

# CONSIDERATIONS REGARDING THE DIVORCE BY AGREEMENT OF THE SPOUSES, ACCORDING TO THE NOTARY PROCEDURE

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## Abstract

*By amending the Family Code according to the provisions of the Law no. 202/2010 regarding some measures in order to speed the solving of processes ("Law of small reform"), representing the introduction to the New Civil Code adopted by the Law no. 287/2009, published in the Official Gazette no. 511 of July 24, 2009, being to become effective, is inserted for the first time the possibility to end the marital relations also before the registrar of births, marriages and deaths or notary public, in strict terms of law. For instance, if there was an agreement between the spouses, without minor children, born during the marriage or adopted, the legislator sets up the possibility to evade the contentious proceeding before the common law courts and allows the spouses to choose between the administrative procedure and the notary procedure in order to dissolve the marriage.*

*In other words, is legislated the possibility of spouses to cease the marital relations also by mutual agreement, like at the time of their marriage, ascertained by the registrar of births, marriages and deaths or notary public. Therefore, on the one hand, is expressed the principle of legal symmetry in this matter, in terms of recognition regarding the ascertaining of the existence of mutual agreement, without the intervention of the magistrate, according to the maxim "mutuus consensus, mutuus dissensus". On the other hand, legitimately, the legislator has in view to eliminate the settlement of the applications for divorce by the courts, given that there is the convergence of spouses' will and no minor child, for the purpose of relieving the courts, a solution that seems quite logical considering that the settlement of such case does not require the jurisdictional work.*

*As a conclusion, an analysis of the new vision of the legislator as regards the settlement of divorce by notary non-contentious procedure is absolutely necessary given that the New Civil Code reintegrates the provisions of the Family Code in the spirit of the unitary conception of the Romanian pre-war private law school.*

**Key words:** divorce, agreement, notary, conclusion, certificate

## Introduction

This paper approaches a very topical subject, which represents an element of novelty, already with great practical application having in view that the legal regulation governing this procedure is in force since a too short time: Divorce by notary procedure.

The divorce procedure has known over the time a series of changes designed to simplify and accelerate the regulation of relations between spouses when the marriage cannot continue and they intend to terminate the marriage by agreement without being necessary to disclose the reasons which led to this decision. The Law no. 59/1993 which also amended the provisions of article 38 of the Family Code<sup>1</sup> introduced for the first time the possibility for the court to pronounce the divorce and only by agreement of both spouses, given the previous legislation in this field of the Family Code that not only did not allow the divorce by mutual consent of the spouses but has attributed to the

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<sup>1</sup> Family Code-Law no. 4 of January 4, 1954 which entered into force on February 1, 1954, amended by Law no. 4 of April 4, 1956 and republished in the Official Gazette, Part I, no. 13 of April 18, 1956, further amended, the last change being made by Law no. 202 of October 25, 2010 regarding some measures to accelerate the settlement of the cases, published in the Official Gazette of Romania, Part I, no. 714 of October 26, 2010 which entered into force on December 27, 2010

dissolution of marriage (by divorce) an exceptional character<sup>2</sup>. Until the amendment of the Family Code by Law no. 202/2010 the divorce by agreement of the spouses could be pronounced only by the court in case of the cumulative fulfillment of two requirements: a) before the application for divorce must have passed at least one year after the marriage conclusion and b) there are no minor children as a result of that marriage. According to the current regulation of the Family Code, as amended by Law no. 202/2010, the procedure of divorce by agreement of the spouses has been simplified more and more and the jurisdiction for settlement was assigned also in the task of other authorities than the court: the notary public and the civil status registrar. Thus, the court may pronounce the divorce by agreement of the spouses regardless the period of marriage and regardless if there are minor children as a result of that marriage, being removed the both requirements from the old regulation of article 38 of the Family Code, the notary public or the civil status registrar being allowed to find the dissolution of marriage by agreement of the spouses by issuing a certificate of divorce to that effect, if the spouses have no minor children, born during the marriage or adopted, according to the new introduced articles 38<sup>1</sup>-38<sup>4</sup> of the Family Code.

By introducing the divorce proceedings by notary procedure the legislator succeeded both to relieve the courts of a number of additional cases, but also to ensure the parties, for the case when there is an agreement as regards the dissolution of marriage and the legal conditions are met, for achieving a competent procedure by an expert of law who will keep watch that their rights and interests to be observed, as well as the subsequent direct access to the conventional procedure of partition to be carried on before the same authority.

