minor's best interest, without prejudice to those criteria established in the applicable specific legislation, as well as any other that may be deemed appropriate, given the specific circumstances surrounding each case. The provision refers, among some others, to "*b) Taking into consideration the minor's wishes, feelings and opinions, as well as their right to*

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14 *GM*, of 07.26.1889.

15 An analysis of this regulation may be found in M.J. MARIN LOPEZ, *Tutela judicial efectiva y audiencia del menor en los procesos judiciales que le afecten,* in *Derecho Privado y Constitución*, 2005 (enero-diciembre), no. 19, pp. 173-182.

16 *BOE,* of 08.01.2000.

17 This reference to the "*exceptional*" intervention of specialists is also embodied in art. 18(2)(4) of the Act 15/2015 of 07.02.2015 (*BOE,* of 07.03.2015), on non-contentious proceedings, and art. 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996, as amended. Consider, M. HERNANDO VALLEJO, *La audiencia del menor recabando el auxilio de especialistas*, in X. ABEL LLUCH, (coord.), *Las audiencias del menor en los procesos de familia*, Madrid, Sepin, 2019, p. 63 ff.

18 *BOE*, of 01.17.1996.

*gradually participate -depending on their age, maturity, development and personal growth- in the process to determine their best interest*." In any case, paragraph 3 of this article states that all these criteria shall be weighted taking some general elements into consideration. The first one of these elements is "*a) The minor's age and maturity*".

The Organic Act 1/1996, of January 15th, 1996 refers, for the first time, to both the right to be heard and the right to be informed not only in judicial proceedings but also in any administrative or mediation proceedings. Thus, in line with the mandate of the previously mentioned article 770(I)(4) *in fine* of the Civil Procedure Act, article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996 establishes that in any judicial procedure and administrative proceedings "*appearance or hearings of minors shall be preferential and shall be conducted in an appropriate manner given their situation and evolutionary development -with the assistance, where necessary, of qualified professionals and experts-, taking care to preserve their privacy and using a language comprehensible to them, in accessible formats adapted to their circumstances, whereby they are informed both of the question being posed and of the repercussions of their opinion, subject to full compliance with the guarantees of the procedure*." And article 9(3) adds that in those cases, in which the hearing of minors directly, or through the person representing them, is denied in administrative or judicial channels, "*the decision shall be motivated by the minor's best interest and communicated to the prosecuting authority, the minor and, where appropriate, their custodian, explicitly detailing any existing appeals against the decision*."

The recognition of the right of the minor to be heard in civil proceeding affecting her / him is made dependent by the Spanish legislator on the age and maturity of the minor. In this sense, article 9(2) of the Organic Act 1/1996 sets forth that "*Minors shall be guaranteed the ability to exercise this right by themselves or through the person they may appoint on their behalf provided they are mature enough*". The assessment of the maturity must be made by "*specialised personnel, taking into account both the minor's evolutionary development and their ability to understand and assess the specific issue at hand in each case. At any rate, they shall be deemed to be sufficiently mature at the age of twelve.*"

The notion of "maturity" is vague and must be interpreted by the judge and assessed, in every case, in accordance with the circumstances surrounding the specific case. In Spain, the most explicit reference to the meaning of "maturity" can be found in article 9(3)(c) of the Act 41/2002, of November 14, 2002, on the fundamental regulation of patient's autonomy, rights and obligations

regarding information and clinical documentation[19]. The provision states that "3. *Consent by proxy will be granted in the following cases: ... c) When the minor patient is not intellectually or emotionally capable of understanding the scope of the intervention. In this case, consent will be given by the minor's legal representative, after having heard his or her opinion, in accordance with the provisions of article 9 of Organic Law 1/1996, of January 15, on the Legal Protection of Minors*."

In any case, this maturity is deemed to exist when they are of the age of twelve in accordance to article 9(2) of the Organic Act 1/1996[20]. This is stressed by the judgment of the Supreme Court 413/2014 of October 20, 2014[21], in line with other judgments of the same court –judgments 157/2017, of March 7, 2017[22]; 578/2017, of October 25, 2017[23]; 18/2018 of January 15, 2018[24] or 4032/2020, of November 30, 2020[25], that "*when the minor's age and maturity presume that they have sufficient judgment and, in any case, those over 12 years of age, must be heard in the legal proceedings in which it is resolved on their custody and custody, without the party being able to renounce to the proposition of said test, having to agree on it, where appropriate, the judge ex officio*"[26].

