

PROCEDURES FOR DISSOLUTION OF MARRIAGE - HARMONIZATION WITH EUROPEAN LEGISLATION

Cristian Gabriel NICU¹

e-mail: nicu.gabrielcristian@yahoo.com

Abstract

Legally, divorce is defined as a means of dissolution of marriage, which can occur when, due to some reasons, relations between spouses are seriously injured and continuation is no longer possible. Dissolution of marriage is an institution of family law that has known an interesting evolution during history, in close liaison with social and cultural changes, specific to each era.

Key words: dissolution of marriage, family law, divorce, breaking marriage

Divorce is defined as a legal way of terminating marriage. The divorce ends the married couple since both partners' marriage has lacks of fundamental elements, on which it was ended: mutual affective feelings, closeness and friendship relations, moral and material support given. The connotations of this act are more complex than simple judgment.

Legally, divorce is defined as a means of dissolution of marriage, which can occur when, due to some reasons, relations between spouses are seriously injured and continuation is no longer possible, although the state is directly interested in defending marriage and family, however this cannot be maintained at any cost. The Law recognizes that, in reality, there are enough reasons that have led spouses to divorce. As for marriage it is required the free consent of the spouses, so their will should be taken into account when it manifests the purposes of divorce.

Either spouse should be entitled to further dissolution of marriage which, due to special reasons, has seriously and irreparably damaged the relations between spouses, becoming impossible for him/her. Not to admit the spouses this right is as returning to the indissolubility of marriage system. Dissolution of marriage is an institution of family law, which has known an interesting evolution during history, in close liaison with social and cultural changes, specific to each era. The concept of divorce is found since Antiquity, being fully developed in ancient Greece, so that a person could divorce only with the permission of a magistrate, who had to submit the reasons of the decision and whether they were considered

sufficient, the magistrate allowed him/her to divorce.

During the Roman Empire, when divorce was strongly influenced by the specific of slave state, it was subjected to different procedures in marriage „*cum mânu și sine mânu*”, then going through some very restrictive periods : in Ancient Rome ending of marriage was possible for all those willing, but the Christianization of the Roman Empire brought restrictions and prohibitions on divorce.

After the fall of the Roman Empire, in the Medieval Period, the divorce has been declining in the West, under the influence of the Catholic Church, which sustained the indissolubility of marriage dogma (I I.D.Lupașcu, Family law, 5th Edition, Universul juridic Publishing House, Bucharest 2010, pg.170, M.I. Rusu- Divorce proceedings in Romanian law, Rosetti Publishing House, Bucharest 2003, pg.26-27; B.D.Moloman-Civil and religious marriage in Romanian law, Universul juridic Publishing House, Bucharest 2009, pg.226). Considered unpardonable sin and the equivalent to adultery, it was forbidden by the Church. A turning point in the history of divorce occurred in 1533, when the King of England, Henry VIII, was separated from his wife, Catherine of Aragon, of the Catholic faith. Because Pope did not give the divorce that he wanted, the king broke the relation with Rome and declared himself the supreme head of the Church of England, and the marriage was invalidated. In America, the divorce became socially acceptable only in the second half of the nineteenth century, under the pressure of

¹ “Spiru Haret” University of Bucharest, Faculty of Legal, Economic and Administrative Sciences of Craiova.

more developed middle class, which required new legislation.

Initially, the Laws concerning the divorce required reasons of breaking marriage – abandonment, abuse, adultery, etc, in order for the divorce to be granted. Recently, the view over divorce in western society has changed, because of adopting the no-fault divorce, through which a spouse can get a divorce without giving any reason. Thus, the two partners cannot be held „captive” together in a marriage, against their will, which represents the Roman principle "matrimonia debent esse libera" ("marriages must be free"). Over time, restriction and prohibition of divorce have devoted whole periods in which families were required to continue to exist, even if the actual conditions made that impossible, in the normal environment. It should be noted that, while the divorce is allowed in our country, in other countries, even nowadays, it is banned, is not provided or is much more difficult.

