

CONTRACTUALISATION OF FAMILY LAW IN PUERTO RICO*

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I. Introduction

The topic of this essay covers: (1) contractualisation; (2) family law and (3) Puerto Rico.

Contractualisation refers to the contract. The Civil Code of Puerto Rico does not define a “contract”. Nevertheless, it can be said that a contract is the agreement of two or more parties for the creation, regulation, modification or extinction of a legal relation out of which obligations and other effects can derive. A contract designates those obligations that the parties have created, modified or extinguished for themselves as opposed to those obligations imposed by law, like taxes. The will of the individual is able to create obligations; through their bargaining power the persons create obligations. An obligation is a legal relationship whereby a person - the obligor - is bound to render a performance in favor of another, the obligee. Said performance may consist of giving, doing, or not doing something.¹

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¹ Some ideas express in Spanish are: (1) el contrato es el negocio jurídico dirigido a crear, regular, modificar o extinguir obligaciones; (2) el contrato es el acuerdo de dos o más partes para crear o constituir, regular, modificar o extinguir entre ellos una relación jurídica patrimonial; (3) el contrato es el medio adecuado para que las partes o sujetos de derecho queden sometidos a las obligaciones que voluntariamente elijan; (4) la obligación es el derecho del acreedor dirigido a que el deudor para conseguir de este último una prestación de dar, hacer o no hacer alguna cosa, que es garantizado con todo el activo patrimonial de dicho deudor o persona obligada.

Family Law is primarily a state law subject. It is the area of the law that deals with family related matters. The rise of individualism has affected the family.² The general public does not see any longer marriage as the only path to family formation. Divorce (*divorce a vinculo matrimonii*) or *only* separation from bed and board (*divorce a mensa et thoro*) are the two ways to break the bond between the spouses established by marriage. In Puerto Rico, only the first type of divorce exists. A family is establish between a man and a woman with or without children. For some people, a family can also be established between persons of the same sex.

Puerto Rico is an archipelago in the Caribbean Sea comprising one main island and other smaller islands, with an area of 3,515 square miles. Some more information about Puerto Rico and its legal and political system will be given further on.

II. General Part

The Puerto Rico legal order is “hybrid” or “mixed”: one in which a basically civil law system has been under pressure from the Anglo-American

² The family is one of Puerto Rico’s most important institution and treasure. It is under constant and heavy pressures from many individuals and groups. The so called “familia ensamblada” or “reconstituted families”, or “reconstructed families” or “familiastra” (“family like”?) (Argentina) are those families originating in the new unions of divorced persons with children.

It should be stated that the decisions handed down by the Supreme Court of the United States of America are binding in Puerto Rico; for example, *Roe v. Wade*, the decision on abortion and *Stenberg v. Carhart*, 530 US 914, 147 S. Ct. 2597 (2000), the decision on partial-birth abortion.

common law and has in part been overcome by that rival legal system's jurisprudence.³

The island of Puerto Rico was discovered by Columbus during his second voyage to the new world in November 19, 1493. Since then, Puerto Rico was a colony of Spain until it was invaded by the troops of the United States of America (U.S.A.) in 1898.

After the U.S.A. invasion, the main bodies of private law in effect during the Spanish rule were kept. They were, among others, the Civil Code of 1889, which came into force in 1890,⁴ the Commercial Code of 1885 and the Law of Mortgages and Registry of Immovable Property of 1869. Some others were replaced, as the penal code, the law of civil procedure and the law of criminal procedure, to follow U.S.A. laws.

Puerto Rico, an unincorporated territory of the U.S.A., approved its own Constitution - the Constitution of the Commonwealth of Puerto Rico - in 1952, as authorized by the Federal Government. There are three public powers, namely the legislative, the judiciary and the executive (Governor).