In addition to the previous pieces of legislation, obligation to hear the minor is also stressed by the Spanish legislator as regard non-contentious proceedings. Article 18(2)(4)(I) and (II) of the Act 15/2015 of July 2, 2015, on non-contentious proceedings[27] governs the appearance of the minor in in court, and article 18(2)(4)(III) requires that "*a detailed report shall be issued and, wherever possible, an audio-visual recording shall be made. If the examination takes place after the appearance, the relevant report shall be passed to the parties to enable them to make*

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19 *BOE*, of 11.15.2020.

20 Nevertheless, many authors consider that between 12 and 18 there are many different levels of maturity and this should be taken into account by the judge. Because of that, the notion of "mature minor" is used to refer to those who are aged 16-18. Note M. CARTIE JULIA, T. JOUNOU BARNAUS & M. ORTI LLORET, *La audiencia del menor y la audiencia del 'menor maduro'*, in X. ABEL LLUCH (coord.), *Las audiencias del menor en los procesos de familia*, cit., p. 43.

21 TOL 4.538.478. As regards this Judgment, see J.I. ZAERA NAVARRETE, *La audiencia al menor en los procesos de crisis matrimoniales. Comentario a la STS núm. 413/2014, de 20 de octubre (REC. 1229/2013),* in *Actualidad Jurídica Iberoamericana*, 2015, núm. 3, p. 793.

22 TOL 5.990.813, Legal ground Second, no. 5.

23 TOL 6.484.675, legal ground Second, no. 2.

24 Legal ground Second, no. 2.

25 ECLI:ES:TS:2020:4032, Legal ground Second.

26 STS 4032/2020, of 11.30.2020, legal ground Five.

27 *BOE*, of 07.03.2015.

*statements within five days*".

This last provision is relevant because its content is in contradiction with the reference to the request made by article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996 to ensure that the appearance of the minor in any judicial procedure and administrative proceeding, "*shall be preferential and shall be conducted in an appropriate manner given their situation and evolutionary development ... taking care to preserve their privacy*" and with the philosophy underlying article 770(I)(4) *in fine* of the Civil Procedure Act that oblige the judge to ensure that during the hearing "*any questioning of minors in civil proceedings is conducted under suitable conditions to safeguard their interests without interferences from other people*". This difference has fuelled the debate as regards the nature of the hearing and has led to some procedurally orthodox solutions that, however, may be harmful for the minor, the exercise of her or his right to be heard and the preservation of her or his superior interests.

## III. The implementation of the right of the children to be heard in Spain

Until 2005, the hearing of minors involved in civil proceedings was considered mandatory.[28] However, the Organic Act 15/2005, of July 8, which modifies the Civil Code and the Civil Procedure Act as regards separation and divorce[29], reformed the wording of article 92(6) of the Civil Code and thus the hearing was no longer considered mandatory: "*In any event, before decreeing the care and custody system, the judge shall ask the opinion of the public prosecutor and hear the minor who has sufficient maturity, if this is deemed necessary on his own motion or at the request of the public prosecutor, the parties or members of the court technical team, or the minor himself, ....*".[30]

### 1. The judge has the possibility, not the obligation, to hear the minor

The hearing of the minor is now approached more as a right of the minor (i.e., under 12) to be

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[28] On the basis of art. 9 of the Organic Act 1/1996 (01.15.1996) on legal protection of children and young people, which partially modifies the Civil Code and the Civil Procedure Act - *BOE*, 01.17.1996-, in combination with art. 12 of the Convention on the Rights of the Child (11.20,1989) -*BOE*, of 12.31.1990- and arts. 92(6) and 159 of the Civil Code of 07.24.1889 - *GM*, of 07.26.1889-, as amended. This mandatory nature was endorsed by the Spanish Constitutional Court in several judgements: 221/2005, of 11.25.2002 (ECLI:ES:TC:2002:221), 152/2005, of 06.02.2002 (ECLI:ES:TC:2005:152) and 17/2006, of 01.30.2006 (ECLI:ES:TC:2006:17).

[29] *BOE*, of 07.09.2005.

[30] This provision must be approached in conjunction with art. 9 of the afore mentioned Organic Act 1/1996 of 01.15.1996 on legal protection of children and young people which also supports this approach.

heard than as an obligation for the judge to hear him or her[31]. The change in the nature of the hearing has been endorsed by the Spanish Constitutional Court in its judgment 163/2009, of June 29, 2009[32] which considers that the "*hearing of the minor is no longer conceived as having an essential nature, because the knowledge of the minor's opinion can be obtained through certain persons (art. 9 of the Organic Law 1/1996) and will only be compulsory when deemed necessary ex officio or at the request of the public prosecutor, parties to the proceeding or members of the judicial technical team, or the minor himself (art. 92.6 CC)*."[33] The Constitutional Court, in its judgment 22/2008, of January 31, 2008[34] states that this is not an absolute right, and that the right of the minor to be heard directly depends on his or her ability to form his or her mind, without providing elements to construct what this actually means.

