DIVORCE PROCEEDINGS, IN LIGHT OF THE NEW PROVISIONS OF LAW NO. 202/2010 REGARDING SOME MEASURES FOR ACCELERATING THE RESOLUTION PROCESS

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Abstract:
Law no. 202/2010 regarding some measures for accelerating the resolution process establishes procedural rules with immediate effect, meant to streamline judicial procedures, and to expeditiously resolve processes, regulating specific legislative measures, which aim mainly to simplify solving cases.
In matters of divorce, a first change is that, unlike the previous situation, the divorce case by agreement will be judged in the council chamber. Also, according to the above mentioned law, if the conditions for dissolution by agreement are accomplished, we can divorce not only in front of the court, but also to the notary public or officer of civil status, opportunity that did not existed in past. Another novelty is the express possibility to demand resolution through mediation for divorce, specifying that the parties can not only refuse the judge's recommendation to seek mediation, but that the parties can refuse mediation session even after information. Regarding mediation, the law brings news on divorce. Under that legislation, divorce can be made by the parties even when the couple has minor children and agree to the mediation process.

Key words: *divorce by agreement, family mediation, divorce to the public notary, divorce in front of the civil state officer, Law no. 202/2010*

Introduction:

The Law regarding some measures for accelerating the resolution process, so-called "Law of the small reform in justice's domain"[1] came into force in two steps. So, excepting the provisions regarding the divorce in front of the civil state officer and to the public notary (provisions which came into force in 60 days from the date when this law was published in the Romanian Official Monitor, first part), the above mentioned law has to be applied even from the end of November, 2010.

By this law it has been introduced new juridical institutions and the legislator had intervened on so-called procedures of prevarication of the judicial act.

Therefore, in the domain of divorce, we are talking about setting up new possibilities for dissolution of marriage (divorce by agreement to the public notary or in front of the civil state office, mediation in divorce proceedings, as we will detail below) or by changing certain aspects of the development process of divorce by agreement before the court (proceedings in closed session, the acceptability of divorce even if there are minor children resulted from marriage).

The new provisions will first try to answer the organizational needs of the overcrowded courts, but also to promote the idea that the divorce should be seen not as a war but as an expression of reciprocal enforcement *"mutuus consensus, mutuus dissensus"*.

Thus, it seems that the establishment of divorce by agreement - administrative or notary way - could answer the real need for those who want an easier and faster divorce. On the other hand, in fact, the new law states also the stimulation of the parties to settle their conflicts outside the judiciary way, many of the processes aiming the collapse of families being "pushed" into a mediation process, possible or not, as we see in the following.

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[1] Law no. 202/2010, published in Romanian Official Monitor, first part, no. 714/26 october 2010.

Paper content:

I. Divorce by agreement - changes and new institutions

In matters of divorce, a first change from the Law no. 202/2010 is that, unlike the previous situation, the divorce case by agreement will be judged in the council chamber (article 613^1 paragraph 2 of the Romanian Civil Procedure Code, modified by the Law no. 202/2010). Spouses may use the path to divorce by agreement in front of the court, regardless of the duration of their marriage and whether or not there are minor children resulting from the marriage (article 38 paragraph 1 of the Romanian Family Code, as it was amended by Law no. 202/2010); it is required that the court determine whether the consent of each spouse is free and uncorrupted. However, divorce by agreement between the spouses can not be accepted if one spouse is put under ban (see Romanian Family Code, article 38, paragraph 2).

If we are make a comparative analysis for *the mutual consent divorce in France,* we will see that this type of divorce proceedings is available for couples who consent to divorce and who are also agreeable as to the separation and settlement terms (child custody, financial matters, property and so on). A single court appearance is required to obtain this type of divorce. The acting lawyer(s) file a divorce petition at the clerk's office of the Higher District court. The couple will be then be summonsed to appear before the Family Affairs Judge of the Higher District Court of their place of residence. At this time, the couple will submit their written agreement settling all practical and financial issues regarding themselves and their children, for review by the court. The judge will grant the divorce immediately, if he approves the agreement. However, if the judge considers that the agreement does not protect the children's interests sufficiently, or that of either spouse, a second hearing will be required to examine a new settlement.