³ Pedro F. Silva-Ruiz, *The Puerto Rico Legal Order: A Mixed System*, "European Legal Traditions and Israel", Mordechai Rabello, ed., The Hebrew University of Jerusalem, Jerusalem, Israel, 1994, pp. 347-48 (citations omitted). The legal system of Puerto Rico can be described as "hybrid" or "mixed" to single out the interrelation of significant characteristics of legal systems of the Romano-Germanic tradition (in particular, Spanish law) and American Common Law. Pedro F. Silva-Ruiz, *Desarrollos recientes y tendencias del Derecho civil para el siglo XXI en Puerto Rico*, tomo XLII, fascículo III del "Anuario de Derecho Civil", Madrid, España, julio-septiembre 1989, pp. 887-888.

Castán Tobeñas is of the opinion that the legal system of Puerto Rico follows the Spanish tradition and has also been influenced by the "Common Law": *Los sistemas jurídicos contemporáneos del mundo occidental*, Instituto Editorial Reus, Madrid, España, segunda edición revisada, 1957, pp. 105-115.

⁴ The current edition of the Civil Code is of 1930. It has been amended since 1900 many times, but the main institutions have been kept (for example, property and contract).

The Supreme Court of Puerto Rico is at the top of the local judiciary. It can declare unconstitutional laws approved by the island's Legislative Assembly. A United States District Court (USDCPR) also sits in Puerto Rico.

Family Law is part of the Civil Code. It is embodied in arts. 68 to 251.⁵ There is also special family legislation. A Department (ministry) of the Family of the Government of Puerto Rico takes care of matters dealing with the family, the elderly and the children.

The concept of "family" is not defined in Puerto Rico law. The Civil Code does not provide an express legal definition of the family. Nevertheless, family law regulation in the Civil Code begins with a definition of marriage, thus reflecting the position that the family rests on it.

The family has been defined by an official body of the Government of Puerto Rico as: "A social system composed of persons in a close relationship, who lives under the same roof, with the intention of family unity continuity, joined by legal and/or affective ties reciprocally acknowledging that they are part of that family unit and that they are interdependent in the satisfaction of their basic needs and in complying their social functions."⁶

Family relations certainly have an impact in tax law. The spouses should render together an annual income tax return and claim deductions - not much - for their children. The couple is allowed to marry under a contract

⁵ 31 LPRA sec. 221 (definition of marriage) to sec. 984 (Registry of the Civil Status or "Registro del Estado Civil").

⁶ See, Pedro F. Silva-Ruiz, *El Derecho de familia en Puerto Rico y la revisión del Código Civil*, 52 Revista Jurídica Univ. de Puerto Rico, 331, 336 (1983) (My translation).

for a total separation of goods. The annual income tax return is then filed individually and not as a couple.

All working persons paid Social Security to the U.S. Government. The amount is deducted by the employer as well as a corresponding amount for the annual income tax.

The Constitution does not mention either the family or family institutions. Notwithstanding, case law affords protection to the family, such as the right to privacy.

Applicable international human rights instruments ratified by the U.S.A. are in force in Puerto Rico.

III. Substantive Contractualisation in General

As to the general boundaries of substantive private autonomy in private law, the Civil Code orders that “the contracting parties may make the agreement and establish the clauses and conditions which they may deem advisable, provided they are not in contravention of law, morals [morality], or public order”.⁷

Needless to say, the phrase “in contravention of law” (contrary to law) includes by-laws or regulations adopted under the authority granted by law.⁸

⁷ Art. 1207 CCPR, 31 LPRA 3372 (official translation). In *Tastee Freez v. Employment Security Bureau*, 108 DPR 495 (1979), it was ruled that any contract not in contravention of law, morality or public order is permissible.

⁸ *Castle Enterprises, Inc. v. Registrador*, 87 DPR 775 (1963).

