

## **CIVIL LAW. FAMILY, ESTATE AND TRUST**

**Bachelor of Laws LLB [2504110] SEP-2023 CLFn-NLL.3.M.B**

Area Private and Business Law

Number of sessions: 15

Academic year: 23-24

Degree course: THIRD

Number of credits: 3.0

Semester: 2º

Category: COMPULSORY

Language: English

Professor: **CASILDA CORTÉS PUYA**

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CASILDA CORTÉS PUYA, PhD in law by Universidad Autonoma de Madrid. graduated in law from Complutense University of Madrid (Spain) and also obtained her LLB at the University of Canterbury (UK). She is a qualified solicitor in England & Wales and registered with both the Madrid and UK Law Society.

She began her working career in London, practicing as a lawyer and solicitor for international law firm Irwin Mitchell. She left London to work as an Associate at Cortes Abogados in Madrid, dealing with civil and commercial law. More that 14 years ago she joined Lexiusta Abogados as a Partner in the International Civil and Litigation Law Department, providing legal advice to Spanish and international companies as well as private clients in relation to civil and company law, arbitration, insolvency and litigation. She also serves as an expert to international courts. Casilda Cortés has also participated in a number of legal forums. Casilda shall be available for tutoring upon schedule appointment.

### **Office Hours**

Office hours will be on request. Please contact at:

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## **SUBJECT DESCRIPTION**

This course is a comparative analysis of the rules governing family relationships and how to determine the rights, obligations and powers that exist between the members of a family. It also studies the financial and estate-related legal relationships born from family ties. Finally, it looks at the different mechanisms for administering these estates when transferred by succession and Trust.

The student will gain an understanding of the main family law and inheritance institutions and of the legal mechanisms and rules governing family estates; topics will be covered from an international and comparative perspective using several jurisdictions as examples.

## LEARNING OBJECTIVES

At the end of the course, students will be familiar with the main principles, concepts and institutions of family law and succession. Likewise, the student will:

- Acquire the skills needed to understand the administration of family estates.
- Learn about the fundamental institutions of family law and how they relate to each other.
- Be able to study, analyse and discuss basic family law issues and give valuable insights and practical options for dealing with such issues.

## TEACHING METHODOLOGY

IE University teaching method is defined by its collaborative, active, and applied nature. Students actively participate in the whole process to build their knowledge and sharpen their skills. Professor's main role is to lead and guide students to achieve the learning objectives of the course. This is done by engaging in a diverse range of teaching techniques and different types of learning activities such as the following:

Learning Activity	Weighting	Estimated time a student should dedicate to prepare for and participate in
Lectures	26.67 %	20.0 hours
Discussions	20.0 %	15.0 hours
Exercises in class, Asynchronous sessions, Field Work	26.67 %	20.0 hours
Group work	13.33 %	10.0 hours
Individual studying	13.33 %	10.0 hours
TOTAL	100.0 %	75.0 hours

## PROGRAM

### SESSION 1 (LIVE IN-PERSON)

1. Methodology of the subject.
2. Introduction to Family Law and Society.

Learning objectives:

- A first approach to the role played by families in society. UN's and EU's view.
- To know which aspects of the family relationship are regulated.
- To study the main characteristics of the law that regulates family relationships.

IMPORTANT : All the readings indicated in the Syllabus as well as other necessary readings will be uploaded to the online campus before the beginning of the course and will be accessible in the folder named with the session number.

## SESSION 2 (LIVE IN-PERSON)

Family life Vs legal family.

1. What is a family? Legal concept.

**Intro:** *Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development Report of the United Nations High Commissioner for Human Rights.*

*There is no definition of the family under international human rights law. The Human Rights Committee notes that the concept of family may differ in some respects from State to State, and even from region to region within a State, and that is therefore not possible to give the concept a standard definition. Social and Cultural Rights has stated that the concept of family must be understood in a wide sense and in accordance with appropriate local usage. Other international human rights mechanisms have expressed similar views. The concept of family may also differ according to the specific rights and responsibilities at stake. For instance, in relation to the rights of the child, the concept of family may include a variety of arrangements that can provide for a young child's care, nurturance and development, including the nuclear family, the extended family and other traditional and modern community-based arrangements, provided these are consistent with the rights and the best interest of the child. Likewise, the notion of "family environment" may encompass children's social ties in a wider sense. However, international standards set forth at least two minimum conditions for the recognition and protection of families at the national level: first, respect for the principle of equality and non-discrimination, including the equal treatment of women; and second, the effective guarantee of the best interest of the child. Given those parameters, human rights mechanisms have found that some forms of relationships, such as polygamy and child marriage, are contrary to international human rights standards and should be prohibited. In addition to the above principles, international mechanisms have called upon States to protect specific forms of the family in view of the vulnerability of their members in relation to the enjoyment of human rights. For instance, attention has been drawn to the discrimination suffered by women and children in de facto unions and there have been calls for the regulation of those unions in domestic law.*

