

Divorce through the Spouses' Agreement by Administrative Method or Notarial Procedure

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Abstract: *This article approaches the problem of marriage termination through divorce through extrajudicial spouses' agreement considering the relevant Romanian legislation.*

After a short introduction which presents the notion of marriage termination, the means of divorce and the subject matter in the case of divorce through spouses' agreement through administrative appeal or notarial procedure, it examines the conditions and presents some procedural aspects regarding the divorce through spouses' agreement through administrative appeal or notarial procedure, and in its final part, the article refers to the mention in the marriage document of the alteration of the civil status as a result of issuing the divorce certificate.

Key words: *divorce, spouses' agreement, registrar, notary public, marriage certificate.*

1. Introduction

The marriage dissolution is the measure of permanent separation of the spouses, adopted in the law conditions. The juridical means which may dissolve the marriage is the divorce [1].

The divorce through spouses' agreement may be pronounced judicially or extra-judicially, and this latter form includes two procedures, an administrative one and a notarial one [2].

The spouses are free to choose one of the three authorities, the judicial court, the registrar or the public notary, if the law conditions are met [3].

The stipulations regulating the divorce through spouses' agreement by the administrative method or notarial procedure and the procedure applicable to it are comprised in the Civil Code [4] (the 2nd Book, About Family, Title II, Marriage, Chapter VII Dissolving the marriage, Section 1 Cases of Divorce, art. 374-378), completed by the stipulations of the Governmental Decision no. 64/2011 for approving the Methodology regarding the unitary application of the stipulation in matter of civil status [5] (Chapter IX, art. 164-182), and also the stipulations of the Order of the Ministry of Justice

no. 81/C/2011 regarding the completion of the Regulation of Application of the Law of Public Notaries and of the Notarial Activity no. 36/1995, adopted by the Order of the Ministry of Justice no. 710/C/1995[6] (Section IV¹ Divorce Procedure, art. 87¹-87⁹).

2. Divorce conditions through spouses' agreement by the administrative method or notarial procedure

According to art. 375 paragraph (1) of the Civil Code, if the spouses agree with the divorce and have no minor children born from the marriage, from outside the marriage or who are adopted, *the registrar or the notary public* of the marriage place or of the spouses' last common lodgement may declare the marriage dissolution through the spouses' agreement, releasing a divorce certificate, according to the law.

Therefore, the competence in the matter belongs, at the spouses' choice, to the registrar or public notary, in the territorial field at the spouses' choice, from the place of marriage contracting or from the place of the last common lodgement [7].

Based on art. 375 paragraph (3) of the Civil Code referring to the stipulations of art. 374 paragraph (2) of the Civil Code, the divorce through the spouses' agreement can only be admitted if one of the spouses has an interdiction.

Consequently, from the content of art. 375 paragraph (1) and (3) of the Civil Code, for the admissibility of the divorce application, the following conditions should be cumulatively met [8]:

- the existence of the spouses' agreement;

The divorce by the spouses' agreement in front of the registrar or of the notary public supposes the spouses' free and non-vitiated consent. The law does not distinguish between the major or minor spouses' divorce and does not require the consents and the authorizations stipulated by the law for contracting the marriage by the minor who reached 16 years old. The regulation is logical because the minor who gets married gains by marriage the full capacity of exertion [9].

- the inexistence of the minor children resulted from the marriage, from outside the marriage or who were adopted;

The legislator institutes the condition of the inexistence of minor children, considering thus the common children of the two spouses. In other words, whether they resulted from the marriage, from outside the marriage or they were adopted, the minor children should have the two spouses as mother and father and the filiation to them should be legally established. The legislator also considers the children from outside the marriage conceived and born by the two spouses before they got married to each other, and the justification is that, according to art. 448 of the Civil Code, the child from outside the marriage, whose filiation was established according to the law, has the same status as a child from the marriage, reported to his or her parents and family. Therefore, the divorce by administrative method cannot be declared by the registrar when the child from outside the marriage established, in the law conditions, his or her filiation to both of the parents, either before their marriage, or after it [10].

- the spouses should have no judicial interdiction;

The judicial interdiction produces the total lack of the person's capacity of exertion and thus, it results that the person having an interdiction cannot express any free and non-vitiated consent [11].