Clauses that absolutely limit the right to the free sale of goods are void.⁹ Also void are clauses that exonerate from future liability produced by negligence when the parties are not in equal footing to contract.¹⁰

Case law defines “public order” as a “cluster of eminent values guiding existence and welfare of society, this concept including and protecting social interest prevailing due to its transcendancy, number of persons it may affect and value of rights it tends to protect”.¹¹

The Civil Code also includes some limitations to contractual freedom in family law, such as “any marriage between persons of the same sex or transsexuals contracted in other jurisdictions shall not be valid or given judicial recognition in Puerto Rico”.¹²

⁹ *Franceschi v. Texaco P.R. Inc.*, 103 DPR 759 (1975).

¹⁰ *Chico v. Editorial Ponce, Inc*, 101 DPR 759 (1973).

¹¹ *Hernández v. Méndez & Assoc. Dev. Corp.*, 105 DPR 149 (1976).

¹² Art. 68 CCPR, 31 LPRA 221, *in fine* (official translation), incorporated by Law 94 of March 19, 1999. The Supreme Court of the United States issued, last June 26, 2013, its decision in the case of *United States v. Windsor*. By a 5-4 vote it declares Sect. 3 of the Defense of Marriage Act (DOMA) (federal) unconstitutional, as it violates the guarantee of equal protection as applied to the Federal Government through the Fifth Amendment (deprivation of the liberty of the person). “The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying any person the equal protection of the laws”, in the Court’s own words (slip opinion, p.25).

Said Sect. 3 of DOMA provides as follows: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘*marriage*’ means only a legal union between one man and one woman as husband and wife, and the word ‘*spouse*’ refers only to a person of the opposite sex who is a husband or a wife.” 1 USC art. 7 (our italics).

Section 2 of DOMA reads: “No state, territory or possession of the U.S., or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession or tribe, or a right or claim arising from such relationship”.

Thus, Sect. 2 prevented States from being forced to recognize same-sex marriages performed in other states. Sect. 3 prevented the federal government from recognizing any same-sex marriages at all.

See, 1 USC sect. 7, 28 USC sect. 1738C.

The same body of laws establish that “persons who may be joined in matrimony may, *before* celebrating it, execute contracts, stipulating the conditions for the conjugal partnership with regard to present and future property, without any other limitations than those mentioned in this title [31 LPRA or Civil Code]. / In the absence of contracts relating to property it shall be understood that the marriage has been contracted under the system of legal conjugal partnership [sociedad legal de (bienes) gananciales].”¹³

It is also ordered that “the contracting parties cannot stipulate anything contrary to law or morality, nor humiliating to the authority [derogatory of the authority] within the family pertaining respectively to the future spouses. / All stipulations not in accordance with the provisions of this section [article] shall be considered void”.¹⁴

In *Albanese D’Imperio v. Secretary of the Treasury*,¹⁵ it was held that a prenuptial agreement is not valid insofar as it prevents the aggregation of the income of husband and wife in a joint return under the Income Tax Return Act of 1924.

Furthermore, “after the marriage has been celebrated, the marriage contract executed prior thereto cannot be changed, whether present or future

¹³ Art. 1267 CCPR, 31 LPRA 3551 (our italics) (official translation) In Spanish, it read: “Los que se unan en matrimonio podrán otorgar sus capitulaciones antes de celebrarlo, estipulando las condiciones de la sociedad conyugal relativamente a los bienes presentes y futuros, sin otras limitaciones que las señaladas en este título [31 LPRA: el Código Civil]. / A falta de contrato sobre los bienes, se entenderá el matrimonio contraído bajo el régimen de la sociedad legal de gananciales.”

See, *Umpierre v. Torres*, 114 DPR 449 (1983); *Vilariño Martínez v. Registrador*, 88 DPR 288 (1963) and *Consolidated Broadcasting Corp. v. Conesa*, 65 DPR 792 (1946).

¹⁴ Art. 1268 CCPR, 31 LPRA 3552 (official translation).

¹⁵ 223 F. 2d 413 (1955); certiorari denied, 350 US 874 (1955).

property is involved.”¹⁶ Thus, the immutability of marriage contracts doctrine is the law in Puerto Rico.¹⁷ Needless to say, this rule should be changed.

