

## Problem solved: custody of children

Can I ensure my siblings bring up my children if I die or would my estranged husband get custody?

**My ex-husband is Spanish, I am English, and our three children – aged 11, eight and six – were born in Spain. We divorced in Spain in 2007, and as part of the settlement, he agreed to pay €200 (£180 at current rates) per child in monthly maintenance, which he did. In September 2007, I moved back to England with the children and have not received any money since. Our house in Spain was repossessed because of money he owed social security, and he has no assets in his name. Is there any possibility of obtaining money from him? I believe he is working but probably without declaring his earnings as he still owes tax in Spain. I haven't made a will but have written a letter stipulating that if I die while the children are minors, I don't wish them to be brought up by their father in Spain but would like my brothers and sisters to be their guardians. Would my ex be able to contest that? He hasn't had a permanent job for three years, and is living in his late mother's flat. If I made a will, would it change the situation? Finally, he has always made me feel that I couldn't take the children out of the country without his consent – is this true? *M, via email***

To take your last question, first: yes. Had you taken the children out of the country without his consent, it would have been child abduction, so he isn't saying it simply to make you feel beholden.

I contacted [Philip Rutter](#), a partner at Collyer Bristow LLP, who specialises in [family](#) law. He says the letter you wrote regarding guardianship is only an expression of a wish and while he advises you to make a will, you can't appoint a guardian in it while your ex-husband is still alive, only put down on paper what you'd like to happen. In this case, that you'd like your sisters and brothers to raise your children. But you need to be aware that this isn't legally binding and that their father has parental responsibility. So he could come and take them back to Spain to live with him, if you die before he does and the children are still under 18.

However, before you panic, you need to think a) how likely this is to happen given his situation and b) your siblings could apply to the courts for the children to live with them. This would be done in the UK and all interested parties would be heard. The courts seek to protect and promote the rights of the children, and their wishes would also be listened to, and the older they are the more sway they would have over their own future (also things such as whether they are about to sit important exams here would be taken into account). At a time that you think is right, I would advise bringing this up with your children, and explaining the situation, given that it's not as clear cut as you thought.

The fact that your ex has not paid maintenance since late 2007 will have very little impact on his application for them to go and live with him. On the subject of maintenance, you have a legally binding agreement, which he has gone back on. His timing, ie he stopped paying when you moved back to the UK, may not be a coincidence, it may be his protestation at you having left. As ever in these situations, it is so much better to try to be cordial about things if possible. Do you need the money? Could you talk to him about making regular, but smaller payments?

Unfortunately it's not going to be easy for you to enforce the maintenance order and I'm afraid that you will have to consult a Spanish lawyer about your enforcement options over there. Rutter advises that you may be able to enforce against your late mother-in-law's flat if he's inherited it, otherwise you will have to "locate assets in your former husband's name or find evidence that he is working, but only a Spanish lawyer would be able to advise you properly."

I hope that now you have a better idea of what is possible, you will see how to move forward with this.