

PRIVATE DIVORCE IN EUROPE

The purpose of this paper is an overview about private divorce in Europe. The approach to private divorce is very different in each European jurisdiction that recognises it. The only common point is the spouses mutual consent in the dissolution of their marriage. The main differences in the private divorce proceedings are the authority/professional that is in charge of it and the possibility to apply for it when minor children are involved.

In the following, I will focus on private divorce in the European Union jurisdictions that rule it: France, Spain, Greece, Latvia, Romania, Estonia, Italy, Portugal and Denmark. Other European countries that provide private divorce are Norway, Russia, Ukraine, Moldavia and Armenia.

FRANCE

Avocats - Lawyers

The French Law Act no. 2016-1547 of 18 November 2016 on the Modernisation of the Justice in the 21st Century has introduced the non-judicial divorce in French law, with the necessary involvement of the lawyers.

The new private divorce is now regulated in articles 229-1–229-4 French Civil Code.

There are not any rules regarding national or international jurisdiction. Any couple could go to France to divorce without any connection to France and without applying French law to their divorce: Is this “Las Vegas divorce” in France?

The Lawyers must check the spouses’ legal capacity and the children’s welfare protection.

If the spouses agree on the divorce and on all its consequences, they can only use the new private divorce by mutual consent and cannot apply for divorce before the court. There are however two exceptions:

- .- when a minor child of the spouses has been informed about his/her right to be heard by the family judge and wants to make use of this right; or
- .- when one of the spouses is placed under a legal protection regime such as guardianship or trusteeship

The spouses shall lay down the content of the agreement in a private document, which they must sign and have countersigned by two “avocats”. Each spouse must appoint an “avocat” who will take care of the spouse’s interests; the written agreement must be filed in with the records of a notary public to become an enforcement order. The notary must check that the agreement was signed only after termination of the reflection period and verify that all required annexes have been attached to the deed. This is a formal check, which means that the “avocats” will bear the responsibility for the contents of the divorce agreement.

The divorce agreement must include the terms of the comprehensive settlement of all divorce consequences, in particular children and spousal maintenance obligations, information regarding the liquidation of matrimonial property (the liquidation must be made in a notary deed if there are immovables to be divided) or the statement that no division of property has to be made; and a reference that the minor child has been informed by his/her parents about his/her right to be heard by the family judge but does not want to make use of it.

Minor children

Yes, it is possible if minor children are involved. The parents and their lawyers must check the children’s consent to his/her parents’ divorce and that he/she does not want to be heard by the judge. If the child wants to use his/her right to be heard by the judge, the parents cannot have a private divorce and they must apply the dissolution of their marriage at court. There is dispute in France if the ability and responsibility to convert the private divorce in a court divorce by the child is in his/her best interest.

SPAIN

Notario-Notary

Ley 12/2015 de Jurisdicción Voluntaria introduced in Spain the consent divorce before a notary. The notary will declare the dissolution of the marriage instead of the judge, but having the same competence by virtue of the Law 12/2015. The notary must check the legal terms and equity of the divorce agreement. If the notary finds the divorce agreement unfair for one of the spouses or their grown-up children, she/he can decide not to ratify it and the spouses must go to court (the notary cannot amend the agreement neither can the spouses go to another notary).

The notary of the spouses' last habitual residence or of one of them habitual residence will have jurisdiction.

The spouses must attend personally to sign the deed in front of the notary and be legally assisted by at least one lawyer representing both parties, who will usually write the divorce agreement.

The divorce agreement must deal with the use of the family home, the spousal maintenance and the grown-up children support. Any other agreement regarding the spouses can also be included, such as donations, etc. The liquidation of the matrimonial property regime can be done in the same agreement or afterwards. The notary deed (escritura) will be considered equivalent to a court order.

There is, however, discussion in Spain about the legal nature of this new concept: if it is a private divorce produced by the spouses consent and willingness towards the dissolution of their marriage (a private contract) or a consent divorce which is ratified by the notary as a public authority.