## Jurisdiction

According to article 38<sup>1</sup> of the Family Code and article 87<sup>1</sup>, the Regulation implementing the Law of notaries public and notary activity no. 36/1995, as amended and supplemented, the jurisdiction in the field of divorce by agreement of the spouses by notary procedure belongs to the notary public having the office located in the district of the court in whose territorial jurisdiction is the place of the marriage conclusion or the last common residence of the spouses<sup>3</sup>. For Bucharest, the jurisdiction belongs to any of the notaries public who perform their activity in the territorial district of the Tribunal of Bucharest, properly applying the provisions of article 114 of Law of the notaries public and notary activity no. 36/1995, as amended and supplemented<sup>4</sup>. In order to establish the territorial jurisdiction, the public notary will check if the above mentioned condition is fulfilled and if the spouses have not previously appealed to another public notary.

The proof of the place of marriage conclusion (city in which is located the town hall or the civil status office where the marriage was celebrated or the certificate of marriage was transcribed) will be done with the certificate of marriage attached to the application. If the marriage was concluded at the diplomatic missions or at the consular offices, the territorial jurisdiction belong to the notary public of Bucharest, because the place of marriage conclusion is considered the Town Hall of sector 1 in whose civil status register are recorded the certificates of marriages issued by the diplomatic missions or by the consular offices.

The proof of the last common residence is made, where appropriate, with the identity card, if it was the residence of one spouse, or with the document proving the ownership or the use holding (sale-purchase contract, donation, lease, free loan etc.). If the spouses have lived together in a house

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<sup>2</sup> Ion P. Filipescu, *Tratat de dreptul familiei ("Treaty of Family Law")*, the 5th edition, revised and supplemented (Bucharest:All Beck, 2000), 200-201

<sup>3</sup> Article 375 (1) of the New Civil Code provides the compliance with the same requirements in order to determine the territorial and material jurisdiction of the notary public in the field of divorce

<sup>4</sup> Law of the notaries public and notary activity no. 36/1995 of May 12, 1995 was published in the Official Gazette of Romania, Part I, no. 92 of May 16, 1995, as amended and supplemented

for which they have no title, the proof is made by authentic statement of both spouses given on their own responsibility, being recorded both in the application for divorce and in the admission conclusion based on which the certificate of divorce will be issued.

At the same time, the notary public will establish also the material jurisdiction, checking if both spouses are present before him, if they signed the application for divorce before him and if they stated in the application for divorce that: a) they agree the divorce, b) they have no minor children born or adopted during the marriage, c) they have agreed on the name that each of them will have after the divorce, respectively the name had on before the marriage or during the marriage, d) none of the spouses is laid under interdiction.

### Application for divorce

In order that the notary public may check the fulfillment of the above mentioned requirements, he must be, first of all, informed by the spouses by submitting an application which, as I stated above, shall be made in writing and signed personally before the notary public to whom the application is submitted by both spouses. By derogation from the provisions of article 614 of the Code of Civil Procedure in the field of divorce by the notary procedure, the conventional representation of the spouses is not allowed, without any exception, as foreseen in the provisions of article 87<sup>1</sup>(7) of the Regulation implementing the Law of notaries public and notary activity no. 36/1995, so that the spouses will personally appear before the notary public intimated both for the submission of the application for divorce and at the term allowed for the dissolution of marriage<sup>5</sup>. Therefore, the notary public will not authenticate powers of attorney of representation in case of divorce by the notary or the administrative procedure (before the civil status registrar), excepting those required for the representation in case of divorce before the court, under the article 614 of the Code of Civil Procedure.

With the submission of the application for divorce, the spouses will submit to the notary public the certificate of marriage issued by the Romanian authorities, in original and certified copy, the certified copy is to be attached to the application for divorce and the original will be kept by the notary public until the issuing of the certificate of divorce. The application for divorce will be accompanied by photocopies of the spouses' certificates of birth and of their identity documents.