Civil Code of 1864 marks an evolution of the concept of divorce by the consent of both spouses, which no longer is regarded as a dissolution of marriage without reasons, but is considered as a way of divorce without making public the reasons that lead spouses to take this step, whenever their interests or kids' would ask they should remain unknown. This Code provides some special conditions for divorce by consent of the spouses - the spouses' age, duration of marriage and some mandatory authorization (N. Titulescu, Civil law, All Beck Publishing House, Bucharest 2004, Titulescu European Foundation, pg.347 ff.; A. Gheorghe, op.cit. pg.382).

In Romania the divorce was never forbidden, but getting it has seen numerous changes. Thus, in the old statutes, spouses divorce by consent was allowed under compliance with several conditions. For example, in Caragea Code, which provided the unilateral right of one of the spouses to repudiate the other (repudium), the dissolution of marriage the spouses was admitted, provided that within three years of the agreement to continue. In the Calimah and Andronache Donici Codes, it was explicitly provided, that you cannot divorce without a determined cause. According to the old rules, in Transilvania, in addition to the divorce, it was also admitted to the body separation called "separation of bed and table" (M. Trif, The termination of marriage through divorce and the division of spouses' joint assets, Hamagiu Publishing House, Bucharest 2007, pg.59; A. Gheorghe - New manners of dissolution of marriage in the new Civil Code. Comments-work of the research team of "Traian

Ionaşcu" Department of private law - Universul juridic Publishing House, Bucharest 2010, pg.382; D. Lupaşcu, op.cit, pg.170 ff.).

Since the adoption of the Family Code and until 1993 divorce was a very restrictive regulatory environment, it can be pronounced only in exceptional cases and only from one or both spouses' cause (I.P. Filipescu - Family law treatise, 5th Edition, All Back Publishing House, Bucharest 2000, pg.200; I. Chelaru - Marriage and divorce, Civil law, religious and comparative law aspects, A92 ACTEON Publishing House, Iaşi 2003, pg.148).

By Law No. 59/1993, regulating the divorce has seen greater openness, the Romanian legislature considering, finally, that maintaining, at any cost, a formal marriage, in which the relationship between spouses may not be such as to maintain a harmonious marriage, no longer corresponds to the spirit of the age. Therefore, it gives up the requirements during the Communist regime, under which the Court could not pronounce divorce except in cases where, due to special reasons, "relations between spouses are so severely and irreparably injured that continuation of the marriage is clearly impossible for the one who asks for dissolution", the Court may terminate the marriage through divorce when, due to special reasons, the relationship between spouses are seriously injured and continuation of the marriage is no longer possible (R.M. Trif, The termination of marriage through divorce and the division of spouses' joint assets, Hamagiu Publishing House, Bucharest 2007, pg.59).

By the same law, the possibility of pronouncement of divorce is reintroduced in Romania, with the agreement of the spouses, if passed at least a year of marriage, and of that marriage did not result any children.

The new Civil Code brings new rules, valued in the doctrine as being modern and innovative, which provides a further relaxation of the conditions under which the divorce by agreement between spouses may be achieved. It can be obtained irrespective of the duration of the marriage and even though the spouses have minor children resulting from the marriage or adopted. From a procedural point of view, according to the provisions of the new Civil Code, divorce by agreement of the spouses will be able to be obtained, in accordance with the law, either judicial or administrative, through the legal procedure.

Divorce administratively-according to the new Civil Code, the spouses decide to divorce and this decision does not affect children resulting from the marriage, outside or over any child

adopted during the marriage, they can do it at the City Hall where the marriage has been concluded or last common housing spouses. It may find dissolution of marriage on the basis of understanding between partners and shall issue a certificate of divorce, according to the law (art. 375 alin.1 The New Civil Code).

When the spouses come to an agreement, civil status officer does nothing but take note of it and issues the certificate.

