

# NOTARY PROCEDURE AND JUDICIAL PROCEDURE FOR THE DIVORCE WITH SPOUSES' AGREEMENT

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## Abstract

*Compared to the old divorce procedures, the dissolution of marriage analysed according to the provisions of the New Civil Code (art.373-404) and the New Code of Civil Procedure (914-934) represents a real legislative innovation.*

*Taking into consideration the judicial procedure, the legislator settles the amicable divorce, referring to spouses' consent on the divorce, as well as to the divorce caused by one of the spouses' poor health, and the divorce through no fault of their own.*

*According to the new legal matters, the dissolution of marriage does not come exclusively under court jurisdiction. Thus, as far as the amicable divorce is concerned, even if the spouses have minor children, either of their own or adopted, they have at their disposal not only the judicial procedure, but also the notarial one. If the spouses do not have minor children, they can go to court, but they can also go to the notary public or to the registrar in order to certify the dissolution of marriage of their own accord.*

*The legislator's preference of the amicable divorce is obvious, especially as the dissolution of marriage of spouses' own accord does no longer depend on either the length of marriage, or on their not having minor children.*

**Keywords:** *divorce, juridical procedure, New Code of Civil, the dissolution of marriage, New Code of Civil Procedure.*

## 1. THE NOTARIAL PROCEDURE REGARDING THE DIVORCE

### 1.1. Preliminary Information

Seen as a legislative innovation, the divorce procedure before a notary public was initially stipulated in the Civil Code adopted in 2009 and subsequently undertaken by Law no. 202/2010. Through this law (namely through the introduction of articles 38<sup>1</sup>-38<sup>4</sup>), the Family Code was modified in such a way that it could only be applied to the collaborative divorce, in which case the spouses did not have minor children and they had to personally come before the notary public in order to file for a divorce – legal representation was not allowed.

In the new Civil Code, the relevant provisions are the legal matters stipulated in art. 375 - 378.

### 1.2. The Notary Public's Competence

On receiving the divorce petition, the notary public must check his non-exclusive jurisdiction.

#### 1.2.1. The Notary Public's Territorial Jurisdiction

When determining his territorial jurisdiction, the notary public shall check whether the place of spouses' marriage or their latest home address are in located in the territorial jurisdiction of the court he has the notarial office in and also if they have not seen another notary public before.

In this respect, the proof of marriage shall be done via the Certificate of Marriage, and the proof of their latest home address shall be done via their ID cards – if it was the home address of at least one of them or via the contract which proves ownership or total utility. If the spouses lived in a house they did not have any act upon (for example one of their parents' or other relative or acquaintance) the proof shall be done through the legal declaration of them both, hereby declared

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under the penalty of perjury and registered both the in divorce petition and in the County Court decision, based on which the Certificate of Divorce shall be issued<sup>1</sup>.

### 1.2.2. The Notary public's Subject Matter Jurisdiction

1. The collaborative divorce when the spouses have no minor children either of their own or adopted during their marriage, established through the provisions of art. 375 paragraph 1.

The following conditions must be totally satisfied in order for a notary public, under the subject matter jurisdiction, to ascertain the divorce taking into consideration the conditions stipulated in paragraph 1:

- a) spouses' consent on the divorce;
- b) no minor children either of their own or adopted during their marriage;
- c) the spouses decided upon the surname each of them shall have after the divorce, and the surname they had when they got married and during their marriage;
- d) neither spouse is mentally incompetent;
- e) both spouses express their free and uncorrupted consent.

When completing the consent, the notary public applies the provision of Notary Public Law no. 36/1995 and its implementing regulation, if one or both spouses are deaf, mute, deaf-mute or if they cannot speak Romanian. In such cases, the interpreter, via whom the consent is registered, shall sign the divorce petition next to the two spouses, and the County Court decision regarding the acceptance or dismissal of divorce next to the notary public.

The spouse' identification shall be made by the notary public only via their ID cards they bring when they file for divorce, as follows: for Romanian citizens resident in Romania – the ID card, the provisional identity card, the identity card, and for Romanian citizens who are resident abroad, the passport which clearly shows their home address.

The notary public shall check the identity cards issued by Romanian authorities with the Directorate for Persons' Record and Databases' Management, which is subordinated to the Ministry of Internal Affairs, according to the agreement between the U.N.N.P.R. (National Union of Public Notaries from Romania) and the Ministry of Internal Affairs.

