

THE DIVORCE BY THE PUBLIC NOTARY. PROCEEDINGS

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Abstract: *The legal institution of divorce is the legal method by which a marriage is terminated. The topic of discussion for the present article is the conventional divorce, which is characterized by the fact that the dissolution of marriage is exclusively the result of the consensual will of the two spouses.*

Key words: *amicable divorce, marriage, the public notary, spouses.*

1. Introduction

De *lege lata*, marriage is dissolved by divorce.

If divorce for unfounded reasons was forbidden during the communist period, after the Revolution, the possibility to terminate marriage by mutual consent appeared.

The enactment of Law no. 202/2010 on measures to accelerate the settlement of court trials and, subsequently, the enactment of the new Civil Code has given the opportunity to spouses to divorce in a non-contentious framework, by administrative means and notary procedure.

The New Civil Code establishes the amicable divorce.

This divorce can be done either judicially, administratively or by a notary.

Unlike divorce proceedings by administrative means, starting with October 1, 2011, the notarial divorce is done in two forms: the divorce without minor children and the divorce when the spouses have minor children.

The divorce by notary brings in undeniable advantages, as it is a much more

rapid form of marriage dissolution by the consent of both spouses.

This is an alternative way to solve conflicts, helping to decongest the judiciary.

The legal basis of the proceedings regarding the divorce by public notary is the Civil Code - art. 375-378, and Law. 36/1995, The Public Notaries Law and of the notarial activities - art. 136.

According to art. 375, para. 1 Civil Code "If the spouses agree to divorce and have no minor children, born in wedlock, out of wedlock or adopted, the registrar or the notary public from the place where the marriage took place or the last family residence can ascertain the dissolution of marriage by agreement between the spouses, issuing a certificate of divorce according to law. "

The quoted text states two conditions:

1) the spouses' agreement for the dissolution of marriage;

2) no minor children, born in wedlock, out of wedlock or adopted.

In the event of the dissolution of marriage by a notary, the condition regarding the agreement of both spouses is more rigorously taken into consideration, in the

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sense that the divorcing spouses must have reached full agreement on all the effects of marriage.

The doctrine states other requirements, such as those related to the exercise capacity or the existence of consent free of any undue influence of the spouses regarding the divorce.

The consent of both spouses for the dissolution of marriage is fundamental for the divorce by notary public.

Regarding the second condition, the article above quoted provides in paragraph 2 the following: *"The Divorce by agreement between spouses can be ascertained by a notary public also in case there are minor children born in wedlock, out of wedlock or adopted, if the spouses agree on all aspects regarding the surname that they will use after the divorce, the exercise of parental authority by both parents, in case of minor children, establishing the child's home after divorce, how to maintain a relationship between the separated parent and each of the children and determining the parents' contribution to the maintenance, education, learning and professional training of children ..."*.

The dissolution of marriage is conditional on the consent of the parents on all aspects mentioned above. The lack of parental consent on the situation of minor children or the name used after divorce are grounds for rejection of the divorce petition.

The divorce by notary cannot be ascertained anywhere, at any notary public office.

The procedure of divorce by agreement between the spouses is a matter of notary public under the law.

According to art. 375, para. (1) Civil Code, the power belongs to the notary public whose office is in the district court or the Court of Bucharest in whose jurisdiction the marriage was concluded or where the last family residence is.

Before checking the territorial jurisdiction, the notary public shall verify that the law applicable to divorce for the marriage sought to be dissolved through the petition received is the Romanian law.

Regarding the place where the marriage was concluded, this does not represent a serious issue, the verification being made with the marriage certificate.

If the marriage was concluded at the diplomatic missions or consular offices, the settlement of the request lies in the jurisdiction of the notary public in Bucharest, as the marriage certificate issued by diplomatic missions or consular offices was registered by the Sector 1 City Hall and, according to the above-mentioned, the competence is that of the notary public whose office is in the jurisdiction of the Bucharest Court of Law.

The last common residence means the last house in which the spouses lived together.

The proof regarding the last common residence is, according to the case, the identity documents of the spouses from which their common domicile or residence results, or, if this cannot be accomplished, through the statutory declaration of each spouse, from which their last common residence results.

The declaration will be recorded in the divorce petition and in the conclusion of the divorce petition.

If the identity documents of the spouses show different domiciles or residences, the proof of the last common residence is done, as the case may be, through the identity card, if it was the domicile of at least one of the spouses or through the document proving ownership or possession (sale agreement, donation, lease, free loan contract, etc.).

We believe that, in the event of declaring the common house as being the one mentioned in the identity card of only one spouse, this requires an affidavit, even if the

spouses have a document proving ownership.

Basically, the spouses have discretion to determine the territorial jurisdiction of any notary public.