The Spanish Supreme Court has mentioned in many occasions the need for the minor to be heard in cases regarding Family law, accepting that this right is subject to the assessment of their maturity. Thus the STS 4032/2020, of November 30, 2020[35], reiterates the position maintained by the Court for long time – e.g. STS 157/2017, of March 7, 2017[36] or STS 18/2018 of January 15, 2018[37] – stressing that "*this Chamber has repeatedly ruled on the need to be heard by the minor in the procedures that directly affect them*[38]".

Taking into account this relevance, the Supreme Court, following the judgment of the Spanish Constitutional Court of June 6, 2005[39], repeatedly manifests –Supreme Court judgment's 18/2018 of January 15, 2018[40] or 413/2014 of October 20, 2014[41]- that this kind of decisions needs to be grounded in order to be valid: "*In order for the judge or court to decide not to implement the hearing, in the interest of the minor, it will be necessary to resolve it in a reasoned manner*".

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31 Vid. J.I. ZAERA NAVARRETE, *La audiencia al menor en los procesos de crisis matrimoniales. Comentario a la STS núm. 413/2014, de 20 de octubre (REC. 1229/2013),* cit., pp. 797 and 802-804; M.J. CALVO SANJOSE, *La reforma del sistema de protección a la infancia y a la adolescencia (Ley Orgánica 8/2015, de 22 de junio y Ley 26/2015, de 28 de julio)*, in *Ars Iuris Salmanticensis*, 2016, vol. 4, p. 34; M.J. MARIN LOPEZ, *Tutela judicial efectiva y audiencia del menor en los procesos judiciales que le afecten,* cit., pp. 188-190.

32 ECLI:ES:TC:2009:163.

33 Legal ground 5.

34 ECLI:ES:TC:2008:22.

35 ECLI ES:TS:2020:4032.

36 Legal ground Second, no. 5.

37 ECLI:ES:TS:2018:41, legal ground Second, no. 2.

38 Legal ground Two.

39 ECLI:ES:TC:2005:153.

40 Legal ground Second, no. 2.

41 Legal Ground Five.

The reasons for rejecting hearing the minor can vary. The Supreme Court – e.g. STS 18/2018, of January 15, 2018 – admits the possibility for the judge to reject hearing the minor, with the obligation of rendering a grounded decision, "*due to the lack of maturity of the minor or because the interest of the minor is put at risk… The goal is to avoid that the direct hearing of the minor causes to him or her a worse damage than the one intended to conjure. But for this to be implemented, it will be necessary for the court to motivate it, or that, in response to that interest, it could be considered to be more appropriate for the examination to be carried out by an expert or to take into account the one already carried out*" [42].

When the hearing of the minor is accepted, the court is compelled to evaluate the opinion of the minor in addition to the other elements and facts that have been accredited during the proceedings. The judgment of the High Court of Justice of Cataluña of January 9, 2014[43] plainly states that the opinion of the minor is not decisive and that it is for the judge to actually decide the outcome of the controversy. Obviously, the more mature the minor is, the more relevant his/her opinion will be and will have a higher impact in the prospective judicial resolution. At the same time, this creates the need for the judge to balance the opinion of the minor with the need to ensure her or his best interest. This is a task for the judge to be done and in some cases this quest for the best interest of the minor may not coincide with her or his will, thus making the enforcement of the prospective resolution more difficult[44]. As the judgment of the Provincial Court (Court of Appeal) of Badajoz (Mérida) 131/2018, of June 26, 2018[45] states, "*This court considers that the interest of the minor does not mean compliance with his will*"[46].

The principle of the best interest of the minor constitutes a public policy principle to be always taken into account by Spanish courts in any proceeding –either judicial or administrative- affecting minors.[47] For instance, the principle has been interpreted by the Provincial Court of Valladolid in its judgment 175/2006, of May 24, 2006.[48] In its judgment the court stresses that article 9 of the Organic Act 1/1996 must be interpreted in "*terms of great breadth and flexibility*"

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42 Legal ground Four, no. 1.

43 ECLI:ES:TSJCAT:2014:5.

44 See, M. CASO SEÑAL & E. ATARES GARCIA, *Naturaleza jurídica*, in X. ABEL LLUCH (coord.), *Las audiencias del menor en los procesos de familia*, cit., p. 29.