No Minor Children

The spouses cannot divorce from the basis of a private divorce if they have minor or disabled children. They can divorce with children older than 18 years that must appear in front of the notary and sign the divorce deed if they are affected by the

divorce agreement. The law does not refer to “common minor children”, so it is unclear if a notarial divorce is possible if only one of the spouses has minor children.

GREECE

Notary

Law 4509/2017, introduced the consensual dissolution of marriage by virtue of an agreement concluded by the spouses and recorded in a notary Deed.

Minor children

Law 4509/2017 stipulated that the spouses must agree in writing on the issues of parental responsibility, such as custody and right of access, maintenance, etc., before proceeding with the consent divorce in front of the notary.

LATVIA

Notary

According to article 69 of Civil Code has been reformed in year 2010 and according to it: “a Notary may dissolve a marriage in accordance with the procedures laid down in the Notariate Law if both spouses agree to the divorce. A marriage is dissolved as of the day when a notary has drawn up a divorce certificate.

No Minor Children

The spouses must consent to the divorce and do not have common minor children or joint property.

ROMANIA

Notary and Civil Register

Article 375 of Civil Code recognises the consent divorce made at the Civil Register or the Notary of the place of the marriage or the spousal last habitual residence.

The divorce petition will be presented by both spouses. After 30 days the spouses must appear at the Notary to ratify the divorce. The Notary will check that both spouses express their free consent to divorce. The Notary will produce the divorce certificate and send a copy of it to the Civil Register where the marriage took place.

Minor Children

The spouses must agree on the children's name, parental responsibility, children's residence, right of access, maintenance, education, etc.

The notary must request a report on the children's welfare to check that the parental responsibility and the children's residence have been settled in the children's best interest. If not, the Notary cannot dissolve the marriage and the spouses must start divorce proceedings in court.

ESTONIA

Vital Statistics Office and Notary

Divorce is regulated by the Estonian Family Law Act (FLA, entered into force 01.07.2010). According to § 64 FLA, a vital statistics (Civil Register) office may grant divorce upon agreement of the spouses on the basis of a joint written petition of the spouses if both spouses reside in Estonia and Estonian law applies to the divorce.

A notary may grant divorce upon agreement of the spouses on the basis of a joint written petition of the spouses (FLA § 64). Thus, the powers of a notary have been expanded to the cases of divorce including a 'foreign element'. It follows that notaries are entitled to grant divorce *inter alia* in cases where foreign law applies to the divorce or where the spouses do not live in Estonia. Notaries may grant a divorce in all cases where the spouses agree about the divorce, regardless of whether the law of Estonia or of a foreign country is applied to the divorce.

The Vital Statistics Registration Act, passed 20.05.2009, according to §44. Application for divorce: In order to get divorced, the spouses shall

personally submit a joint written application to a vital statistics office (or notary). In the application the spouses shall express their wish to divorce and confirm that they have no disputes concerning the circumstances relating to the divorce. In addition to the above, the application shall contain the following:

- 1) the time and place of contraction of the marriage being dissolved;
- 2) the surname after the divorce;

If a spouse cannot appear with good reason at a vital statistics office in person for submission of a joint application, he or she may submit a separate notarially authenticated application.

Minor children

Yes, if there is no dispute about minor common children or maintenance or the division of joint property.

ITALY

Civil Registry Officer "Ufficiale dello Stato Civile"

Article 12 of Decreto-Legge 12 settembre 2014, n.132 (Law 10 November 2014, n.162) introduced a new proceeding in front of the Civil Status Officer for consensual separation and joint divorce. Spouses who want to apply for divorce must have been separated for at least six months.

The spouses must attend the Civil Registry Office of at least one of them habitual residence or where their marriage is inscribed. The assistance of a lawyer is optional. The couple will sign an agreement which will be endorsed in the document finally drafted by the Officer and will be formally confirmed by both partners after at least thirty days. After such confirmation, the agreement has the same effect as the judicial decree in the consensual separation in court. The agreement cannot envisage any transfer of immovables or valuable assets, although it may provide for spousal maintenance obligation.