As far as minors are concerned, if he/she “can marry in accordance with law may also execute his marriage contract, but it shall be valid only when in its execution the persons designated by law to give consent to the minor to contract marriage take part therein...”.¹⁸

Furthermore, “marriage contracts and modifications must be contained in a public instrument executed before the celebration of the marriage” reads art. 1273 of the Civil Code.¹⁹

IV. Vertical Family Law

The *patria potestas* over nonemancipated children belongs to both parents jointly, and in case of an emergency may be exercised solely by the parent having the guardianship of the minor at the time of such emergency.²⁰

And “after the dissolution of the family unit, whether due to the death of one of the parents or as a result of a divorce, separation or annulment of the

¹⁶ Art. 1272 CCPR, 31 LPRA 3556 (official translation).

¹⁷ See *Umpierre v. Torres*, *supra*.

¹⁸ Art. 1270 CCPR, 31 LPRA 3554 (official translation) See, *Gil v. Marini*, 167 DPR 553 (2006).

¹⁹ Art. 1273 CCPR, 31 LPRA 3557 (official translation). See, Notarial Law, Law no. 99 of June 27, 1956, in effect January 1, 1957, 4 LPRA 1001, arts. 13-38, incls. Also see, Pedro F. Silva-Ruiz, *Derecho Notarial (Casos y Materiales)*, Ed. UPR, Rio Piedras, Puerto Rico, segunda edición revisada, 1994, 717, pp., Chapter V in particular, pp. 303-433.

²⁰ See, Art. 152 CCPR, 31 LPRA 591.

In *Suro v Sucn. of Prado*, 21 P.R.R. 227 (1914), it was held that pursuant to the *Partidas Laws* in force in Puerto Rico in the year 1879 the mother had no *patria potestas* over her minor children, the same being vested in the father only according to Laws II and III, Title XVII, Partida 4. (*Las Partidas*).

For *patria potestas*, also see Chapter X: *Patria Potestad*, in vol. 2 *Derecho de Familia*, by Pedro F. Silva-Ruiz and John L.A. de Passalacqua, “Derecho de las Personas y de la Familia en Puerto Rico”, Equity Publishing Co./Butterworth Legal Publishers, New Hampshire, Conn., USA, 1991, pp. 549-661.

marriage, the parents or tutors with ‘*patria potestas*’ or custody over a nonemancipated minor shall not, without just case, prevent the latter from maintaining a relationship with his/her grandparents.”²¹

Husband and wife, ascendants and descendants and the adopter and the person adopted are obliged to support each other.²² Support is all “that is indispensable for maintenance, housing, clothing and medical attention, according to the social position of the family. / Support also includes the education and instruction of the person supported when he is a minor.”²³

Support includes attorney’s fees for claims thereof whether defendant was held obstinate in his own defense or not.²⁴

Parental duty to provide means for education of children does not cease by the mere fact of child reaching majority.²⁵ And parental obligation to supply economic support for graduate or professional studies should be decided in view of the particular facts of each case.²⁶ Thus, obligation to educate a minor receiving support encompasses means to complete higher education even after reaching legal majority (still 21 years), if said education began while still a minor.

Nonemancipated minors and minors emancipated by judicial decree or with the consent of the father, mother or parents with *patria potestas*, may be

²¹ Art. 152A CCPR, 31 LPRA 591a, first paragraph, added in the year 1997 (official translation).

²² Art. 143 CCPR, 31 LPRA 562.

²³ Art. 142 CCPR, 31 LPRA 561 (official translation).

²⁴ *Guadalupe Viera v. Morell*, 115 DPR 4 (1983). Also see, *Conesa v. District Court*, 72 P.R.R. 65 (1951).

²⁵ *Key Nieves v. Oyola Nieves*, 116 DPR 261 (1985).