### UN AND EU APPROACH to the concept of legal family.

How is the international community shaping the concept of the family?

- Special references and analysis to Articles 8 - 12 and 14 of the ECHR.
- References to Sharia law in EU: "Sharia, the Cairo Declaration and the European Convention on Human Rights".
- International Concept and Limits: Harmonisation: Changing Attitudes towards the Concept: Oliari et al. v. Italy - HUDOC.

*Article: New Families in the Legal World: a Comparative Perspective (This article reproduces the paper presented as a member of CIRF at the International Conference on Family Law "Sustaining Families," held at the University of Iowa, June 14-16, 201; Interdisciplinary Journal of Family Studies, XVIII, 2/2012) (CED)*

*Other / Complementary Documentation: ART. 12 (Guide on Article 12 of the Convention – Right to marry, 2020) (ECHR)*

*Other / Complementary Documentation: ART. 8 (Guide on Article 8 of the Convention – Right to respect for private and family life) (ECHR)*

*Other / Complementary Documentation: UN Legal Family 2015: "Family policy development: achievements and challenges" (United Nations Expert Group Meeting New York 14 – 15 May 2015)*

*Practical Case: Oliari V Italy (Judgment Strasbourg 21 July 2015) (ECHR)*

### **SESSION 3 (LIVE IN-PERSON)**

Adult relationships legally recognised as a form of family. Comparative study.

1. Partnerships and statutory unions: FAMILY RELATIONSHIPS others than marriage.
2. MARRIAGE.

Introduction: modernization and harmonization of the institution.

*Article: Reasons for Regulating Informal Relationships: A comparison of nine European jurisdictions (Utrecht Law Review, Volume 12, Issue 2 (June) 2016) (CED)*

### **SESSION 4 (LIVE IN-PERSON)**

#### **I. Marriage: Comparative study**

##### **A. Requirement for the validity of Marriage**

1. Legal capacity to perform the act of marriage. (National law ). Voidability and impediments.  
Comparative Study
2. The particular consent of the parties.
3. Form. Requirements for the validity of a marriage:  
CASE STUDY. ONLINE ASSIGNMENT. 5% Final Grade.
  - Spanish Civil Code.
  - Matrimonial Causes Act 1973 UK.
  - Divorce, Dissolution and Separation Act 2020.
  - Civil Partnership Act 2004.

### **SESSION 5 (LIVE IN-PERSON)**

1. GENERAL EFFECTS OF MARRIAGES: duties, liabilities & children: principles.

#### **2. PATRIMONIAL EFFECTS: comparative study.**

1. *Jurisdictions where there are ex-lege Mandatory Matrimonial economic regimes. ( Absolute separation and Community property´s regime or community of gains´ system)*
2. *Jurisdiction with no mandatory economic regimes . E.g: Washington*

#### **MATRIMONIAL ASSETS?**

#### **THE ROLE OF THE PRE NUPS: Premarital agreement can override some community property laws?**

- Posner v. Posner, 233 So. 2d 381, 382 (Fla. 1970 )Uniform Premarital Agreement Act (UPAA).
- Uniform premarital and marital agreements Act UPMAA 2012.

#### **Other examples: UK-**

- Radmacher (formerly Granatino) v Granatino [2010] UKSC 42 and DB v PB [2016] EWHC 3431 (Fam).
- Brack v Brack [2018] EWCA Civ 2862, [2019] All ER (D) 18 (Jan).