No Minor children

The proceeding in front of the civil Status office can be addressed only by childless couples, or couples having children over eighteen but financially independent.

PORTUGAL

Civil Registry Office “Conservatoria do Registro Civil”

The 2008 Divorce Law Reform (Law no. 61/2008, of October 13th) has made divorce by mutual consent less demanding. Only the agreement regarding divorce itself is now demanded as a requisite for divorce by mutual consent.

The spouses must file for divorce at the Civil Registry Office and present a set of documents among which are included mandatory agreements regarding four different matters: maintenance between former spouses, the allocation of the family home, the exercise of parental responsibilities (if not previously regulated) and the placement of pets. These agreements are subject to the scrutiny of the registrar of the Civil Registry as to their adequacy (art. 1776 Portuguese Civil Code) and the agreement on the exercise of parental responsibilities has to be subject to the control of the Public Prosecutors' Office (art. 1776-A Portuguese Civil Code). Whenever these agreements are not ratified by the competent authorities (because they were not deemed to be fit and the spouses failed to alter them adequately), the proceedings will be transferred to the Court, where the judge will decide the issue that the couple has not been able to solve by agreement. In the end, there will be a divorce by mutual consent in the Court (judicial divorce).

Minor Children

The Civil Register Officer must send the agreement to the Public Prosecutors' Office that must inform in thirty days. If the Public Prosecutor's report considers the agreement against the children's welfare, the spouses can amend it. Otherwise, the divorce application will be sent to the Court. The Register Office has now some powers on family matters such as: maintenance and the use of

the family home for grown-up children; the spouses surnames after divorce and changing separation into divorce.

DENMARK

State County Office

On April 1, 2019 a new system entered into force in Denmark to deal with divorce cases. The system has two authorities: a new administrative body, the Agency of Family Law, and a new court, the Family Court. All family law cases start in the Agency of Family Law.

Danish Marriage Act section 42 is applicable. After six months separation the spouses can complete the divorce application form at the State County Office. It is not necessary to have a lawyer.

The parties must agree on the consent divorce, maintenance obligations, parental responsibility, whether the wife maintains a right to a widow's pension, who retains the lease if they shared rented accommodation, in case one of the spouses has had separate property, he/she shall pay the other spouse an amount of money.

In order to become separated the couple must appear before the state county offices to negotiate the conditions. If both parties agree to the negotiated conditions, they do not have to appear before the state county offices again. The divorce is obtained on the basis of the negotiated conditions concerning the separation. Both parties must sign the divorce petition. The divorce petition shall be returned to the state county offices. If the parties do not agree on the negotiated conditions they will have to go to court appearing before the judge.

If the parties have reached an agreement on the negotiated conditions at the state county offices, the lawyer at the state county offices has to ensure that the agreement does not contain conditions which are unconscionable to one of the parties. If it does, he must reject the (separation or) divorce application. Practice shows that this rarely happens.

Minor Children

Yes. Non-conflict cases are to be dealt with by the Agency of Family Law and its decisions can be appealed to the Family Court. As part as the Agency of Family Law, a Children's Unit was set up for children affected by family law issues. In the Children's Unit, staff child experts will ensure that the child is involved early in a case, and a child expert will be appointed as a contact person for a child.

There are also other European jurisdictions that recognises private divorce outside the European Union. The Norwish Marriage Act of 1991 introduced private divorce in Norway and became the first country in Europe to grant consent non-judicial divorce by means of an administrative procedure by the County Governor (Fylkesmann). Private divorce is also available in Rusia, Ukraine, Moldavia and Armenia.

There is a new focus on divorce as a consent private contract, similar to the conclusion of the marriage, in which the spouses should have the leading roll. This new perspective on divorce as a remedy to a matrimonial crisis started unnoticed in Norway in year 1991 and has evolved to a quite progressive regulation in the French Law of year 2016.

What are the prospects of private divorce in Europe? Which private divorce proceeding, from the different approaches in each jurisdiction, will prove to be the better option? We have the legal laboratory in Europe working on different samples...

Amparo Arbáizar, L.L.M.

Family Lawyer

Spain