²⁶ *Ibid.*

adopted. Adoption is only granted by judicial decree. There is also one type of adoption: full adoption. Once the adoption has been decreed, the adoptee shall be deemed, for all legal purpose, as the child of the adopter, with all the rights, duties and obligations corresponding to it by law. It extinguishes any legal nexus between the adoptee and his/her former biological or previous adoptive family.²⁷

There is no local law regulating artificial insemination, fertilization *in vitro* and surrogate motherhood nor the use of gametes or embryos. The issues raised by the above are studied by this author elsewhere.²⁸ In general, it can be affirmed that in Puerto Rico artificial insemination techniques are used as well as there has been a case of surrogate motherhood (as informed by the mass media), although not brought before the courts. Assisted reproductive techniques are growing both in use and acceptance. Thus, legislation should be approved, as soon as possible.

²⁷ See, art. 130 of the CCPR *et. seq.*, 31 LPRA 531 *et. seq.* Adoption laws were changed in 1995 (see 31 LPRA 1 to 1270, Cumulative Pocket Suppl. 2010).

²⁸ See, Pedro F. Silva-Ruiz, *Maternidad subrogada o de alquiler*, in vol. III “Libro Homenaje a J. Vallet de Goytisolo”, Junta de Decanos de los Colegios Notariales de España, Madrid, España, 1989, pages 827-847. Also, *Artificial Reproduction Techniques, Fertility Regulation: The Challenge of Contemporary Family Law*, 34 American Journal of Comparative Law 125-140 (1986) (Supl.); *La maternidad sustituta o subrogada*, “Revista Uruguaya de Derecho de Familia”, Año III, núm. 4, 1989, pp. 72-78 and *Baby M y el contrato de maternidad, sustituta o suplente*, “Boletín de Información del Ministerio de Justicia”, Madrid, España, núm. 1503, 15 sept. 1988, pp. 3898-3901; *El Derecho de familia y la inseminación artificial in vivo e in vitro*, 48 Revista del Colegio de Abogados de Puerto Rico, 25-35 (1987); *Procreación humana asistida: la maternidad subrogada, suplente o sustituta*, en el “Anuario” del Instituto de Derecho Comparado, vol. 21, 1998, Facultad de Derecho, Universidad de Carabobo, Venezuela, pp. 141-173 (ponencia presentada en las XIII Jornadas Franco Latinoamericana de Derecho Comparado) and bibliography therein cited.

V. Horizontal Family Law

Marriage “is a civil [not religious] institution originating in a civil contract whereby a man and a woman mutually agree to become husband and wife and to discharge toward each other the duties imposed by law. It is valid only when contracted and solemnized in accordance with the provisions of law; and it may be dissolved before the death of either party only in the cases expressly provided for by this title...”.²⁹

On the other hand, concubinage *more uxorio*³⁰ is recognized by case law (it is judge made law). In U.S.A. law there is a “common-law marriage” also termed “informal marriage”: “a marriage that takes legal effects, without license or ceremony when a couple live together as husband and wife, intended to be married, and hold themselves out to others as a married couple...”.³¹ “Concubinage” is not a “common-law marriage”. A “concubinage” is not “a *marriage* that takes legal effect...” as does the “common-law marriage”.

Concubinage *more uxorio* also called “concubinage in the manner of marriage” (or “cohabitation without formal marriage”, as it is also designated) is the union of a man and a woman, both single, who lived as husband and wife for a relatively long period of time without the celebration of any marriage ceremony or solemnity.

²⁹ Art. 68 CCPR 30, 31 LPRA 221 (official translation).

³⁰ “Concubinato more uxorio” in Spanish. Concubine is “a woman who cohabits with a man as a wife, without being married”, *The Law Dictionary*, Anderson Publishing Co., Cincinnati, Ohio, 7th edition, 1977.

Concubinato-concubinage. Concubinage is often referred to an “institution” representing a cultural alternative to legal marriage.