*Article: EU property marriage principle (Intersentia) (CED)*

*Book Chapters: The Financial Consequences of Divorce in a European Perspective; Scherpe (ed.), Unedited book chapter, published in European Family Law, Vol. III, Edward Elgar Publishing 2016*

(CED)

## **SESSION 6 (LIVE IN-PERSON)**

### **CASE STUDY: DIVORCE: dissolution of marriage and patrimonial effects.**

A. Harmonising the non fault divorce.

E.g: The Divorce, Dissolution and Separation Act 2020 UK triggered by Owens v Owens 2018: Mrs Owens petitioned for divorce in May 2015. In order to demonstrate that the marriage had irretrievably broken down she relied on Mr Owens' unreasonable behaviour. It was such that she said she could not reasonably be expected to live with him anymore. Mr Owens defended the petition on the basis that his behaviour had not been unreasonable in the context of their marriage. Reasonable expectations of marriage. The Judge at first instance said that Mrs Owens had exaggerated the context and seriousness of the allegations and that they were at of a kind to be expected in a marriage. The Court found no behaviour that Mrs Owens could not reasonably be expected to live with and, therefore, the marriage could not be said to have irretrievably broken down. Mrs Owens' petition was dismissed. Mrs Owens appealed the decision. However, the Court of Appeal returned to the question enshrined in statute: has the respondent behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent? The Court of Appeal was satisfied that the judge at first instance had correctly applied the law and Mrs Owens' appeal was dismissed. Supreme Court : Mrs Owens appealed the decision again in July 2018. Whilst the Supreme Court judges agreed that it was a troubling case and their decision left them feeling uneasy, they recognised that it was not for them to change the law laid down by Parliament. Their role was only to interpret and apply the law which was handed to them. The Law As currently at the time, the petitioner is required to find fault in the respondent and, on this occasion, Mrs Owens had failed to persuade the Court that Mr Owens' behaviour was unreasonable enough. The effect of the decision is that Mrs Owens will now have to wait until the year 2020 for a divorce, when she will be able to petition on the basis of five years' separation without Mr Owens' consent.

No-fault divorce: The decision highlights the need for Parliament to seriously reconsider the long standing campaign for 'no-fault divorce' and amend the statute accordingly. Until such time, the risk remains that family solicitors are forced to use more extreme examples of unreasonable behaviour in order to cross the threshold, thereby unnecessarily increasing the animosity between the parties, or that a party remains trapped in a loveless marriage long after they believe it has broken down,

### **The Divorce, Dissolution and Separation Act 2020**

**B. Personal effects.**

**C. Patrimonial effects: matrimonial economic regimes vs share principle (case law & statutory law).**

Review Session 5 readings.

### **CASE LAW**

Miller v Miller; McFarlane v McFarlane [2006] UKHL 24.

A short sharp shock: fair doesn't necessarily mean equal when dividing assets on divorce after a short marriage - Sharp v Sharp [2017]

NOTE : Sharing principle. Established in White v White [2000] UKHL 54 and Miller v Miller; McFarlane v McFarlane [2006] UKHL 24. The principle is derived from the basic concept of equality: spouses are equal parties in a marriage and should share "the fruits of the matrimonial partnership" equally. In practical terms, this means the starting point for a financial division on divorce, nullity or judicial separation is 50:50.

Although the sharing principle applies to the vast majority of cases, in a small minority, a short marriage, no children, dual incomes and separate finances may justify departing from it (Sharp v Sharp [2017] EWCA Civ 408). The same principles apply on the dissolution of civil partnerships.

*Practical Case: Sharp Case [2017] (EWCA Civ 408)*

*Practical Case: Miller [2006] (UKHL 24)*

*Article: Owens and Owens: Unreasonable law not unreasonable behaviour? (Family and Children,*

25 Jul 2018 (*lawsociety.org.uk*)

*Book Chapters: The Financial Consequences of Divorce in a European Perspective; Unedited book chapter, published in Scherpe (ed.), European Family Law, Vol. III, Edward Elgar Publishing 2016 (CED)*

- Spanish Civil Code.
- Matrimonial Act 1973 UK.
- The Divorce, Dissolution and Separation Act 2020 UK.
- Case Law.

## **SESSION 7 (LIVE IN-PERSON)**

The conflicts of law.

1. Connecting factors.
2. ADR.
3. Case Study: application of the EU Regulation.

## **SESSION 8 (LIVE IN-PERSON)**

GROUP CASE STUDY: 30% FINAL GRADE.