Procedurally, however, things are presented as follows:

a. when they submit an application for divorce, the spouses need to be together to make this step. After the registration of the request, spouses are given within 30 days of thinking, during which they can analyze the situation;

b. After the 30 days, the spouses come in front of the civil status officer. He checks whether they insist with the idea of separatio and if the expressions of consent is free and uncorrupted;

c. If the consent of the spouses is found to be of free will, the officer shall issue the certificate of divorce;

d. Entries will be made on the certificate of marriage with respect to the divorce.

For things to go well, the spouses must agree each other with regard to divorce and to keep the marriage name of the spouse who has taken it of the other. Otherwise, the civil status officer directs the parties to the Court.

Even though in the New Civil Code provisions regarding guidance by the mediation, to settle amicably divorce, are not mentioned, civil status officer may recommend mediation to spouses according to article 13. 6 of 192/2006 (Law 192/2006 on mediation and the profession of mediator, published in the Official Journal, Part I, no. 441 of 22 May 2006).

If spouses can't easily reach an agreement, they will not be required to apply to a judge, but may take into account the mediation services.

In order to solve the conflicting status of partners, they can seek the services of a mediator, then submit the request together with the mediation agreement.

In this situation, the civil status officer will follow the procedure, as it is prescribed by law. The application for divorce is submitted once the parties have reached an agreement. Otherwise, they shall have recourse to the procedure in court. Thus, either the spouses agree the divorce, or seek mediation services, if there are not minor children, divorce can be solved administratively. If the spouses have also to do goods sharing, it can be settled later, by public notary or court, in order to obtain the stamp duty.

Divorce at notary office - it is achieved when the public notary is entitled by law (Order no. 81/2011 on supplementing the application regulation of Law no. 36/1999 on notaries public and notary public activity – the elaboration by the Ministry of Justice of divorce proceedings through notaries public) to ascertain the dissolution of marriage by agreement of the spouses and to order the issue of a certificate of divorce, whether or not the spouses have minor children born of the marriage, or adopted from outside. Divorce ended in agreement, at notary, presents multiple advantages over the one pronounced in court, both from the point of view of completing time (30 days), of total costs reduced and the confidentiality of the proceedings.

The procedure of divorce by agreement of the spouses is under the competence of the public notary office in the District Court they belong to: the place of conclusion of marriage or the last dwelling of spouses.

Application for divorce shall be in writing and shall be signed personally (New Civil Code-art.376 alin. 1) by the spouses in the presence of a competent public notary to which it is submitted and shall include:

-the Declaration of spouses according to which they do not have minor children born of marriage or adopted and their consent concerning the name of the family they are going to wear after divorce.

Receiving the request, the public notary shall have the following obligations:

-checks whether, on the dissolution of marriage, there are foreign elements and proceeds in accordance with the laws governing the dissolution of marriage where there are legal relations with foreign elements.

-checks the local jurisdiction.

If he considers that the divorce by agreement of the spouses is under the competence of another Notary Office, directs the spouses to apply to the appropriate public notary, and in a situation where they insist, he will record the request and decide a rejection termination of it. Assuming that several notaries are competent, the first Office will perform the procedure of divorce. Each request for divorce will also receive a unique registration number at national level, in The National Register of applications for divorce.

-Verifies the identity of the spouses and if the statements in the application for divorce are in accordance with statements in the attached application papers;

-registers the application in the register of divorces, once he verifies that he is competent and if the fee is paid;

- checks on the national register of applications for divorce if another request for divorce is registered by the spouses ;

- grant the spouses a period of 30 days for the eventual withdrawal of the application for divorce;

- Verify, upon the expiry of 30 days, if the spouses insist in the divorce application and if their consent is free and uncorrupted (art.376 alin.2 Noul Cod Civil- „Art. 376 para. 2 of the new Civil Code - "by way of exception to the provisions of para. 1, the application for divorce may also be submitted to the notary public by an agent having authentic mandate").

Perseverance, or lack of diligence of each of the spouses shall be recorded in the completion of admission or rejection of the application for divorce.