As far as spouses' own accord on the divorce is concerned, it must also contain the effects of the divorce regarding the surname they shall have after the divorce (either to keep the surname they had during their marriage, or to take the surname they had before their marriage). It must be mentioned that the lack of accord shall lead to the dismissal of the divorce petition and to the spouses' guidance towards court (art. 376 paragraph 5 the New Civil Code).

Although the notary public does not have material competence to give a judgement on contentious matters regarding the other effects of divorce<sup>2</sup>, if the spouses agree on the other effects of divorce, such as the maintenance obligation between them, common home, compensation payment, etc., the notary public may certify this agreement in a transaction contract in accordance with art. 2267 - 2278 Civil Code, fact also stated by the authors of the commented New Civil Code.

As far as the end of the state of being married is concerned, the provisions of art. 385 the New Civil Code stipulate that the marriage between the two spouses is over starting with the day they file for divorce.

In this respect, in accordance with art. 386 paragraph (1), the New Civil Code, the notary public shall mention the date when the divorce petition was filed for in the Certificate of Divorce.

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<sup>1</sup> Instructions regarding notaries public's fulfillment of the divorce procedures, page 3, adopted through Decision no. 15/2011 of the Executive Bureau of UNNPR (National Union of Public Notaries from Romania)

<sup>2</sup> Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constatinovic, Ioana Macovei, *The New Civil Code. Observation on articles* - CH Beck Publishing House, Bucharest, 2012, page 417.

We mention the fact that the provisions of art.386 are only applicable in case the divorce petition is made after the Civil Code has come into force, and the legal documents are signed by one of the spouses against the other spouse after the day the divorce is filed for.

Paragraph 2 of art. 385 of the New Civil Code stipulates that the spouses may ask the court to ascertain that the matrimonial regime was over on the day of the factual separation.

According to the opinions stated in the legal literature<sup>3</sup>, the notary public may also authenticate a transaction contract if the spouses agree on this aspect.

Regarding the liquidation of the community regime, the provisions of article 355 NCC are applicable, in the sense that when community ends, it shall be liquidated via an authentic notarial deed, a complex deed, which has two phases: the first phase – the spouses' share of common assets is first determined (based on how much each of them contributed to their acquisition), and also the fulfilment of common duties; and the second phase is represented by the distribution of joint assets and debt settlement.

The state of marriage chosen liquidation deed shall be communicated by the notary public to the Notarial National Register of States of Marriage with the purpose of information, and to the other advertising registers stipulated by law, taking into consideration the nature of assets: for real estate – the Real Estate Register, and for the personal estate – Electronic Archive of Real Movable Guarantee and Trade Register.

As compared to the comments above, we do not share the opinion stated by the authors of the new commented Civil Code<sup>4</sup>, naming that the liquidation of the matrimonial regime might be done via a transaction contract.

We must also mention the fact that, according to the provisions of article 356, until the liquidation of the matrimonial regime, the ex-spouses remain condominium co-owners of joint assets until the share entitled to each of them is decided.

2. In light of the statement stipulated by article 375 paragraph 2, the notary public is competent to ascertain the dissolution of marriage on the spouses' own accord also when there are minor children born during the marriage, out of the marriage, of both spouses or adopted by both spouses.

In this case, the notary public may ascertain the divorce only if the following cumulative conditions are fulfilled:

- the surname each of the spouses shall bear after the divorce;
- the obligation of both parents towards their children;
- the decision about children's home after the divorce;
- the way of preserving the personal relationship between the separated parent and each child;
- the decision upon parents' contribution to children's upbringing, education, school and professional development.

If the psychosocial investigation report shows that spouses' own accord regarding shared parenting or the one regarding children's home is not in the child's interest, the provisions of art. 376 paragraph 5 (NCC) shall be applied. In the case, the notary public shall dismiss the divorce petition and shall guide the spouses towards the court.

Although under the provisions of art. 375 paragraph 2, the legislator does not use the notion "child's best interest", the phrase "child's interest" must be interpreted in accordance with the provisions of art. 3 Law 272/2004 regarding the protection and promotion of children's rights, and with the provisions of art. 1 of the Convention regarding children's rights.