## **SESSION 9 (LIVE IN-PERSON)**

I. Comparative Approach to succession: differentiating factors.

1. **Degree of freedom/ autonomy of the testator to dispose mortis causa. Mandatory Family Protection.**
2. **Manner in which the inheritance is passed on to the successor. Devolution of inheritance/ Universal succession.**

1. Direct accrual upon acceptance. In Austria, Spain and Italy. *Ius delatione* \*\* The primary objective of the model of accrual upon acceptance is to protect legal successors from liabilities of the estate. The inheritance in abeyance (*hereditas iacens*).
2. Indirect devolution of the inheritance through a compulsory intermediary. Ireland, Denmark, Finland and Sweden. The beneficiaries only have a personal claim *inter vivos* for the transfer of the assets after adjustment for the liabilities of the estate. In no case are they personally liable for these liabilities.

II. Elements for succession to apply:

1. DEATH.
2. Successor: Legal heir, Representation and Transmission.
3. OBJECT: STATE and disposal limits: Donation and Gifts in Systems of Direct Accrual upon acceptance.

*Article: A Comparative Analysis of Civil Law Succession (Villanova Law Review, Vol. 11, Iss. 2 [1966], Art. 3) (CED)*

*Article: EU Law succession (ERA Forum (2015) 16:119–124) (CED)*

*Book Chapters: EU Regulation 650.2012 (ced)*

## SESSION 10 (LIVE IN-PERSON)

I. The trust: Management and transfer of the estate. Family Trust with Mortis causa effects. Common law. e.g: England & Wales.

### References to application in Continental Law.

*Article: Trust elements (Cuadernos de Derecho Transnacional (Marzo 2016), Vol. 8, Nº 1, pp. 184-207) (CED)*

*Technical note: Guide on international private law in successions matters (2014, Ministry of Justice)*

## SESSION 11 (LIVE IN-PERSON)

I. Introduction to testate succession.

- Nature of the will.
- Capacity and animus testandi.
- Formalities and types of a will.
- Content of a will.

II. Testate succession: Comparative Study

1. Limits to the freedom of will. Mandatory family protection. Civil Law.
2. Dependants (Common Law).

## SESSION 12 (LIVE IN-PERSON)

Case Study testate succession.

## SESSION 13 (LIVE IN-PERSON)

Intestate succession: Comparative Study.

- Default rules.
- Who is protected and why?
- Case study.

## SESSION 14 (LIVE IN-PERSON)

Conclusions: CASE STUDY RECAP.

## SESSION 15 (LIVE IN-PERSON)

**FINAL EXAM 40%. Final Grade.**

## EVALUATION CRITERIA

In order to pass the course and for the final exam to average with the rest of the marks (participation and group case), the student must obtain at least 4 out of 10 points in both the exam and in each of the two tests.

criteria	percentage	Learning Objectives	Comments
Examen Final	40 %		SESSION 15



Group Presentation	30 %		SESSION 8
Individual Work	20 %		TWO REVIEW TEST : 10% EACH
Class Participation	10 %		PARTICIPATION IN CLASS

## RE-SIT / RE-TAKE POLICY

### Retake policy.

Any student whose weighted final grade is below 5 will be required to sit for the retake exam to pass the course (except those not complying with the attendance rules, whom are banned from this possibility).

Grading for retakes will be subject to the following rules:

- The retakes will consist of a comprehensive exam. The grade will depend only on the performance on this exam; continuous evaluation over the semester will not be taken into account.
- The exam will be designed bearing in mind that the passing grade is 5 and the maximum grade that can be attained is 8 out of 10.
- The third attempt will require the student to complete any written assignment(s) required by the instructor and a final exam. This is also applicable to students who do not have required attendance, e.g. sickness.
- Dates and location of the retakes will be posted in advance and will not be changed.

## BIBLIOGRAPHY

### Recommended

- Jens M. Scherpe. (2016). *European Family Law*. Cambridge. ISBN 9781785363009 (Printed)
- James Stewart. (2015). *Family Law. Global Guides*. 3rd edition. ISBN 9780414039469 (Printed)
- Dan Andrei Popescu. (2014). *Guide on international private law in successions matters*. Magic Print. ISBN 9786066221535 (Printed)

## BEHAVIOR RULES

Please, check the University's Code of Conduct [here](#). The Program Director may provide further indications.

## ATTENDANCE POLICY

Please, check the University's Attendance Policy [here](#). The Program Director may provide further indications.

## ETHICAL POLICY

Please, check the University's Ethics Code [here](#). The Program Director may provide further indications.