Their last dwelling, according to law, is the one in which spouses lived, and the proof is done with appropriate identity documents of the spouses, which shows common domicile or residence in the municipality, or, if one can't do it this way, by personal authentic evidence of each of the spouses, indicating that it was their last joint dwelling. The Declaration will be recorded both in the application for divorce and in the conclusion of its admission. Representation of the spouses when filing for divorce can be done also by authentic proxy representative, therefore, in applying the provisions of the above law, notaries will be able to authenticate powers of representation for filing for divorce before the notary public or officer of civil status, but under the procedure for perseverance in the application for divorce and the expression of free and uncorrupted consent, the presence of the spouses is compulsory (Art. 376 para. 3 of the new Civil Code - "spouses appear in person before the civil status registrar or the notary public, who verifies if the spouses persist in their decision to divorce and if, to that effect, their consent is free and unvitiated.").

For statements made in front of the public notary, who investigated the request for divorce, which are required in proceedings for divorce, it is charged no fee. Spouses who decide to divorce at the notary must submit, at the request for divorce, the following documents:

- photocopies of birth certificates of the spouses, as well as their identity documents. With the filing of the application for divorce, there also goes the marriage certificate, issued by the Romanian authorities, in original and certified copy;

- original marriage certificate is withheld by the notary until the certificate of divorce.

After filing the documents required by law, the public notary shall issue a dismissal of the

application for divorce, if: spouses insist on the idea of divorce, express free and uncorrupted consent, cumulatively, are met the other legal conditions laid down in the Family Code for the dissolution of marriage by consent of the parties, the conclusion will find all of the above.

Finally, the notary shall issue the certificate for divorce, in which he ascertains the end of marriage, by agreement of the spouses. Divorce certificate is drawn up in six original copies, of which:

- one for each spouse;

- one copy for the divorce folder,

- one for the divorces folder from the Office of notary,

- a copy for the civil status register from the place where the marriage has been concluded or where it was transcribed marriage certificate, issued in another State,

- a copy for the civil status register held by the direction of the County.

The public notary shall request, via the administrator of registers from the National Union of Public Notaries, the allocation of the number of divorce certificate from the register of certificates of divorce (Register required by Art. 561 letter e) of the Regulation of application of Law no. 36 on notaries public and notary public activity, approved by Order no. 710/C/1995 of the Minister of Justice, as subsequently amended and supplemented), kept by the Ministry of Administration. This number is listed on the certificate of divorce. If it is found that in the register of certificates of divorce is already assigned a registration number for a certificate of divorce issued for the same spouses, the public notary will conclude the rejecting of the application for divorce, as remaining without object.

Certificate of divorce will consign dissolution of marriage by consent of the spouses, at the public notary, and the last name on the former spouses will wear after divorce.

After issuing the certificate of divorce, the public notary will send a copy to the City Hall where the marriage has been concluded or where it was transcribed the marriage certificate, issued in another State, to mention the divorce in the Marriage certificate, and one copy to the register of civil status, kept by the county office that records the individuals.

With the issue of the certificate for divorce, the public notary shall refund the spouses the marriage certificate, that will score the words: «Loosened marriage by divorce certificate No. .../...». In the case of acceptance of the application for divorce, the public notary will immediately

notify, in electronic format, with a view to closing position of the National Register of applications for divorce (National Registry of Divorce applications aims at keeping national records of divorce applications addressed to public notaries, in order to avoid double claims for divorce records, and records data solutions by notaries public).

If that does not satisfy the conditions for termination of divorce in front of the notary, the Office shall reject the application for divorce, if there are not met the legal conditions of the Family Code for the dissolution of marriage by consent of the parties, as well as in one of the following cases (art. 376 para. 5 New Civil Code "article 383 paragraph 1. (1) and (3) shall apply accordingly. If the spouses do not understand over the name of the family to wear after divorce or, in the case referred to in article 1. 375 para. (2) upon the exercise of parental rights in common, the civil status officer or, as appropriate, the public notary shall issue an order dismissing the application for divorce and encouraging spouses to apply to the Court under the provisions of art. 374. "):

- has no legal jurisdiction to determine an application for divorce;

- one of the spouses is under interdiction;

- one of the spouses is unable to express free and uncorrupted consent;