45 TOL 6.793.731.

46 Legal ground Three.

47 In accordance to M.A. PARRA LUCAN, *El principio del interés del menor en la jurisprudencia*, in J. PICO I JUNOY & X. ABEL LLUCH (dirs), *Problemática actual de los procesos de familia. Especial atención a la prueba*, Barcelona, JMBosch, 2018, pp. 34-44.

48 ECLI:ES:APVA:2006:568.

and taking into account all its numbers which are related among themselves and serve the essential goal of the "*protection of the interests of the minor that are satisfied, not only when he is heard but also when hearing is not granted in those cases in which the judge does not consider it necessary (...) or it is not in the interest of the minor (...). The interests of the minor that are protected in art. 9 contemplate the right to be heard, that can be exercised directly (section 2 first paragraph) or through its legal representatives when it is not possible or does not suit their interest (section 2 paragraph second), such as the possibility of not being it when the judge denies such right in resolution motivated, which obviously must respond to a possible damage to the minor who could derive from the hearing and that must be resolved in each case according to the circumstances concurrent*."[49]

2. The nature of the hearing of the minor and the procedural stage to implement it

Traditionally, the hearing of the minor in civil cases does not constitute a means of proof, but a judicial activity to enable the minor to exercise a right granted on him/her[50]. However, this issue is growingly under dispute and a discussion between a "rights of the minor approach" and a much more procedural approach to the hearing of the minor in any civil procedure affecting her or him is taking place in recent years in Spain[51].

The issue of the nature of the hearing of the minor has been approached by Spanish courts. The Supreme Court in its judgment 18/2018 of January 15, 2018, states "*that the purpose of the examination of the minor is to inquire about his or her interest, its due protection, and, therefore, it is not properly a means proof, so that his or her interest does not necessarily coincide with his or her will, it is for the judge to assess their maturity and if their wishes are consequence of his or her caprice or due to external influences*"[52]. As the judgment of the Provincial Court of Barcelona 98/2013, of February 11, 2013,[53] in the hearing of the minor, adds that the "*minor is not the object but the subject who exercises a right*".[54] To this respect, the Judgment of the Provincial Court of

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49 Legal ground One.

50 M. CASO SEÑAL & E. ATARES GARCIA, *Naturaleza jurídica*, cit., pp. 27-28; A.L. CAMPO IZQUIERDO, *La audiencia de menores*, in *Diario de las Audiencias del El Derecho editores*, nº. 496, 6.9.2006, p. 1.

51 See, J.P. GONZALEZ DEL POZO, *Medios de prueba*, in E. HIJAS FERNANDEZ (coord.), *Los procesos de familia: Una visión judicial*, Madrid, Colex, 2009, p. 493 ff.; V. LOPEZ YAGÜES, *La prueba del reconocimiento judicial en el proceso civil*, Madrid, La Ley, 2005, p. 195.

52 Legal ground Four, no. 1.

53 TOL 3.415.824.

54 Legal ground One.

Granada 100/2017 of March 17, 2017[55] stresses that the hearing "*is conducted exclusively for the formation of the criteria of the court, and of the Public Prosecutor's Office, the only addressees of the necessary immediacy required, about what is the most convenient for the interest of the minor based on the perceptions that comes out from his or her manifestations without the interference that may cause to him or her the presence of the parties involved in the process*".[56]

The specific object of the hearing of the minor in those civil procedures affecting her or him directly affects its procedural nature. Thus, as the judgments of the High Court of Catalonia 18/2012, of February 23, 2012[57] -or of the Provincial Court of Almería 5/2015, of January 7, 2015[58]- declares, "*it can hardly* (be) *consider*(ed) *a means of proof on which to base a resolution but the instrument by which the minor affected by a procedure can make his or her opinion known to the judge*". The fact that the judicial examination of the minor cannot be considered as a means of evidence but as a diligence intended to satisfy and to fulfil the minor's right to be heard explains, as the judgment of the Provincial Court of Barcelona 516/2015, of July 7, 2015[59], "*why the procedural requirements of the evidence are not of application*"[60] to them.