The notary public is competent, next to the case stipulated by art. 375 paragraph (1) of the Civil

Code (the divorce by agreement with no minor children) to declare the marriage dissolution by the spouses' agreement, according to art. 375 paragraph (2) of the Civil Code, when there are minor children resulted from the marriage, from outside the marriage or who were adopted, if the spouses agree on all the aspects referring to: the last name they should have after the divorce; the exertion of the parental authority by both of the parents; establishing the children's domicile after the divorce; the way of keeping the personal connections between the separate parent and each child; establishing the parents' contribution to the expenses for the children's raising, education, learning and professional training. If the social investigation report reveals the fact that the spouses' agreement regarding the common exertion of the parental authority or the one regarding the establishment of the children's domicile is not in the child's interest, the notary public issues a stipulation of rejecting the divorce application and guides the spouses to address to the judicial court, for suggesting the divorce by the spouses' agreement by the judicial way [12].

3. Procedural aspects regarding the divorce through spouses' agreement by the administrative method or notarial procedure

As we mentioned above, the divorce by administrative method, before the registrar, may occur only if the spouses have no minor children born from the marriage, from outside the marriage or who were adopted.

The divorce through spouses' agreement may be declared by the notary public when there are minor children born from the marriage, from outside the marriage or who were adopted, if the spouses agreed referring to the relations between them and the children in the sense of the common exertion of the parental authority, of the way of keeping the personal connections between the separated parent and each child, regarding the establishment of the children's domicile, and also each parent's contribution to the expenses for the children's raising, education, learning and professional training [13].

3.1. The divorce application

The divorce application is made in writing and it is personally signed by the spouses before the registrar or the competent notary public where the demand is submitted [14].

As an exception from the rule according to which the demand is personally submitted by both of the spouses, the law stipulates that the divorce

application may also be submitted at the notary public by a trustee having an authentic power of attorney [15]. The exception only refers to the notarial procedure, not to the administrative procedure, so that the submission of the demand at the registrar should be made personally by both of the spouses [16].

The divorce application *by the administrative method* [17] should contain, next to the demand to declare the marriage and to release the divorce certificate, each spouse's statutory declarations according to which:

- a) they agree with the marriage dissolution;
- b) they have no minor children with the other, children born from the marriage, from outside the marriage or who were adopted together with the other;
- c) they have no interdictions;
- d) they have not demanded the marriage dissolution to other authorities.

Also, in the divorce application, the spouses make the following statutory declarations:

- a) the address of their last common lodgement;
- b) the name they have or, where appropriate, one of them is to have after dissolving the marriage.

When submitting the divorce application, the registrar requires to the spouses the following documents:

- a) the spouses' certificates of birth and marriage, in original and in copy;
- b) the identity documents, in original and in copy;

These documents should also be accompanied by a declaration made before the registrar, when the last common lodgement is not the same as the domicile of both of the spouses registered in the identity documents.

After comparing the data of the presented documents to the data registered to the divorce application, the registrar certifies the divorce application for conformity, except for the marriage certificate whose original is kept.

The divorce application *by the notarial method* contains, next to the application to declare the marriage dissolution and to release the divorce certificate, the spouses' declarations according to which:

- a) they express their free consent regarding the marriage dissolution;
- b) they have no children from the marriage, from outside the marriage or who were adopted, in the hypothesis of their inexistence; if there are minor

children, the application should contain their indication and the spouses' agreement regarding: the exertion of the parental authority by both of the parents; the establishment of the children's domicile after the divorce; the way of keeping the personal connections between the separate parent and each child; the establishment of the parents' contribution to the expenses for the children's raising, education, learning and professional training.

- c) they have no interdiction;
- d) they did not demand the marriage dissolution to any other authorities;
- e) the address of their last common lodgement;
- f) the last name each of them will have after the divorce;

The divorce application should be accompanied by photocopies of the spouses' birth certificates and identity documents and, where appropriate, the certificates of the minor children. When submitting the divorce application, the spouses should present to the notary public the marriage certificate issued by the Romanian authorities in original and in a legalized copy and the legalized copy is to be annexed to the divorce application. The original of the marriage certificate is kept by the notary public until the divorce certificate is released [18].

The registrar or the notary public registers the divorce application and, according to art. 376 paragraph (1) of the Civil Code, grants to the spouses a 30-day term for reflection. The term granted by the registrar or by the notary public after the registration of the divorce application is a compulsory reflection term offering to the spouses the possibility to try to get over their discontents and conflicts, as it is granted for a potential retraction of the divorce application. During the 30 days, the term has a suspensive effect, meaning that the settlement of the divorce application is postponed until it is reached [19]. This term is calculated on free days and it does not contain the day when submitting the application or the day when it ends.

3.2. Settling the divorce application

When the 30-day term expires, the spouses come personally and the registrar or, where appropriate, the notary public checks whether the spouses insist to get divorced and whether their consent is free and non-vitiated in this sense [20].