- when submitting the application for divorce, there are not present both parties, and one of them insists on registering the application;

- one of the spouses refuses to sign the request in front of the public notary;

- spouses refuse to give the statements referred to in this regulation;

- spouses does not understand about the surname to be worn after divorce by each of them;

- spouses do not show, when applying for the divorce, the marriage certificate in original;

- the spouses have minor children born in the marriage, or adopted;

- one of the spouses shall come in front of the public notary to the 30-day deadline set for reconciliation and declines the application for divorce;

- one of the spouses does no longer insist on the divorce application, as s/he did not come to the public notary until the expiry of 30 days granted for reconciliation, to declare that is insists on the application for divorce;

- the application has run out, as the marriage of the spouses has been disposed by another competent authority;

- spouses reconcile;

- spouses withdrawn their application for divorce;

- before completing the procedure for divorce one spouse died, the marriage ending by itself.

In case of rejecting the application for divorce, the public notary will immediately notify, in electronic format, the solution, in order to seal their respective position in the National Registry of divorce applications.

Judicial divorce - this way of termination of marriage shall be carried out by judicial process, regardless of whether or not the spouses have children from the marriage, out of marriage or adopted.

Different from the old regulations, divorce by agreement of the spouses may be pronounced regardless of the duration of the marriage. Also, it doesn't matter whether underage children resulted from marriage or not.

If one of the spouses is under interdiction, divorce by agreement of the spouses cannot be upheld

The procedure for judicial settlement-in accordance with article 374 of the New Civil Code, includes the following situations:

1. When spouses agree about the dissolution of marriage and all aspects, such as trusting the underage child to one spouse or another, establishing his residence, the contribution of parents regarding the upbringing and education of minors and other mandatory aspects dealing with the divorce, the spouses may draw together an application requesting the Court dissolution of marriage and accept the agreement of the spouses that will be attached to the application. Parties may include in the application the agreement reached before addressing the Court.

2. If the spouses still have unresolved differences, they can appeal to the mediation procedure, in order to reach an arrangement so that they can maintain good relations, this being more important in cases where there are minors. Thus, with the assistance of a mediator, the spouses may conclude an agreement on mediation to attach the application for divorce. However, nothing stops spouses first to file an application for divorce and then to conclude the mediation agreement.

At this point I would add a recommendation. When the mediator considers that it can be beneficial for both parents and children, after a preliminary discussion with the parents, children over the age of 10 years may participate to some of the mediation session.

3. After the submission of the agreement, the Court is obliged to verify the existence of free and uncorrupted consent of each spouse. Also, the Court is required to verify compliance with the best interests of the child. In this respect, it may

require a social investigation report and can listen the child's opinion.

4. If the mediation agreement is filed after the Court appeal, at the same time with the mediation agreement, spouses may also submit the request for refunding of stamp duty. Refund of stamp duty can also be obtained separately, within one year from delivery of the decision of the mediation agreement.

5. Once the procedure satisfied, the Court authorizes the agreement to mediate and pronounces the dissolution of marriage, according to the requirements of the spouses, written in the agreement.

6. The competent court is that of the place where the marriage is concluded or of the last common dwelling of spouses.

The spouses agreement should include entries regarding:

- the name of the family to wear after the divorce;

- The exercise of parental authority (by both parents);

- The establishment of the children' residence after divorce;

- The method of personal ties between the parents and each of the children;

- The establishment of parents ' contribution to expenditure growth, education and training of children.

- Where appropriate, the agreement may also cover a method of sharing the common assets.

Calling the mediation is not mandatory, but it confers several advantages:

- according to the law, the procedure is faster;

- it is no longer required the administration of evidence to prove who is guilty for the breakup of marriage;

- stamp duty shall be released. As we already know, in order to encourage the parties to seek mediation, the State gives stamp duty back (which often is consistent, for example 3% at partition) and only if the parties enter into an agreement to mediate;

- the spouses decide on all aspects of divorce with the assistance of a mediator in privacy conditions, different from the court, when it is public.

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