By derogation from the provisions of Law of the notaries public and notary activity no. 36/1995 and the Regulation implementing the Law of the notaries public and notary activity no. 36/1995 regarding the identification of the parties, within the divorce proceedings, the identification of the spouses will be made by the notary public only based on the identity documents submitted by both spouses when filing the application for divorce. Thus, the proof of identity could be made by the spouses with one of the following documents: a) for Romanian citizens: the identity card, the temporary identity card, the ID, according to the provisions of article 11 of the Emergency Ordinance no. 97/2005 regarding the records, the domicile, the residence and the identity documents of the Romanian citizens, as amended and supplemented, and in case of Romanian citizens residing abroad, the passport in which is provided the domicile, as allowed by the provisions of Law no. 248/2005 regarding the regime of free movement of the Romanian citizens abroad, as amended and supplemented, the passport to be within the validity period, both at the time of application and at the issuing date of the certificate of divorce; b) for citizens of the European Union or European Economic Area: the identity document or the passport issued by the state to which belongs; c) for stateless: the passport issued under the Convention regarding the Status of Stateless Persons of the year 1954, accompanied by the temporary or permanent residence permit, as appropriate; d) for foreign citizens from third states: the passport issued by the state whose citizens they are, in which to

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<sup>5</sup> According to article 376 (1) of the New Civil Code, the application for divorce is filed by the spouses together

be applied the visa for entry into the territory of Romania that must be valid both at the time of application for divorce and at the issuing date of the certificate of divorce; e) for foreigners who were granted a form of protection in Romania: the travel document issued under the Convention of Geneva of the year 1951 or, as appropriate, the travel document for the foreigners who obtained a subsidiary protection - conditioned humanitarian protection; f) for the applicants foreign citizens for asylum in Romania: the passport issued by the state whose citizens they are, accompanied by the temporary identity document.

The provisions of Law of the notaries public and notary activity no. 36/1995 and the Regulation implementing the Law of the notaries public and notary activity no. 36/1995 regarding the taking of consent at the conclusion of the notary documents and proceedings if one spouse or both of them are deaf, dumb, deaf and dumb, blind or non-connoisseur of the Romanian language, as well as at the conclusion of the notary documents and proceedings outside the notary office are accordingly applied. In such situations, the interpreter, by who is taken the consent, will sign the application for divorce, alongside the spouses, and the conclusion of acceptance or rejection of the application for divorce, alongside the notary public. If one spouse is illiterate, he/she will sign the application for divorce, the conclusion and the other procedural acts by applying the footprint of the forefinger on his left hand.

In accordance with article 871 (2) of the Regulation implementing the Law of the notaries public and notary activity no. 36/1995, upon receipt of request, the notary public verifies in advance the territorial jurisdiction. If, upon verification, is established that the divorce is in the jurisdiction of another notary office, he will direct the parties to address to the competent notary public, giving the application back to the spouses together with its appendixes, without recording in the register of divorces<sup>6</sup>. The same solution will be adopted also if the other conditions for the registration of the application for divorce are not fulfilled, and the parties insist to register the application, in which case the notary public will proceed to the registration of the application in the register of divorces, only if the spouses have paid the fee, and will issue a conclusion of rejection, motivated in fact and in law. The conclusion of rejection is not subject to any appeal.

If more notary offices are competent, the competence for fulfillment the divorce proceedings will belong to the first intimated office.

Before checking the territorial jurisdiction, the notary public will verify that, as regards the dissolution of marriage, there are foreign elements and will proceed according to the legal provisions governing the dissolution of marriage where there are legal relations with foreign elements<sup>7</sup>.

After checking the material and territorial jurisdiction and all the conditions foreseen in article 38<sup>2</sup> of the Family Code, as amended and supplemented, and by the Regulation implementing the Law of the notaries public and notary activity no. 36/1995 (including the identity of the spouses and if the data entered in the application for divorce correspond to the information contained in the documents attached to the application), as well as after the payment of the notary's fee, the notary public will proceed, at the date of receipt of the application, to the registration of the application in the register of divorces kept by the notary office and the communication to the National Register of records of the applications for divorce<sup>8</sup>, managed by Infonot Systems SRL<sup>9</sup> of the request for the registration of the

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<sup>6</sup> The Order of the Minister of Justice no. 81/C/2011 published in the Official Gazette of Romania, Part I, no. 59 of January 24, 2011 regarding the supplement of the Regulation implementing the Law of the notaries public and notary activity no. 36/1995 following the amendments in the Family Code by Law no. 202/2010, introduces two new letters in the article 40 paragraph (1), after the letter l): m) the register of divorces; n) the index of the register of divorces

<sup>7</sup> Article 87<sup>1</sup> paragraph (5) of the Regulation implementing the Law of the notaries public and notary activity no. 36/1995, as amended

<sup>8</sup> National Register of records of the applications for divorce aims the keeping, at national level, of the records of the applications for divorce addressed to the notaries public in order to avoid the double registration of the applications for divorce, as well as the records of the solutions given by the notaries public

application for divorce. The application for divorce will be registered in this register if, following the verifications made by Infonot Systems S.R.L., is found that there is no other application for divorce registered by the spouses. If, following the verifications, is found that the spouses did not appeal to another notary public, Infonot Systems S.R.L. will register the application on behalf of notary office where the applicant notary unfolds his activity and will issue to him a certificate attesting the number under which the application was registered in the National Register of records of the applications for divorce and that the application for divorce is found at the notary office in order to be settled. If, following the verifications, is found that the spouses have addressed a similar application to another notary public, the registration number being already assigned for a certificate of divorce issued to the same spouses, Infonot Systems S.R.L. will issue a certificate and the notary public will reject the application and will guide the spouses to address to the first intimated notary, without being bound to refund the fee charged when submitting the application.