Regarding the settlement of the divorce application *through the administrative method*, the following solutions are possible:

A) Application closing [21]

The common divorce application closing occurs in the following situations:

- If the spouses do not come together after the 30-day term;
- If both of the spouses or only one of them understand/understands to give up the divorce;
- If one of the spouses has an interdiction before the accomplishment of the divorce procedure;
- If a child is born before the accomplishment of the divorce procedure;
- If one of the spouses died before the accomplishment of the divorce procedure, as the marriage stops by means of death.

The closing is registered to an essay archived to the divorce file.

B) Admitting the application

If the law conditions are accomplished, the registrar declares the marriage dissolution by the spouses' agreement and releases the divorce certificate that is given to the former spouses in a maximum term of 5 working days. The release date of the divorce certificate constitutes the date when the marriage is dissolved. The divorce certificate should have no mentions regarding the divorce reasons or the spouses' guilt [22].

C) Rejecting the application

If the law conditions for the marriage dissolution are not accomplished, the registrar should reject the divorce application [23].

The registrar also emits a stipulation of rejecting the divorce application if the spouses do not agree on the last name they should have after the divorce and guides the spouses to address to the judicial court [24].

In the framework of *the notarial divorce procedure*, the notary public gives one of the following solutions, for accomplishment:

A) admitting the divorce application [25]

The notary public emits an accomplishment of the divorce application if the spouses insist to get divorced, express their free and non-vitiated consent and the other legal stipulations of the Civil Code are cumulatively achieved.

The notary public, based on the admission of the divorce application, releases the divorce certificate declaring that the marriage of the spouses is dissolved through the parties' agreement.

The divorce certificate should consign the marriage dissolution through the spouses' agreement,

in front of the public notary, and also the last name the former spouses should have after the divorce.

The certificate contains no mention regarding the spouses' guilt.

The marriage is dissolved at the release date of the divorce certificate.

B) rejecting the divorce application [26]

The notary public emits an accomplishment of the rejection of the divorce application in one of the following cases, and also in other situation when the legal conditions for the marriage dissolution are not cumulatively accomplished by the parties' agreement:

- a) he has no legal competence to settle the divorce application;
- b) one of the spouses has an interdiction;
- c) one of the spouses cannot express his or her free and non-vitiated consent;
- d) when submitting the divorce applications, both of the spouses are not present and the present spouse insists to register the application;
- e) one of the spouses refuses to personally sign the demand in front of the public notary;
- f) the spouses refuse to give the declarations stipulated by the regulation;
- g) the spouses do not agree on the last name each of them should have after the divorce;
- h) the spouses do not present the marriage document in original when submitting the divorce application;
- i) the spouses have minor children born from the marriage, from outside the marriage or who were adopted and they do not agree on the common exertion of the parental rights or on the children's lodgement;
- j) the social investigation report reveals the fact that the spouses' agreement regarding the common exertion of the parental authority or the one regarding the establishment of the children's lodgement is not in the child's interest;
- k) one of the spouses comes before the notary public after the granted 30 day term, declaring that he or she does not insist to get divorced anymore;
- l) one of the spouses does not insist to get divorced anymore whereas he or she came in front of the notary public at the expiration of the 30-day term for declaring that he or she insists to get divorced;
- m) the demand has no more object whereas the marriage between the spouses were dissolute by another competent authority;
- n) the spouses get back together;
- o) the spouses retract their divorce application;

p) before the accomplishment of the divorce procedure, one of the spouses died so the marriage stopped by this means.

In the rejection cases stipulated at letters g), i) and j) the notary public guides the parties to address to the judicial court, according to the stipulations of art. 374 of the Civil Code.

According to art. 376 paragraph (6) of the Civil Code, the settlement of the applications regarding other divorce effects which the spouses do not agree on, is for the competence of the judicial court.

3.3. Appeal methods

Against the rejecting stipulation of the divorce application by the administrative method, and also against the rejection accomplishment of the divorce application through the notarial method, there is no means of appeal, but the spouses may address with the divorce application to the judicial court, in order to declare the marriage dissolution by their agreement or based on another reason stipulated by the law.

For repairing the prejudice by the abusive refusal of the registrar or of the notary public to declare the marriage dissolution by the spouses' agreement and to emit the divorce certificate, art. 378 paragraph (3) of the Civil Code shows that any spouse may separately address to the competent court.

Thus, the legislator recognizes every spouse's right to claim and obtain from the registrar or from the public notary, the equivalent of the prejudice he or she suffered by accomplishing an illegal act consisting of an omission (the abusive refusal of the registrar or of the public notary), a case when there is delictual civil responsibility, a different source of obligations. These compensations (damage-interests) may be granted, in the conditions of common law, either as a global money amount, or as periodically performed amounts [27].