Nevertheless, although this approach is broadly supported, some discussion has taken place in the lasts years. Thus, for instance, the judgment of the Provincial Court of Cádiz of October 22, 2012[61] admits the existence of this debate: "*Certainly some sector has maintained the character of full proof of this hearing, embodying it in the framework of the recognition of persons provided for in articles 355 ff. of the Civil Procedure Act but we cannot agree with this approach because in the hearing of the minor, the right to be heard is materializing, while these recognitions are not considered as a right of the person to be appreciated, but as a means available to the judge to reach a conviction about certain points relevant to the rendering of the judgment.*"[62]

This debate has led to the existence of –so far- some isolated judgments from lower instances which grant to this obligation to hear the minor the double nature of being a procedural means of proof *stricto sensu* and a way to assess the opinion of the minor. This discussion has increased since the enactment of the afore mentioned Act 15/2015 of July 2, 2015, on non-contentious

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55 TOL 6.189.923.
56 Legal ground One.
57 Id Cendoj: 08019310012012100019, legal ground Five.
58 TOL 5.186.374, legal ground Eleven.
59 ECLI:ES:APB:2015:6823.
60 Legal ground Two.
61 TOL 3.020.058.
62 Legal ground Two.

proceedings, whose article 18(2)(4)(III) seems to stress the idea of means of proof[63]. The provision, which refers to all non-contentious proceedings in general, sets forth that once the hearing takes place, "*a detailed report shall be issued and, wherever possible, an audio-visual recording shall be made. If the examination takes place after the appearance, the relevant report shall be passed to the parties to enable them to make statements within five days*".

Standing on this article, the judgment of the Provincial Court of Tenerife 153/2018 of March 19, 2018[64] stresses the idea that, although the hearing constitutes a way to assess the real will of the minor, it is also a means of proof aimed to protect her or him[65]. This discussion is relevant in so far the consideration of the hearing in one or another way has relevant consequences in its practical implementation and may also affect its development and the achievement of its goals. Technically, it may not be included in article 299 of the Civil Procedure Act and lacks the specific condition of "means of proof" but it does have an evidential relevance[66].

In any case, the special nature of the hearing makes more flexible the specific moment of its implementation, although it must always take place before any decision is taken by the judge. This idea is stressed by the judgment of the High Court of Cataluña 39/2015 of May 25, 2015[67] when stating that it "*must be practiced prior to the decision-making*"[68]. In fact, the hearing can also take place when enforcing a judgment even *ex officio* as the Order of the Provincial Court of La Rioja, 23/2018, of February 16, 2018[69] admits on the basis of article 560 of the Civil Procedure Act, which "*does not regulate the hearing as an imperative step of the proceeding to be followed in case of opposition to the enforcement for substantive reasons. The decision on its celebration corresponds to the judge, who may, in any case, not consider appropriate its celebration*"[70].

3. The meaning of the hearing of the minor

No legal provision and no single way to implement the hearing of the minor exits in Spain.[71]

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63 See M.J. COSTA LAMENCA & C. CARRETERO PEÑA, *La confidencialidad de la audiencia del menor*, in X. ABEL LLUCH (coord.), *Las audiencias del menor en los procesos de familia*, cit., pp. 76-77.

64 TOL 6.680.127.

65 See M. HERNANDO VALLEJO, *La audiencia del menor recabando el auxilio de especialistas*, cit., p. 64.

66 Consider to this respect, J.I. ZAERA NAVARRETE, *La audiencia al menor en los procesos de crisis matrimoniales. Comentario a la STS núm. 413/2014, de 20 de octubre (REC. 1229/2013),* cit., pp. 799-780.

67 ECLI:ES:TSJCAT:2015:8099.

68 Legal ground One, no. 3. Note J.A. GARCIA GONZALEZ, *La confidencialidad de la audiencia del menor*, in X. ABEL LLUCH (coord.), *Las audiencias del menor en los procesos de familia*, cit., pp. 86-87.

69 ECLI:ES:APLO:2018:125A.

70 Legal ground Two.

71 See, Provincial Court of Tenerife 153/2018 of 03.19.2018, legal ground Two – following the judgment of the

According to the judgment of the Provincial Court of Almería 5/2015, of January 7, 2015[72] the rules on the hearing of the minor are "*excessively evanescent or ethereal, without specifying the concrete way in which diligence is practiced*" or what it actually means.

The fact that the hearing of the minor has not been traditionally considered a procedural means of proof *stricto sensu* permits to implement it without following the rules and principles about the means of proof embodied in the Civil Procedure Act, that is, as the judgment of the Provincial Court of Palencia 30/2015, of April 4, 2015[73] states, "*publicity and ... the contradictory intervention of the parties in its development*"[74].