The couple will appear in person before the notary public in order to file for divorce, as well as, subsequently, in the proceedings, to maintain the divorce petition and to express their consent, free of any undue influence on the dissolution of marriage.

As an exception, the divorce petition can be filed to the notary public also by a procurator with mandate, comprising all the particulars required by law. Since the law does not distinguish, it can be said that the authorized person can be the spouse.

Identifying the parties is done only with the identity documents presented by the couple:

- for Romanian citizens: the identity card, the temporary ID card, the ID card (old version), and for the Romanian citizens residing abroad, the passport providing residence and containing the term of validity;
- for the citizens of the European Union or the European Economic Area: identity document or passport issued by the state of residence;
- for the stateless: passport issued under the Convention on the Status of Stateless People from 1954, accompanied by a temporary or permanent residence permit, as appropriate;
- for foreigners from tertiary countries: passport issued by the state whose citizens they are, having a visa for Romania; the visa must be valid both at the time of application and at the date of issuing the divorce certificate;
- for foreigners who were granted a form of protection in Romania - the travel document issued under the Geneva Convention or, where appropriate, the travel document for

the foreigners who have subsidiary protection - conditional protection;

- for the foreign citizens defecting in Romania - passport issued by the state whose citizens they are, accompanied by the temporary identity document.

Upon receiving the request, the notary public is required to check in advance the territorial jurisdiction under the law.

If the parties insist upon registering the application in violation of territorial jurisdiction, the notary public shall record it and issue an order dismissing the application.

The divorce application shall be written and signed by the spouses personally or by the authorized person, in front of the notary public where the petition was filed.

The mandate must be given in authentic form. This will include all the particulars required by law when filing the petition.

The petition shall include the statement in which the spouses declare that they have not registered any other divorce petition in any institution provided by law (court, city hall, notary public) that their consent is free of any undue influence, whether they have or do not have minor children born in wedlock, out of wedlock or adopted, the agreement on the exercise of parental authority by both parents, deciding upon the child's home at the domicile of one of the parents, the establishment of living costs for children, the modality of maintaining personal relationships between the separated parent and each of the children, setting the parents' contribution to the costs of raising, education, teaching and training of the children, and the agreement on the family name that each of the spouses will use after the divorce.

The divorce procedure is one of the notary procedures in which the petition must be done in writing and it must be signed by the parties before the notary.

In the situation in which the parties, for whatever reason, cannot read or sign the

petition or there are other impediments in expressing consent, the provisions of Law no. 36/1995 and of the regulation regarding the implementation of this law are enforced, namely:

- for the deaf, dumb or deaf-mute, who are for any reason unable to write, the statement of intent will be taken through an interpreter (of the deaf-mute language) in the presence of two witnesses;

- in the case of a blind person, he or she will have the contents of the petition read, the notary public will ask if s/he had heard right when s/he was being read the document and whether the aforementioned represents her/his will, they will be recorded in the petition, in the presence of two witnesses;

- for those who, because of their infirmity, illness or any other cause, cannot sign, the notary public will record their consent in the presence of two witnesses;

- the people who do not speak or understand the Romanian language are given the opportunity to acknowledge the facts through a translator or interpreter, under the law, by the Ministry of Justice.

In all such cases, the witnesses, the translator or the interpreter will sign the petition for divorce together with the spouse who can sign, and on the decision to accept or reject the petition for divorce, along with the notary public.

On receiving the petition, the notary public files it in the divorce record book after checking if it is relevant and if the fee was paid.

The divorce application shall be accompanied by copies of the birth certificates of the spouses, of their identity documents and, where appropriate, the acts of birth for the minor children.

Together with the filing of the divorce, the spouses will present to the notary public the original marriage certificate issued by the Romanian authorities, a copy of which will be attached to the petition for divorce. The

original marriage certificate will be retained in the case file until issuing the certificate of divorce.

After filing the petition, in order to continue the divorce proceedings, the notary public verifies in the RNECD (National Notarial Register for registering divorce petitions) that there is no other petition for divorce filed by the same spouses.

This registry aims at keeping records of divorce petitions addressed to notaries public at national level in order to avoid double counting of the petitions for divorce, as well as the record of the solutions given by the notaries public.

In case it is concluded that the divorce by agreement between the spouses is the responsibility of another notary public office, the notary public directs the parties to address the competent notary public.

In case the jurisdiction lies to several notaries public, the competence belongs to the notary public office which first registered the petition at RNECD.

After signing the petition, as we have seen, the notary public registers the petition at RNECD (the National Notarial Records regarding divorce petitions) and grants the spouses a reflection period of 30 days and informs them regarding this at the time of filing the petition.

The time limit granted will not be less than 30 days and shall be written both in the divorce petition and in the Register of Divorces.