³¹ *The Law Dictionary*, *supra*.

Thus, there are four essential elements in order for concubinage to exist: (1) consensual marital union, that is, the cohabitation which results from the consent of a man and a woman; (2) the freedom of the concubines, that is, the absence of marital responsibilities and obligations toward someone else other than the concubine; (3) the permanent nature (or rather for a relatively long period of time). It is not a casual union, nor is it characterized by sexual permissiveness. It is also presupposes mutual fidelity and (4) the absence of the solemnities that by law institute a marriage and the juridical consequences which are generated thereby.³² Concubinage should not be mistaken with “mistress’ relationship” (*queridato* in Spanish), where one of the parties, either the man or the woman, by reason of being joined in marriage to another person, is not able to marry since he or she is not single.

In *Torres v. Roldán*,³³ it was decided that patrimonial rights cannot arise of concubinage for the latter does not give rise to any rights whatsoever. It rules that: “If a man and a woman living in concubinage *agree, expressly or implicitly*, that they will pool their earning and share equally the ownership of property therewith the court will require the party retaining more than his share as provided in the agreement to disgorge the same... / Moreover, even in the absence of such an *express or implied agreement, in order to avoid an unjust*

³² See, Pedro F. Silva-Ruiz, *Private Law Aspects of Cohabitation without Formal Marriage in Puerto Rican Law*, in “Legal Problems Concerning Unmarried Couples”, Eleventh Colloquy on European Law, Council of Europe, Strasbourg, France, 1982, pages 251-263. Also see, Pedro F. Silva-Ruiz and J.L.A. de Passalacqua, vol. II: “Derecho de Familia”, of the book “Derecho de las Personas y de la Familia en Puerto Rico”, Equity Publishing Co., New Hampshire, Conn., USA, 1991, pages 173-190 (which is chapter IV); and Pedro F. Silva-Ruiz, *Family Formation and Dissolution in Latin America*, Taipei, Taiwan, 1992, 24 pages.

³³ 67 DPR 367 (1947).

enrichment of the defendant, the plaintiff is entitled to share in the property jointly accumulated, in the proportion that her funds contributed toward its acquisition.”³⁴

Marriage is dissolved by divorce legally obtained.³⁵ It can be granted only in an action instituted in the ordinary manner and by a judgement rendered by the court. The causes or grounds for divorce are, among others: (1) adultery on the part of either of the parties (the spouses) to the marriage; (2) habitual drunkness or the continued and excessive use of opium, morphine or any other narcotic; (3) cruel treatment or grave injury; (4) abandonment or desertion of the wife by the husband or of the husband by the wife, for a longer period of time than one year; (5) absolute, perpetual, and incurable impotency supervening after the marriage; (6) attempt of the husband or wife to corrupt their sons or to prostitute their daughters and connivance (*connivencia*) in their corruption or prostitution; (7) separation of both spouses for an uninterrupted period of more than two years, provided that neither of the

³⁴ 67 PRR 342, 343-344 (our italics). See also, *Celestina Caraballo v. Acosta y otros*, 104 DPR 474 (1975), and *Danz v. Suau*, 82 DPR 609 (1961).

Although the case of *Marvin v. Marvin* is not a case handed down in Puerto Rico, but in California – 557 P. 2nd 106 (Cal.) (1976) – the grounds for the decision that “the courts should enforce contracts between nonmarital partners except to the extent that the contract is founded on the consideration of meretricious sexual services [and that] in the absence of an express contract, the court should inquire into the conduct of the parties to determine whether that conduct demonstrates and implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The court may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts [unjust enrichment doctrine], when warranted by the facts of the case”, are the same grounds found in the cases of the Supreme Court of Puerto Rico.

Needless to say, this case is known for establishing what is now called “*palimony*”, used to describe a financial settlement made upon the break-up of a unmarried, cohabiting couple (man and woman); a couple that lives together and carries / engages in sexual relationship outside of marriage.