However, the absence of clear rules as regards the content of the hearing has favoured differences in the way the hearing is actually implemented by courts in Spain[75]. In fact, the Spanish Defensor del Pueblo –ombudsman – has stressed both the existence of these differences and the quest for harmonization[76]. This lack of uniformity as regards this relevant issue is considered very negative for minors and for the system itself: "*throughout the national territory a great disparity exists in terms of the form and persons who can intervene in this judicial proceeding, a situation that does not favour legal security and even less the interests of minors*"[77].

In order to overcome this very negative situation, Spanish courts have attempted to harmonize the situation and have provided some ideas and principles on which the implementation of the hearing of the minor should stand. Particularly, the judgment of the Provincial Court of Cádiz 554/2012 of October 22, 2012 states that when implementing the hearing of the minor, several basic principles should be taken into account and honoured:[78]

1) Before starting the hearing, the minor "*must be offered informed truthful, complete and*

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Provincial Court of Cádiz 554/2012 of 10.22.2012, TOL 3.020.058, legal ground Two, plainly admits this. Only art. 778 *quinquies*(8) of the Civil Procedure Act, which sets forth a rule specifically as regards International Child Abduction, admits *in fine* that the "*act may be carried out via video conferencing or another similar system*." Consider, X. ABEL LLUCH, *La confidencialidad de la audiencia del menor,* cit., p. 79.

72 Legal ground Eleven.

73 TOL 4.800.566.

74 Legal ground Five.

75 J.I. ZAERA NAVARRETE, *La audiencia al menor en los procesos de crisis matrimoniales. Comentario a la STS núm. 413/2014, de 20 de octubre (REC. 1229/2013),* cit., pp. 804-805.

76 DEFENSOR DEL PUEBLO: *Estudio sobre la escucha y el interés superior del menor. Revisión judicial de medidas de protección y procesos de familia,* Madrid, 2014, p. 17.

77 Judgment of the Provincial Court of Cádiz 554/2012 of 10.22.2012, legal ground Two.

78 All of them set forth in legal ground Two. Also, consider, Legal ground Two of the judgment of the Provincial Court of Tenerife 153/2018 of 03.19.2018.

*according to the conditions of age and maturity of the minor about what is being decided in the process and the extent it may affect him or her*".

2) The hearing of the minor "*must be carried out respecting the necessary conditions of discretion, privacy, safety and absence of pressure, to safeguard the minor's dignity and personality as much as possible*".[79]

3) It is necessary to avoid "*as much as possible the feeling of betraying one or the other parent, or having to choose between one parent and another*".

4) The hearing must take place "*in a suitable place and comfortable, which usually will be the office of the judge or the courtroom itself*." But also, as the judgment of the Provincial Court of Madrid 24/2017, of January 13, 2017[80] states, "*behind closed doors or outside the venue of the court*".[81]

5) The hearing must be carried out "*in a language and wording adapted to the*" minor and his or her ability to understand.

6) The hearing should be done, preferably, "*without the presence of parents, guardians or lawyers, as provided for in article 770.4 of the Civil Procedure Act*".[82]

7) And, at the same time, it should be developed with "*the presence of the Public Prosecutor*" in so far it collaborates with the judge and promotes justice in defence of the interests and rights of minors and disabled. This intervention is mandatory.[83]

8) Also it is said that although the hearing does not constitute a means of proof *stricto sensu* "*it must be documented by the court clerk*" adding that this must be done "*not literally, but by means of a documentation in which the allegations and statements that are relevant for the adoption of any measures that may affect the minor, ...*".

9) However, "*for reasons of privacy, dignity and in order to pressures and conflicts of fidelity to one or another parent, it should not be tape-recorded*".

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79 With the goal, as the judgment of the Superior Court of Cataluña 39/2015 of 05.25.2015 mentions, of allowing the minor to express herself / himself "*with the highest degree of autonomy and without restricting their opinions, avoiding the dreaded 'conflict of loyalties'*" Legal ground One, no. 3.

80 ECLI:ES:APM:2017:619.

81 Legal ground Two.

82 This idea is ratified by the judgment of the Superior Court of Cataluña 39/2015 of 05.25.2015 which plainly recognizes that this fact "*does not violate fundamental rights, but quite the opposite, since the presence of the parties ... would imply an undesirable lack of freedom for minors, who can already be affected by the mere fact of appearing in court*" (Legal ground One, no. 3).

83 The intervention of the public prosecutor in cases involving minors is stressed by the already mentioned judgment of the Spanish Constitutional Court 17/2006 of 01.30.2006.

10) In addition to this, some other judgments -judgments of the Superior Court of Catalonia 18/2012, of February 23, 2012[84] or of the Provincial Court of Almería 5/2015, of January 7, 2015[85]- support the immediacy of the hearing, in the sense of direct relation with the minor.