At the justified request of the parties and if both spouses agree, the notary public will grant a period exceeding 30 days.

The time limit set by the notary public shall be brought by her/him to the attention of the spouses verbally, specifying the day, month, year and the time when they must be present.

If the time limit expires on a public holiday, it is extended until the first workday.

The calculation of the period is made under the provisions of the Code of Civil Procedure.

At the time limit set, the spouses must come in person, sending representatives being no longer allowed.

For the remaining term, in case the spouses have minor children, the notary public will require the competent Guardianship Authority to draw a psychosocial investigation report, attaching the spouses' agreement on the minor children.

According to art.229, paragraph (3) of Law 71/2011, for the enactment of the Civil Code, as amended and supplemented by Laws no. 60/2012, 54/2013 and 214/2013, the report will be made by the guardianship authority within municipalities, until the regulation of the organization and functioning of the guardianship court, by the law on judicial organization.

The competent guardianship authority is the one from the minor's parents domicile, if they live together or the home of the parent where the child lives on a regular basis. If the child lives only with her/his mother, the competent guardianship authority is to draw up the psycho-social investigation report considering the mother's domicile.

The quoted provisions are intended to ensure that measures are taken for the protection of minor children, a principle that should be respected in settling all divorce petitions, either judicially or by a notary.

Within the notarial divorce proceedings, the notary public gives one of the following decisions: acceptance or rejection of the divorce petition.

I. The admission of the divorce petition. At the time limit set, the notary public verifies if both spouses are present in person, if the spouses continue in their demand for divorce, if their consent is free of any undue influence, if none of them is put under interdiction, if they maintain all statements made when filling in the divorce

petition, if any child has been born or adopted.

If there are one or more minor children, aged at least 10, according to the provisions of art. 264 Civil Code, hearing the children is mandatory, even if art. 375 of the Civil Code provides nothing in this respect.

The child has the right to be heard, has the opportunity to request and obtain any relevant information according to her/his age, to express her/his views and be informed of the consequences her/his opinion may have.

The child's views can be taken into account by the notary public in relation to the age and maturity level of the child. Having in view the principle of ensuring the best interest of the child, if the notary public considers that this principle is not respected by the parents' agreement, s/he shall issue a decision to reject the petition for divorce, directing the parties to address the court.

If for some reason (e.g. disease / syndrome) the child cannot be heard, the notary public may decide on accepting the petition for divorce, mentioning in the conclusion of the admission that the hearing of the minor could not take place for reasons that make the communication with her/him impossible.

With regard to the obligation to support the children, which rests with the parents, this is a part of parental authority as a set of rights and duties regarding the person and the child's property, being exercised together and equally by both parents, whether they are actually separated or divorced.

Under the provisions of art. 499 Civil Code, this obligation is common, both the father and mother being compelled to support their minor child, ensuring the necessary things for living and education, learning and professional training.

This solidarity envisages a particular aspect, in the sense that they are bound by this obligation, proportionally to the income and assets they possess.

According to art. 530 Civil Code, the obligation regarding maintenance is fulfilled in nature by providing the basic needs and, where appropriate, the costs for education, learning and professional training.

Basically, it establishes the principle of joint and several liability, as the main means of performance.

Obviously the parent where the domicile of the minor was established will be required to support her/him, in general, with joint liability, the other parent also having the same obligation and only in case of impossibility, maintenance will be provided in the form of money, having therefore a subsidiary character. In this case, the obligation may be set as a fixed amount or a percentage of the net monthly income of the person owing it.

If the spouses continue in their petition for divorce and if in this respect, their consent is free of any undue influence, after the authentication of the parental consent regarding the minor children, the notary public draws up a decision to accept the petition for divorce by mutual consent, a conclusion ascertaining that the consent is free of any undue influence and the other legal conditions set out in the Civil Code for the dissolution of marriage are met, then the divorce certificate is issued.

Between the time of signing the conclusion for the divorce petition and the issuing of the divorce certificate, the public notary must complete another legal procedure.

In order to issue a divorce, the notary public will require through the administrator of the unique registers of the Union the allocation of the number for the divorce certificate in the Unique Register of divorce certificates, kept by the Ministry of Interior.

The number assigned by this register is written down by the notary public in the divorce certificate.

In the divorce certificate, the following will be recorded: the dissolution of marriage by agreement between the spouses before a

notary public, the surname that the former spouses will use after the divorce, as well as, where appropriate, the indications regarding the parental consent on the minors resulting from marriage.

The divorce certificate proves the marriage dissolution by agreement of the parties as well as the surname that both spouses will use after divorce. In its content, it does not make any mention regarding either spouse being at fault for the dissolution of the marriage.

The divorce certificate has the undeniable value of an authentic document.