³⁵ Divorce not only breaks the matrimonial bonds between the spouses, but also put to an end the legal conjugal partnership among the parties to a marriage.

spouses shall be considered to be guilty nor innocent when the judgement is rendered; (8) incurable insanity of either of the spouses supervening after the marriage, for a period of more than seven years, when it seriously prevents the spouses living together spiritually.³⁶

Case law established the mutual consent of the spouses as a ground for divorce.³⁷ There is no need for an adversary procedure, and a mere ex-parte joint petition by both consorts is enough. There is no need for a guilty or innocent party declaration and there is also no need for statement of motives for such decision by consorts which could involve revelation of details of their intimate life.

It must be stated that no person can obtain a divorce who has not resided in Puerto Rico for one full year immediately prior to the action, unless the act or acts on which the suit is based has arisen in Puerto Rico, or while one of the spouses or parties to the marriage resided in the island.³⁸

A divorce carries with it a complete dissolution of the matrimonial ties or bonds between the parties, and the division of all the property between the spouses.³⁹

In all cases of divorce the minor children shall be placed under the care [cuidado, in Spanish] and *patria potestas* of the spouse whom the court

³⁶ Art. 96 CCPR, 31 LPRA 321 (Cumulative Pocket Suppl. 2010).

³⁷ See *Figueroa Ferrer v. ELA*, 107 DPR 250 (1978). Such creation of mutual consent as a ground of divorce was done pursuant to the right to privacy of the Constitution of Puerto Rico (thus, constitutional grounds).

Also see, Chapter VI. "Divorcio por mutuo consentimiento" (divorce by mutual consent), in vol. 2: *Derecho de Familia*, by Silva-Ruiz and Passalacqua, *supra*, pages 333-367.

³⁸ Art. 97 CCPR, 31 LPRA 331, as amended.

³⁹ Art. 105 CCPR, 31 LPRA 381.

considers best fitted to serve the best interest and welfare of the minor(s). The other spouse shall have the right to continue family relations with his/her children, in such a manner and extent as the court may determine upon decreeing the divorce, considering the case at issue.⁴⁰

It should be mentioned that since September 25, 2012 the law for “virtual visitations” is in force,⁴¹ also called “internet visitation” and “electronic - or ‘e’- visitation”, in favor of the non custodial parent. The idea is not the substitution of the direct – person to person or face to face – contact between (the non-custodial) parent and child(ren), but complementing it by using the “internet”. For example, a non-custodial parent, father or mother, can read a story to his son or her daughter at bed time by the internet. The agreement between the former spouses is of great importance because there are cost to cover.

In 1999, art. 107 of the CCPR was amended so that “in all cases of custody [custodia, in Spanish] and patria potestas, the history of the prior domestic violence conduct of the parents shall be considered to determine the best interest of the child...”.⁴²

There is a possibility to conclude an agreement on post-divorce support, both for the spouses – called alimony – or for the children. Both are subject to judicial scrutiny.

⁴⁰ Art. 107 CCPR, 31 LPRA 383, as amended.

⁴¹ “Law for Virtual Visitations”, *Ley de Visitas Virtuales*, núm. 264, 25 sept. 2012. See, Pedro F. Silva-Ruiz, *Las visitas del progenitor no custodio en acciones de divorcio (Puerto Rico)*, published in the webpage of the “Academia Nacional de Derecho y Ciencias Sociales”, Córdoba, Argentina.

⁴² Art. 107 CCPR, 31 LPRA 383, second paragraph.

As to alimony is convenient to point out that, if any of the spouses does not have sufficient means for subsistence once the divorced is decreed, the court may assign support from the income, earnings, salary or property of the other spouse, taking into account, among others, the agreements reached by the former spouses. If the divorced spouse entitled to such alimony marry again or lives in public concubinage, said support could be reversed by the court.⁴³

Art. 109-A of the Civil Code,⁴⁴ orders that “the spouse to whom custody is granted as a result of a divorce of the minor children of the married couple, or the physically or mentally disabled children, whether of legal age [21 years] or minors who are dependents as students until the age of twenty-five (25), shall have the right to claim the dwelling which constituted the home of the married couple and which is hold as community property claim as a homestead, during the minority of the children, during their studies or because of the disability of the children who remained in his/her custody due to a divorce”.