Finally, the judgment of the Provincial Court of Cádiz 554/2012 of October 22, 2012 stresses that the hearing "*must be documented by the court clerk, although not literally, but by means of a document in which the allegations and statements that are relevant for the adoption of any measures that may affect the minor, however for reasons of privacy, dignity and in order to pressures and conflicts of fidelity to one or another parent, it should not be tape-recorded*"[86]. In this same direction, the judgment of the Provincial Court of Tenerife 153/2018 of March 19, 2018 considers that, although this has been controversial, "*this Chamber has been considering that the exploration of minors must be documented due to the mandatory nature of the court clerk, who attests to the fact of the hearing and the declarations*"[87].

4. The implementation of the hearing of the minor and the preservation of her or his privacy

The necessary documentation of the hearing has created many controversies as regards its meaning. In contrast with the silence of the Civil Procedure Act or the Legal Protection of Children and Young People Organic Act 1/1996 as regards to this issue, article 18(2)(4)(III) of the Act 15/2015 of July 2, 2015, on non-contentious proceedings states that "*a detailed report shall be issued and, wherever possible, an audio-visual recording shall be made*".

Certainly, this provision does not refer to contentious proceedings, which, in principle, will be governed by the Civil Procedure Act[88] but, in any case the plain reference to "*detailed*" does not fully fit with the narrow interpretation of this article provided by the Spanish Constitutional Court in its judgment 64/2019 of May 9, 2019[89]. The court stresses that the "*content of the record shall only detail those manifestations of the minor that are essential as significant, and therefore strictly relevant, for the decision of the case*".[90]

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84 Legal ground Five.

85 Legal ground Eleven.

86 Legal ground Two.

87 Legal ground Two.

88 In favour to the extrapolation of the doctrine of the Constitutional Court also to contentious proceedings, see X. ABEL LLUCH, *La confidencialidad de la audiencia del menor*, in X. ABEL LLUCH (coord.), *Las audiencias del menor en los procesos de familia*, cit., p. 85.

89 ECLI:ES:TC:2019:64.

90 Legal ground 8. This idea is supported by the judgment of the Provincial Court of Barcelona 516/2015, of 07.07. 2015, legal ground Two. Note, X. ABEL LLUCH, *La confidencialidad de la audiencia del menor,* cit.,

The fact that the hearing of the minor is broadly understood as not being a means of proof *stricto sensu* has a direct impact on its treatment in the procedure. A relevant issue to this respect is that the judge has no obligation to forward to the parties the outcome of the hearing of the minor for them to have the opportunity to make allegations as judgments of the Provincial Court of Alicante 369/2015, of October 14, 2015,[91] of the Provincial Court of Guipúzcoa 250/2016, of October 21, 2016,[92] or of the Provincial Court of Barcelona 98/2013, of February 11, 2013 recognize: "*In any case, it should be noted that not being a means of proof, it is not necessary for it to be assess it by the litigating parties, and this leads to the conclusion that this they have not been produced any defencelessness by such action*"[93].

As the mentioned judgments of the Provincial Court of Alicante 369/2015, of October 14, 2015[94] or that of the Provincial Court of Guipúzcoa 250/2016, of October 21, 2016[95] accept, this is not only due to the fact that the hearing does not constitute a procedural means of proof but also because of the content of the hearing and the impact that its outcome may have in the future relationship between the minor and his or her parents. In fact, it should not be forgotten "*that the purpose is to create an environment conducive to the minor to expand, to show his feelings, his ideas and sensitivities*".[96]

However, this has been an issue under growing debate whose solution very much depends on the position adopted by the court as regards the legal nature of the hearing of the minor. The afore mentioned judgment of the Provincial Court of Tenerife 153/2018 of March 19, 2018, which accepts the special nature of the hearing – a way for the minor to exercise his or her right to be heard and, also, means of proof- refers to article 18(2)(4)(III) of the Act 15/2015 of July 2, 2015, on non-contentious proceedings[97] when stressing this last nature[98]. In this line, the judgment of the

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pp. 84-85.

91 TOL 5.585.505, legal ground Two.

92 TOL 5.911.450, legal ground Two.

93 Legal ground One.

94 Legal ground Two.

95 Legal ground Two.

96 "*If you are being asked about the ins and outs of your life and relationship with his parents, it is very dangerous to* '*betray*' *him later by giving a copy of the recording to the parties. Involuntarily, the risk may be generated that one of the parents, before comments that are not to his or her liking, reprimand the minor, or adopt positions contrary to him… Their interests are not guaranteed if what was restricted to the knowledge of the judge and the public prosecutor only, is subsequently disclosed to the parties*." (Judgment of the Provincial Court of La Coruña 295/2009, of 07.03.2009, legal ground Two).