Also, returning to the Romanian law, according to the above mentioned act (Law no. 202/2010), if the conditions for dissolution by agreement are accomplished, we can divorce not only in front of the court, but also to the public notary or civil state officer, opportunity that did not existed in past.

But, in these both cases, the civil state officer or the public notary at the marriage place or at the last common house of the spouses may divorce them by consent only if they haven't any minor children born naturally from marriage or adopted (article 38^1 from the Romanian Family Code, introduced by the Law no. 202/2010).

Divorce application is filed by the spouses together. Civil state officer or public notary registers the request and grant a period of 30 days for the eventual withdrawal of an application for divorce. Thereafter, the civil state officer or, where appropriate, the public notary verifies that the spouses insist on divorce and whether, in this sense, their consent is free and uncorrupted. If the spouses continue in divorce, civil state officer or, where appropriate, the public notary gives them a certificate of divorce without making any mention of the guilty of the spouses. Also in the case of divorce by agreement in front of the court, the judge does not make any mention regarding the guilty of one or another husband. If spouses can not agree on the family name to wear after the divorce, the civil state officer or, where appropriate, notary public releases a disposition to reject the application for divorce and spouses are guided to address to the court. Also, for the resolution of any other effects of divorce, on which the spouses do not understand, court will have jurisdiction.

When the divorce application is filed to the hall where the marriage took place, the civil state officer, after releasing the certificate of divorce, makes a proper mention in the act of marriage.

If the application is made to the municipality in whose jurisdiction the last dwelling spouses were common, civil state officer releases the certificate of divorce and forward forthwith a certified copy thereof to the municipality where the marriage took place, to be made the mention in the act of marriage.

In case of divorce by notary public, it shall release the divorce certificate and forward immediately a certified copy thereof to the municipality where the marriage took place, due to be mentioned in the act of marriage.

II. Mediation in divorce proceedings

It is well known that divorce mediation is a dispute resolution process in which, as an alternative to judicial or administrative decision-making, the spouses are assisted by an impartial and neutral professional (the mediator or mediators) in order to analyse the situation arising from the spouses' wish to be divorced and to try to reach their own agreement with regard to some or all the matters under dispute. [2]

Mediation and the processes of negotiation or arbitration. Mediation has the common characteristic of resolving disputes between spouses or among family members without a judge's order after an adversarial trial. However, by contrast with negotiation, where the parties or their representatives try to seek a resolution to their dispute through direct discussions, in mediation the dispute resolution process is facilitated by a third party, neutral and impartial. Comparative to arbitration, where the parties delegate, by mutual agreement, the power to decide to a third party, in mediation this third party does not have the power to decide the dispute and his purpose is to help the parties to reach to their own decision.

The European Union promote actively methods of an alternative solution of the conflicts, among them mediation. Directive 2008/52/EC regarding mediation[3] applies to cross-border disputes in civil and commercial matters. This refers to disputes in which at least one party is domiciled in a member State other than that of any other party to the date on which the parties agree to use mediation or the date on which a court decides the use of mediation. The main objective of this legal instrument is to encourage the use of mediation in the Member States. In this respect, the directive includes five basic rules:

• requires to the Member States to encourage training of mediators and to ensure high quality of mediation;

• provides for any individual judges the right to invite parties in conflict to use mediation first if deemed advisable, given the circumstances of the case;

• provides that agreements resulting from mediation can become effective if both parties request that; this can be achieved, for example, through an approval by a court or authentification by a public notary;

• ensures that mediation takes place in an atmosphere of confidentiality; that is why the mediator can not be required to provide evidence in court about what happened during mediation in a further dispute between parties to that mediation;

• guarantees that the parties do not lose their right to address to the court as a result of the mediation period running: time limits for bringing an action in court are suspended during mediation.

Mediation is a natural response to the evolution of society, serving to produce social ties and affirmation of values such as autonomy, responsibility, adapting to new circumstances, solidarity and agreement. Also, mediation is a process of creation and management of social life, which allows either restoring the social connection, either preventing or resolving conflicts due to the intervention of a third party, impartial and free of power decision, which guarantees communication between partners.[4]

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[2] See M.M. Casals, *Divorce mediation in Europe: An Introductory Outline*, E.J.C.L., Vol. 9.2 July 2005, on http://www.ejcl.org/92/art92-2.html.