4. The mention in the marriage document

Once the divorce certificate is released by the registrar or by the notary public, the change of the civil status is to be consigned through a mention in the marriage document.

When the divorce application is submitted at the town hall where the marriage was accomplished, the registrar makes the appropriate mention in the marriage document, after issuing the divorce certificate [28].

In case of submitting the application at the town hall in whose territorial ray the spouses had their last common lodgement, the registrar emit the divorce certificate and immediately brings a certified copy of it at the town hall where the marriage was accomplished, in order to mention this in the marriage document [29].

If the notary public declares the divorce, he or she emits the divorce certificate and immediately bring a certified copy of it to the town hall where the marriage was accomplished, in order to mention this in the marriage document [30].

We think that by using the means of administrative appeal or notarial procedure regarding marriage termination through spouses' agreement, under the conditions of the law, the courts of law are exempted from this cause, which can only be beneficial under the conditions of agglomerating their activity during the last few years.

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[10] Alin-Gheorghe Gavrilescu, *Divorce through the Spouses' Agreement in the Regulation of the New Civil Code*, in Annals of "Constantin Brâncuși" University of Tg-Jiu, Series of Juridical Sciences, no. 3/2011, p. 60; See also Emese Florian, *op. cit.*, p. 109, 145

[11] Ioan Dorel Romoșan, *op. cit.*, p. 259

[12] The legal text expressly refers to the notary public competence in this matter, not in the registrar's one

[13] When the spouses have minor children and they agree on the divorce consequences regarding their status, the minors' hearing is compulsory, according to art. 264 paragraph (1) of the Civil Code. This solution is imposed even if this stipulation is not expressly provided by art. 264 of the Civil Code, referring only to administrative or judicial procedures, and even if the procedure stipulated by the Order of the Minister of Justice no. 81/C/2011 does not stipulate this (Raluca Elena Gâlea, Dan Lupașcu, *Divorce by the Spouses' Agreement*, Romanian Pandect, no. 10/2011, p. 41)

[14] Art. 166 paragraph (1) of the Governmental Decision no. 64/2011 for approving the Methodology regarding the unitary application of the stipulation in matter of civil status; Art. 87² paragraph (1), thesis I of the Order of the Minister of Justice no. 81/C/2011 regarding the completion of the Application Regulation of the Law of Public Notaries and of Notarial Activity no. 36/1995, adopted by the Order of the Minister of Justice no. 710/C/1995

[15] Art. 376 paragraph (2) of the Civil Code. The conventional representation is admitted only when laying down the divorce application. The authentic delegacy of representation should contain the essential investment elements and should consign that there is the spouses' agreement regarding all the elements attracting the public notary's competence (National Union of Public Notaries of Romania, *Romanian Civil Code. Notarial Guide*, Vol. I, the Official Gazette R.A., 2011, p. 136)

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[17] See Dan Lupașcu, Cristina Mihaela Crăciunescu, *op. cit.*, p. 232; Raluca Elena Gâlea,

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[22] See art. 173 paragraph (1), (2) and art. 176 of the Governmental Decision no. 64/2011 for approving the Methodology regarding the unitary application of the stipulations in matter of civil status

[23] See art. 378 paragraph (1) of the Civil Code

[24] See art. 376 paragraph (5) of the Civil Code

[25] See Dan Lupașcu, Cristina Mihaela Crăciunescu, *op. cit.*, p. 237; Raluca Elena Gâlea, Dan Lupașcu, *op. cit.*, p. 42; Art. 87⁵, art. 87⁷ paragraph (1) of the Order of the Minister of Justice no. 81/C/2011 regarding the completion of the Application Regulation of the Law of Public Notaries and of Notarial Activity no. 36/1995, adopted by the Order of the Minister of Justice no. 710/C/1995; Art. 376 paragraph (4) of the Civil Code

[26] See Dan Lupașcu, Cristina Mihaela Crăciunescu, *op. cit.*, p. 237-238; Art. 87⁸ of the Order of the Minister of Justice no. 81/C/2011 regarding the completion of the Application Regulation of the Law of Public Notaries and of Notarial Activity no. 36/1995, adopted by the Order of the Minister of Justice no. 710/C/1995; Art. 375 paragraph (2) of the Civil Code

[27] Aurelian Gherghe, *op. cit.*, p. 442;

[28] Art. 377 paragraph (1) of the Civil Code

[29] Art. 377 paragraph (2) of the Civil Code

[30] Art. 377 paragraph (3) of the Civil Code