VI. Procedural Contractualisation

1. Jurisdiction

Alternative Dispute Resolutions (ADR) whereby the parties settle their conflicts themselves are admissible in the legal system of Puerto Rico.

⁴³ Art. 109 CCPR, 31 LPRA 385, as amended.

⁴⁴ Art. 109-A CCPR, 31 LPRA 385a, added on December 26, 1997 (official translation).

There are *Regulations for ADR*.⁴⁵ They comprehend three methods: mediation, arbitration and neutral evaluation as complementary techniques to the traditional court adjudication of controversies.

Thus far, only mediation is provided free of charge to the parties involved.

Chapter 7 of the *Regulations* deal with mediation.⁴⁶ It is a non-adversary alternative for the solution of conflicts, employing an impartial mediator to help the parties to reach an agreement among themselves.

The mediator cannot pass judgment on the controversies. Mediation is available to civil cases, including family law.

Cases involving filial relations (parents and grandparents, for example), claims for support as a consequences of a separation or divorce of parents and the division of the legal conjugal partnership are among the most common to be referred to mediation.

Out of court ADR also apply the *Regulations*.

The parties to a case are informed on the availability of the ADR techniques. In mediation, only the parties can decide whether or not to submit

⁴⁵ *Reglamento de Métodos Alternos para la Solución de Conflictos*, approved by the Supreme Court in June 25, 1998, in effect in January 1, 1999, as amended (March 4, 2005). They are: “mediación”, “arbitraje” and “evaluación neutral”. There is no translation, whether official or unofficial, of the *Regulations*.

It should also be mentioned that as of July 1, 2013 there is in force the “Ley para mediación compulsoria y preservación de tu hogar en los procesos de ejecuciones de hipoteca de una vivienda principal”. (Law for the Compulsory Mediation and Preservation of your Home [house, residence] in Actions for the Execution of Mortgages of a Principal Dwelling-House). No court of justice can issue a judgment for the execution of a mortgage of a principal dwelling-house unless mediation has taken place, if the case was sent for mandatory / compulsory mediation.

⁴⁶ Rules 7.01 to 7.12.

to the process, but they need to attend a meeting whereby they are informed of what the technique is about.

In sum, there is still a long way to go for ADR to be applied in Puerto Rico. Lawyers usually object of a mediator without formal legal training.

2. Recognition

The cases referred by the court to mediation can end at any time, if the parties reached an agreement or if one or both parties do not want to continue with the procedure. In the first case – the parties have reached an agreement – the court is informed of it. The court verifies the content of the written document. The judge then issues a written resolution ordering, under contempt of court that the parties execute their own agreement.

If one of the parties does not execute the agreement, the other party may return to court requesting contempt proceedings be instituted. If punish for contempt of court, the party affected may move for certiorari.

VII. Additional Comments

The Civil Code of Puerto Rico has been under revision for many years. The last effort produced many drafts of the books, chapters, topics and areas regulated by the code. Not one ever became law. Many different and divergent opinions by individuals and interest groups clashed and prevented any positive actions. No consensus was ever reached.⁴⁷

⁴⁷ The last effort to revise the Civil Code was centered in the so called “Permanent Joint Commission for the Revision and Reform of the Civil Code of Puerto Rico of the Legislative Assembly”, now dismantled. It was directed by a non experience lawyer and some members of

The law is stated as of August 1, 2013.

the legislature. Not one had the respect of the legal community as a whole, including their own consultants. They did not deserve any consideration whatsoever.

See Law 85 of August 16, 1997, 2 LPRA 141 ss.