### The Term

Receiving the certificate, the notary public will proceed to the registration of its number in the register of divorces and setting the term for the dissolution of marriage, which occasion the spouses will have to personally appear. In the absence of the certificate issued by Infonot Systems S.R.L., the notary public cannot establish a term for the dissolution of marriage.

In accordance with article 38<sup>2</sup> of the Family Code, the term set by the notary public for the possible withdrawal of the application for divorce is of 30 (calendar) days<sup>10</sup>. The term may not be shorter, it may not be extended by granting a new term and it will be recorded by the notary public both in the application for divorce and in the register of divorces. The notary public will also take into account, when granting the term of 30 days, whether term will expire in a day in which the notary office is closed for justifiable reasons (non-working days, legal holidays, rest leave), in which case the term may be extended until the first working day. For the calculation of the term of 30 days, will be applied the provisions of article 101 and the following of the Code of Civil Procedure in the field of calculation of the procedural terms. The notary public will have in view also the availability of spouses to be present at date to be determined, in which case he may, if one spouse requests and the other agrees or both of them request, to set a term longer than 30 days.

The notary public will set just one term, which he will orally notify to the parties, specifying the date (day, month, year) and the hour when they must personally appear at the notary office. If, at the determined term, the notary public may not be present for justified reasons, to settle the application for divorce, he will notify the Chamber of the Notaries Public in order to delegate another notary public to the notary office, to settle the application.

### Admission/rejection conclusion of the application for divorce

At the expiry of the determined term, the notary public verifies if: a) both spouses are personally present, b) insist on the application for divorce, c) agree the name they will have after the divorce, d) maintain the other statements given when submitting the application of divorce, e) can express their free and uncorrupted consent, f) none of the spouses is laid under interdiction, g) the

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<sup>9</sup> Infonot Systems S.R.L. is the administrator of the National Registers of computerized records of some notary acts and procedures foreseen in article 56<sup>1</sup> of the Regulation implementing the Law of the notaries public and notary activity no. 36/1995. By the Order of the Minister of Justice no. 81/C/2011, in the article 56<sup>1</sup> after letter d) was introduced a new letter, the letter e): National Register of records of the applications for divorce (NRRAD) in which are registered the applications for divorce by the notary procedure

<sup>10</sup> The term of 30 days for the possible withdrawal of the application for divorce is also governed by article 376 (1) of the New Civil Code

birth or the adoption of a child has not occurred until the set term. The persistence or the lack of persistence of each of the spouses is found in the conclusion of admission, respectively of rejection of the application for divorce in accordance with article 87<sup>3</sup> paragraph (5) of the Regulation implementing the Law of the notaries public and notary activity no. 36/1995. If, following the verifications, the notary public finds that the above requirements are met and, simultaneously, the other conditions foreseen in the Family Code and in the Regulation implementing the Law of the notaries public and notary activity no. 36/1995, will proceed to the drawing up of the conclusion of acceptance of the application for divorce in which he will ascertain the dissolution of marriage and will dispose the issuing of the certificate of divorce. The conclusion of admission will be signed both by the notary public and by both spouses and, as appropriate, by an interpreter. If, following the verifications, the notary public finds that have occurred new elements leading to a cumulative non-fulfillment of the above conditions, he will proceed to the drawing up of the conclusion of rejection in which he will dispose the rejection of the application for divorce. The conclusion of rejection will be sent the same day, electronically, to Infonot Systems S.R.L. to make the appropriate mentions in the National Register of records of the applications for divorce.

Against the conclusion of rejection there is no appeal, but the spouses may address the application for divorce to the court for the dissolution of marriage by agreement or for other reason foreseen by law. Either spouse may apply, by separate proceedings, to the competent court to repair the damage caused by the abusive refusal of the notary public to ascertain the dissolution of marriage by agreement of the spouses and to issue the certificate of divorce (article 38<sup>4</sup> of the Family Code).