Furthermore, this principle constitutes a part of the right of respect for one's family life, stipulated in art. 8 of the European Convention on Human Rights (see: *C. Birsan*, Convention, p. 651; CEDO, *Ignaccolo-Zenide vs. Romania*, the decree of 25 January 2000, published in the Official

<sup>3</sup> E. Florian, *Family Law*, IV<sup>th</sup> Edition, CH Beck Publishing House, Bucharest, 2011, page 105.

<sup>4</sup> Flavius-Antoniou Baias (Coordinator), *quoted operas*, page 417.

Gazette no. 6 of 8 January 2001, when it was decided that state authorities have the duty “de a depune eforturi rezonabile pentru ca atunci când interesele părinților sunt în conflict, iar copiii nu sunt suficient de maturi pentru a-și exprima ei înșiși, în mod clar, propriile preferințe, interesele superioare ale acestora să fie promovate”<sup>5</sup>

Under the procedure of the amicable divorce, when there are minor children, it is compulsory that the tutelary authority should carry out the psychosocial investigation report and interview the minor who is 10 years old.

The procedure of interviewing the minor shall be carried out by the notary public, under the conditions stipulated in art. 264 the NCC.

If parents cannot agree upon one or all these aspects, the notary public issues the dismissal of the divorce petition and sends the parties to the court of law.

The provisions of art. 376 paragraph 4 the NCC were incorrectly interpreted in the legal literature<sup>6</sup>, without taking into consideration the cumulative fulfilment of the conditions stipulated in art. 375 paragraph 2. These conditions state that the notary public may ascertain the divorce also in the case that the psychosocial investigation report shows that spouses’ agreement is not in the minor’s interest, with the argument that “the parties have no other solution but to go to court since they have agreed on child custody and since their main purpose, the dismissal of their marriage, has anyway been accomplished”. We think this opinion is in complete contradiction with the legal provisions which settle the notary procedure of divorce.

### **1.3. The divorce procedure when minor children are involved is:**

The divorce petition has to be personally submitted to the notary public by both spouses together.

Although the legislator does not mention the content of the divorce petition, the National Union of Public Notaries from Romania via its issued instructions, the notary guide and the notary guidebook, has outlined some professional notary routines and has contributed to the development of a common notary practice concerning the divorce (regarding the divorce petition, pronouncement and rejection of divorce, divorce certificate, etc.)

As an exception, the divorce petition can also be submitted by a mandatary having a special power of attorney.

As far as the notarial procedure divorce is concerned, representation is admitted but only when the divorce petition is submitted, case in which the mandatary (the special authentic power of attorney) shall contain the represented spouse’s accord (principal) on all elements mentioned in the petition. When submitting the divorce petition, the fact that the represented spouse is aware of the hearing shall be mentioned in the trust mandate, according to art. 376 of the Civil Code. The lack of one of the mentioned elements from the trust mandate shall lead to the rejection of the divorce.

Representation is also admitted when submitting the divorce petition without minor children.

We reiterate the fact that the authentic representation procedure must contain investiture essential elements and state the fact that spouses’ own accord has been reached regarding all elements which make the notary public’s competence authority.

After the notary public confirms that he has been legally invested, he shall allow a 30-day period of reflection and shall request the fulfilment of the necessary formalities regarding the minor: the psychosocial investigation, the minor’s interviewing.

The 30-day period of time is calculated according to the Civil Procedure Code, in the sense that the first and the last day are not taken into account.

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<sup>5</sup> *Ibidem*, page 432 „spare no effort to have children’s best interests promoted when parents’ interests are in conflict, and the children are not mature enough to clearly state themselves their own preferences”).

<sup>6</sup> E. Florian, *quoted operas.*, page 108.

If the report of the psychosocial investigation has not been submitted in due time and, on probable cause, the minor has not been interviewed, and both spouses insist on the divorce petition, other hearings can be allowed only with regard to the fulfilment of the two conditions.

In conclusion, the decision upon the scheduling of another hearing may only be because of the lack of the psychosocial investigation and/ or the impossibility of interviewing the minor.

We mention that, as compared to the divorce with minor children, for the divorce without minor children only one hearing can be scheduled.