[3] The Directive was published in the EU Official Journal on 24 May 2008. Member States must comply with this Directive by 21 May 2011.

[4] M. Sassier, *Construire la médiation familiale*, ed. Dunod, Paris, 2001, p. 10.

The definition of mediation should not be limited to that of an alternative model of conflict resolution. Thus, it can prevent conflicts, fix and restore the social and cultural ties, it is important to be seen not as a procedure, but rather as a process. This is because a process is adaptive, while a procedure involves constraints, pre-establish stages, precisely determined. Although based on specific rules and steps are inevitable, the process of mediation does not follow a procedural logic, the mediator mastering the process and having the ability to adapt it, depending on the situation.

In family law, mediation scope is various: the separation of spouses, the divorce, the children's custody, the division of goods or some behavioural problems in the family. Written contract of mediation is a condition *ad validitatem*; article 45 paragraph h) of the Act[5] draws attention to the condition of multiple copies for the approval by which a settlement is achieved (separate from the mediation agreement), if agreed to be in written form, that is to be drawn in as many copies as are parts (in accordance with the provisions of the Romanian Civil Code, article 1179).

The paradox of the mediator's neutrality[6] is that it stops where begins the debate of mediation philosophy. In this case it is not neutrality, but a commitment from the mediator that a conflict can be solved otherwise than by force report. Neutrality gets, in mediation context, a different meaning than the traditional, defined in public international law. It no longer appears as a state or attitude of non-involvement in the strained relations that exist between states, but as an active manifestation of the mediator to facilitate resolution of a conflict without a specific interest in the solutions. Also, the neutrality translates into a lack of quality for the mediator to represent the parties or to be their warrant.[7]

On the other hand, it must not understand that the neutrality of the mediator excludes its commitment and responsibility. The mediator must be neutral towards the parties, not toward the human relationships, since the conflict resolution through mediation is a choice freely consented.

Resolving conflicts through mediation, the parties make an appropriate response to the conflict, by focusing on the interests at stake. If the traditional conflict resolution is focused mainly on the legal aspects of the dispute, the mediation's aim (in accordance with the law) is to find a realistic and convenient solution for both sides in the conflict.

Thus, the mediation process, in comparison with the classic justice, does not have the purpose to establish guilt or innocence of the parts. The mediator has no power of decision, but provides procedural information, stimulates dialogue, facilitates the exchange of views and information between the parties, helps parties to clarify their needs and interests, to overcome barriers in communication and to resolve disputes through an advantageous solution for both parties.

Family mediation, like other forms of mediation, is divided between different visions of what it should be, what is its purpose and how does she evolve.[8]

Many authors and practitioners define mediation as a practical, specifically concept: a way of resolving conflicts, which allow finding solutions for situations of disagreement, tension, even outrage among people, channelled, more or less, to a concrete goal of reorganization of family life.

Mediation is a way to better manage conflicts[9] and is based on the principle of dialogue, listening and construction of the agreement, not on that of confrontation which would involve the

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[5] Law no. 192/2006 regarding mediation and the profession of mediator, published in Romanian Official Monitor, first part, no. 441/22 mai 2006, modified by Law no. 370/2009, published in Romanian Official Monitor, first part, no. 831/3 december 2009.

[6] J.M. Lascoux, *Pratique de la médiation (Une méthode alternative à la resolution des conflits)*, ed. ESF, Issy-les-Moulineaux, 2004.

[7] D.A.P. Florescu, A. Bordea, *Medierea*, Ed. Universul Juridic, Bucuresti, 2010, p. 54-55.

[8] L. Dumoulin, *La médiation familiale: entre institutionnalisation et recherche de son public*, Recherches et prévisions 70 (2002), p. 6.