The application for divorce, the conclusion of admission/rejection of the application for divorce has the same number as the number of the file of divorce in the register of divorces kept by each notary office.

If, after the registration of the application for divorce in the National Register of records of the applications for divorce have passed 60 days and during this period the notary office has not requested a number of certificate, the register operator will proceed to the closing of the mention in this register, in which case a new application for divorce of the same spouses may be registered. Where, in the range between 30 and 60 days after the submission of the application, another notary office asks the registration, the operator of the National Register of records of the applications for divorce will inform the notary, upon the issuing of the certificate, that the notary office which received the application has not requested a number of certificate of divorce, with possibility that the application be rejected<sup>11</sup>.

### Certificate of divorce

In case of finding the divorce by the notary public, he will issue the certificate of divorce, immediately submitting a certified copy thereof to the town hall of the place where the marriage was concluded, in order to make mention in the marriage act, in accordance with the provisions of article 38<sup>3</sup> of the Family Code.

Before the issuing of the certificate of divorce, the notary public will require, through Infonot Systems S.R.L., the assignment of the number of the divorce certificate from the Sole Register of certificates of divorce kept by the Ministry of Administration and Interior, and the number assigned in this register shall be written down by the notary public in the certificate of divorce. If, following the submitted application, is found that in this register is already assigned the registration number for

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<sup>11</sup> Article 7 of the Methodological Norms regarding the organization and operation of the National Register of records of the applications for divorce (NRRAD), approved by the Decision no. 4/January 14, 2011, adopted by the Executive Office of the Council of the National Union of the Notaries Public in Romania

a certificate of divorce issued to the same spouses, the applicant notary public will dispose, by conclusion, the rejection of the application for divorce, as having no object, according to the provisions of article 87<sup>6</sup> paragraph (2) of the Regulation implementing the Law of the notaries public and notary activity no. 36/1995, making the appropriate mention both in the register of divorces and in the National Register of records of the applications for divorce.

The drawing up and signing of the conclusion of admission by all the parties, the obtaining of the number of the divorce certificate and the drawing up and issuing of the divorce certificate will take place at the same day, respectively at the term granted for the dissolution of marriage.

The certificate of divorce will record the dissolution of marriage by agreement of the spouses before the notary public and the surname that the former spouses will have after the divorce.

As noted above, after the issuing of the certificate of divorce, the notary public shall immediately send a copy thereof to the town hall of the place where the marriage was concluded or the place where the certificate of marriage issued in another state was transcribed, in order to make mention about the divorce in the marriage act and an original copy to the civil status register kept by the people record department of that county or of Bucharest.

Once with the issuing of the certificate of divorce, the notary public gives back to the spouses the certificate of marriage on which he will mention: "Dissolution of marriage under the certificate of divorce no. ....".

According to the article 39 of the Family Code, the marriage is dissolved on the date of issuing of the divorce certificate. In relation to third parties, the patrimonial effects of marriage shall cease on the date of mention about the certificate of divorce on the edge of the marriage act or the date on which they have been informed about the divorce in another way. According to article 385 of the New Civil Code, the matrimonial regime (article 312 (1) of the New Civil Code provides that the future spouses can choose as matrimonial regime: lawful community, separation of goods or conventional community) ceases between the spouses on the date of introduction of the application for divorce, but the spouses may require together to the notary public to find that the matrimonial regime ceased on the date of separation in fact. The legal matrimonial regime applies whenever the future spouses have not concluded a matrimonial convention<sup>12</sup>.

## Conclusions

According to the current regulations, the procedure of divorce by agreement of the spouses may be accomplished not only by the court, but also by non-contentious procedure performed by the notary public or by the civil status registrar. When the spouses choose the notary procedure, fulfilling the conditions foreseen by law, the term for the settlement of the application for divorce is very short (30 days), at the end of which, if they insist in the dissolution of marriage, obtain the certificate of divorce which opens the way towards solving the other effects of marriage which are not in the jurisdiction of the notary public or the cessation of common property through judicial or conventional partition, in a shorter time and enjoying a considerably increased comfort than when this procedure was in the exclusive jurisdiction of the courts.

The current regulations are in full compliance with the ones of the New Civil Code to meet the needs of a rapidly and continuous changing society, to which the old regulations, inspired from the date they were adopted, could no longer meet the need to have options with multiple settlement alternatives.

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<sup>12</sup> Marieta Avram and Cristina Nicolescu, *Regimuri matrimoniale (Matrimonial regimes)* (Bucharest: Hamangiu, 2010), 28

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