The divorce certificate is issued in six copies, one copy for each spouse, a copy for the divorce file, one for the divorce file from the notary's office, one for the civil registration at the place where the marriage was concluded or where the marriage concluded in another state was transcribed and one for the Civil register held by the Local Public Community Service of Personal Records.

The Civil Code speaks of a certified copy of the divorce certificate to be submitted to the City Hall where the marriage was concluded, but the notary public is not wrong if s/he submits the institution an original copy of the divorce certificate.

With the issuance of the divorce certificate, the notary public returns the former spouses the marriage certificate, which bears the specification "dissolution of marriage by divorce certificate no. ... / ... followed by the signature and the seal of the notary public who instrumented the case.

The divorce certificate takes effect between the spouses from the moment when it is issued and regarding the third parties, it becomes enforceable at the time of registration in the marriage act or when the third parties took note of it in any way.

In practice the divorce certificate may contain some material errors or omissions (as, for example, incorrect spelling of the name or surname - without diacritics or

without hyphens in composite names, mentioning the number of the marriage certificate instead of the number of the document under which the marriage was concluded, etc.), requiring its correction or completion.

Although the marriage certificate is a notarial act, the amendment procedure cannot be performed according to Law. 36/1995, the Law of notaries public and of notary activity.

In case of the rectification of the divorce certificate, the methodology provided by Government Decision no. 64/2011 will be enforced, according to the provisions on civil status.

In this sense, all the copies of the divorce certificate incorrectly filled in will be withdrawn in order to be rectified.

After correction, the divorce certificate is issued, pursuant to the corrections, and the wrong one is invalidated and filed away in the case file.

However, if there is a material error in the conclusion for the admission of the divorce petition, the correction will be acted on the rules of common law, namely under the provisions of art. 87 of Law no. 36/1995.

In this situation, basically, we can speak of a double correction: one for the conclusion of the divorce petition, which is done according to art. 87 of Law no. 36/1995 and one of the divorce certificate, which is always done according to art. 182, para. (1) of Government Decision no. 64/2011.

II. A second solution provided by law is the rejection of the divorce petition. In this case, the notary public issues the conclusion to reject the divorce petition in the following cases in which the conditions provided by law for divorce by mutual consent are not met:

- a) does not have jurisdiction to settle the divorce petition;
- b) one of the spouses is under interdiction;
- c) one of the spouses cannot express consent free of undue influence;

- d) when filing the divorce petition, the spouses are not both present in person or by proxy;
- e) a spouse or the personal representative refuses to sign the petition personally in front of the notary public;
- f) the spouses refuse to make the statements provided by this Regulation;
- g) the spouses cannot agree on the name to be used after divorce by each of them;
- h) the spouses are not present when filing the divorce petition, the original marriage certificate;
- i) one of the spouses appears before a notary public within the 30 days granted and declares that s/he is no longer willing to continue the divorce petition;
- j) one of the spouses no longer continues the divorce petition as s/he did not appear before the notary public at the date set to declare that s/he still persists in the divorce claim;
- k) the petition is superfluous, since the marriage of the spouses was dissolved by another competent authority;
- l) the spouses get along;
- m) the spouses withdraw their divorce petition;
- n) the spouses cannot agree on their obligations regarding the minor children or the names to use after the divorce;
- o) before the conclusion of the divorce proceedings, one of the spouses dies, the marriage thereby coming to an end.

The notary public shall also issue an order dismissing the divorce petition if following the social inquiry report, it results that the spouses agreement on the joint exercise of parental authority or that on the children's domicile is not in the interest of the children, the public notary advising the parties to address the court.

In the case presented above, according to the provisions of art. 376, para. (5) the settlement of petitions is in the jurisdiction of the courts of law.

As shown, from the analysis of the cases that lead to the rejection of the divorce petition, it appears that most of the grounds for rejection cited in the text of art. 277 of the Rules for the enforcement of Law 36/1995 are justified because they evoke the inobservance of some of the basic conditions for divorce, such as those aimed at putting under interdiction certain people or not having a consent free of any undue influence.

We also note that during the procedure, circumstances may arise that determine the spouses to reconcile or to withdraw the petition.

In case of the rejection of the divorce petition, the notary public shall immediately communicate electronically the solution for closing the position in RNNECD.

Against the notary public's refusal to declare a divorce, there is no remedy of law, but the spouses may address the court in order to divorce.

Although against the notary public's refusal there is no remedy of law, the Civil Code provides the possibility of any of the spouses to require compensation for the damage caused by the abusive denial of the notary public (since it is a tort, the one who claims damages must prove the meeting of the conditions), the competence to settle the petition being that of a guardianship authority.

Also, if the requirements which had brought about the rejection were met in the meantime, there is the possibility of filing a petition by the spouses.

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