[9] M. David-Jougneau, *La médiation familiale: un art de la dialectique*, in A. Babu (et al.), *Médiation familiale. Regards croisés et perspectives*, Paris, Eres, coll. „Trajets", 1997, p. 21-22.

dichotomy winner / loser. It will require techniques thanks to which the mediator helps the parties to resolve the conflict between them. About the voluntary, consensual nature of the mediation, we note the absence of any obligations of the parties to participate in such proceedings. In terms of a conflict of private law, the possibility of amicable settlement is available to the parties directly involved, rather as an opportunity to slow, rigid and costly mechanism court proceedings, and whether the arbitration. None of the special laws, without violating fundamental human rights, will not be able to regulate the requirement of an institution designed to address, through a third party, by way of negotiations between the parties, their conflict. Because, therefore, it would be create an obligation for the parties from a conflicting report to address, contractually, to a third person that facilitate their settlement. [10] And, more of this, we must make a grammatical interpretation of the article 43 from Law no. 196/2006 (above-mentioned), who provide that the parties in a conflict *may presents* together in front of a mediator.

Mediation can occur by an independent manner, at the initiative of the parties and outside of any legal proceedings when the parties feel that certain difficulties arise. But the mediation can be used also when the dispute is already in front of the court. Thus we are talking about "judicial mediation"[11] and his complementarities to the judicial proceedings. This other form of justice, a gentle justice, joins the traditional one, filling it by proposing different ways to see and resolve conflict. When the judge recomands mediation and the parties accept it, the parties should go in front of one mediator, for information regarding the advantages of the mediation. After this session of information, the parties decide if they are going to proceed in accepting or not resolving their divorce through mediation.[12]

We also have to avoid some myths about family mediation, like: the mediator gives legal advice (the fact is that the mediator does not give legal advice to the parents, he may only suggest possible best or worst case scenarios and this is done only to help the parents to think about what might happen); mediation is similar to going through counselling services (the mediation is not counselling or therapy; the mediator focuses the parents on future goals to help avoid future disputes); family mediation requires compromise (we must take into consideration that the goal of mediation is an agreement that everyone can accept, but it does not always require a compromise, it does just require that each person listen to each other and be flexible); the family mediator makes the decision for the parties (never a family mediator does not make decisions); if we mediate, we must come to an agreement (no, the parties do not have to come to an agreement and they should not feel pressured to agree to anything; if one party or another does not agree the mediation the court will decide); courts are more qualified to reach a fair decision (only the spouses know their needs and wants better than the court, so they are in a better position to reach an acceptable agreement).

Conclusions:

Regarding divorce by agreement, it is undeniable that the Law no. 202/2010 intended to streamline divorce proceedings. However, leaving aside the necessity to relieving the courts of the many processes of divorce, we must not forget that although we have the possibility to divorce in front of a public notary, some issues concerning property division between husbands will be solve nevertheless in front of the court because the non-agreement between the parties in this regard (and they are many cases of). This is regrettable if we take into consideration that the main purpose of these provisions is that they would have to be a helping hand to the courts. So, whether we like it or not, we do not think that the courts will actually be relieved considerably from their cases.

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[10] D.A.P. Florescu, A. Bordea, *Medierea, op. cit.*, p. 47.

[11] P. Bonnoure-Aufiere, *Médiation familiale et la loi: regards d'une avocate, médiatrice familiale*, in A. Babu (et al.), *Médiation familiale, op. cit.*, p. 162.

[12] See art. 614^1 from the Romanian Procedure Civil Code, introduced by the Law no. 202/2010.

Regarding mediation, it is good that we should not see this exclusively in his peaceful image, as if it will be enough for the individuals to enter into such a process for the inequalities and differences of opinions and interests to be subdued.

Most conflicts end up in court because the individual believes the court ruling is the sole and only way which can be set right. Mediation is a new liberal profession, in the pioneering stage, appeared recently in Romania and therefore, that any new institution, it is harder understood and accepted by Romanian citizens.

It may be good that between justice / judges and mediation / mediators it will be establish a fully functional collaborative partnership, justice being the ultimate solution to the serious conflicts that could not be resolved through mediation.

Basically, by signing such of cooperation protocols can be brought to the attention of potential justice seekers information regarding: the advantages of mediation, the mediation service procedure, the role of the mediator in resolving disputes amicably, mediators and the parties' right to choose their own mediator.

Family mediation (not only this form, but the mediation, in general) remains a practical as confidential, so little known in society. The absences of an information, accurate and complete (if possible), which must be released in the juridical literature or in practice, produce a utopia effect on individuals, depriving the real impact of the necessity of such institutions.

But to what extent the regulation of the profession of mediator will become compatible with its conceptual and philosophical foundations, and the social realities, it remains to be seen.

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