97 Legal ground Three.

98 See M.J. COSTA LAMENCA & C. CARRETERO PEÑA, *La confidencialidad de la audiencia del menor*, cit., pp.

Superior Court of Cataluña 39/2015 of May 25, 2015 states that one thing is to develop the hearing of the minor without the presence of the parents and their representatives, as a way to foster the freedom and independence of the minor and his or her right to intimacy and, "*a different issue is that the said hearing of minors developed behind closed doors and in a reserved manner and recorded, does not receive, regardless of its content, any publicity even for the parties, something that violates both the procedural regulations contained in articles. 138. 1, 140.3 CPA and 234 LOPJ as fundamental rights of effective judicial protection in accordance to article 24. 2 CE*"[99].

The debate has gone a step further with the judgment of the Constitutional Court 64/2019 of May 9, 2019, which specifically refers to the obligation to forward the minutes of the hearing to the parties in accordance to article 18(2)(4)(III) of the Act 15/2015 of July 2, 2015, on non-contentious proceedings. The Constitutional Court considers that it is not when the record is actually implemented when the right of privacy of the minor must be preserved but, as a general principle, in a previous moment to the actual development of her or his hearing. And this must be done by selecting the questions and limiting the areas of the interrogation to the minor: "*ensuring at all times that the statements of the minor are limited to those necessary for the investigation of the disputed facts and circumstances, so that the examination only deals with those issues that are strictly related to the object of the case*"[100].

Should "*these rules and precautions*" be strictly observed "*as it is required in attention to the best interests of the minor, the impact on his or her privacy is reduced to a minimum: as a reflection of a judicial examination in which the appropriate measures have already been adopted to preserve the privacy of the minor, the content of the record should only detail those statements of the minor that are essential as significant, and therefore strictly relevant, for the decision of the case*."[101] And, consequently, the record "*must be made forwarded to the parties so that they can make their allegations*" because it does not entail "*a disproportionate sacrifice of the minor's right to privacy*"[102].

Despite the limited scope of the judgment, related to non-contentious proceedings that involve minors[103], the procedural approach to the hearing followed by the Spanish Constitutional Court

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99 Legal ground One, no. 3. See J.A. GARCIA GONZALEZ, *La confidencialidad de la audiencia del menor*, cit., p. 89.

100 Legal ground 8.

101 Legal ground 8.

102 Legal ground 8.

103 Therefore, contentious proceedings would not be affected by this rule. See X. ABEL LLUCH, *La*

supports the understanding of the hearing as a truly means of proof. In addition to that, it rises new issues related to the need to specify which is the meaning of "*issues that are strictly related to the object of the case*"[104] and who is in charge of determining which is the information that must be documented and, consequently, forwarded to the parties[105].

This discussion can be also found in Spanish literature. Some authors, taking into account the special nature of the hearing, consider that in no case the record of the hearing – whatever the way it has actually been done – should be provided to the parents of the minor. Only to their representatives[106]. At the same time, those authors who are willing to accommodate the necessary preservation of the intimacy of the minor and confidentiality of the hearing with the right of the parties to have access to the minutes of the hearing itself support the possibility to forward general information about the hearing without reproducing the specific responses provided by the minor[107], especially in those cases in which the minor shows rejection towards one of the parents or clear preference for one of them as a way to avoid future controversies with the parents[108].♣



*confidencialidad de la audiencia del menor*, cit., p. 81. Also, consider, L. ZARRALUQUI SANCHEZ-EZNARRIAGA, *La audiencia del menor en el Proyecto de Ley de la Jurisdicción voluntaria*, in *Actualidad Jurídica Aranzadi*, no. 895, 2014, p. 2.

104 Legal ground 8.

105 To this respect, consider, M.J. COSTA LAMENCA & C. CARRETERO PEÑA, *La confidencialidad de la audiencia del menor*, cit., p. 78.

106 M.J. COSTA LAMENCA & C. CARRETERO PEÑA, *La confidencialidad de la audiencia del menor*, cit., p. 77.

107 See X. ABEL LLUCH, *La confidencialidad de la audiencia del menor*, cit., pp. 80-81.

108 X. ABEL LLUCH, *La confidencialidad de la audiencia del menor*, cit., p. 86.