In accordance with the provisions of art. 264 the NCC, the notary public shall interview the minor who is 10 years old, taking into consideration the following conditions:

- He/ she shall be accompanied by both parents;
- the interviewing shall be done in the presence of both parents;
- the notary public shall write down the minor's declarations.

In the case of divorce with minor children, the spouses must agree upon the following aspects:

- the obligation of both parents towards their children;
- the decision about children's home after the divorce;
- the way of preserving the personal relationship between the separated parent and each child;
- the decision upon parents' contribution to children's upbringing, education, school and professional development.

In order to certify the spouses' own accord upon the above mentioned, the notary public shall authenticate the spouses' settlement, which shall be stated in the divorce certificate.

As compared to the previous settlement in the Family Code, the legislator of the new civil code has provided the modern solution according to which the both parents together are responsible for the child's upbringing, thus the parental rights and responsibilities regarding both the child's person and assets are equally shared by both parents (art. 483 paragraph 2 the NCC).

Parents' agreement regarding the contribution of each of them to the expenses concerning the upbringing, education, learning and professional development may have various aspects and must take into consideration the minors' needs and the parents' possibilities.

We have to mention that the parent in whose house the minor lives cannot deny the other parent's contribution because the beneficiary of this right is the minor and not the parent.

The criteria for establishing the alimony are settled by art. 529-533 the NCC.

If after analysing the divorce petition and the documents submitted, the notary public sees that the legal provisions are not cumulatively satisfied, he shall dismiss the divorce, and shall guide the parties towards the court, according to the provisions of art. 374 Civil Code. In this case, the dismissal of the divorce shall compulsorily contain the reason of the divorce dismissal, as well as the parties' guidance towards the court.

The notary public issues the divorce dismissal in one of the following cases:

- a) he does not have the legal competence to settle the divorce;
- b) one of the spouses is under interdiction ;
- c) one of the spouses cannot express his/ her free and uncorrupted consent;
- d) if when the divorce petition is submitted one of the spouses is not present, or not represented, or the trust mandate does not contain all compulsory elements stipulated in art. 375 Civil Code, and the present spouse insists on having his/ her petition registered;
- e) one of the spouses refuses to sign the petition personally in presence of the notary public;
- f) the spouses refuse to fill in the official forms stipulated by the present regulation;
- g) the spouses cannot decide upon the surname each of them shall bear after the divorce;
- h) when they submit the divorce petition, the spouses do not submit the original certificate of marriage;
- i) the spouses have minor children, either of their own or adopted during their marriage, and have not decided upon:
  - the obligation of both parents towards their children;

- the decision about children's home after the divorce;
- the right of preserving the personal relationship between the separated parent and each child;
- the decision upon parents' contribution to child/ children's upbringing, education, school and professional development.

**j)** one of the spouses comes in front of the notary public within the term of 30 days, according to art. 376 Civil Code, and declares that he/ she does not want to proceed with the divorce petition;

**k)** one of the spouses does not proceed with the divorce petition because he/ she has not come in front of the notary public within the term of 30 days, according to art. 376 Civil Code, in order to declare that he/ she wants to proceed with the divorce petition;

**l)** the petition remained without an object as the marriage between spouses has been dissolved by another competent authority;

**m)** the spouses make up;

**n)** the spouses withdraw their divorce petition;

**o)** one of the spouses died before the closure of the divorce procedure, the marriage thus ending;

**p)** the lack of the psychosocial report;

**q)** the impossibility of interviewing the minor who is more than 10 years old;

**r)** the conclusions of the psychosocial investigation state that the spouses' agreement regarding the sharing of their obligations towards their children or regarding their decision about children's home after the divorce is not in the latter's best interest<sup>7</sup>.

Paragraph 2 of the art. 378 the NCC stipulates the fact that there is not any way to attack the divorce dismissal by the notary public, but the lack of motivation or the improper argumentation of the divorce dismissal shall lead to his/ her tort liability, according to the provisions of art. 378 paragraph 3, the NCC.

If after the period of reflection, the spouses come personally and insist on divorcing, all the conditions stipulated in art. 375 the NCC being fulfilled, (and, in the case of the divorce with minor children, the psychosocial investigation report and the minor's testimony) the notary public shall write the divorce acceptance and shall issue the certificate of divorce, without mentioning any fault.

According to the provisions of art. 87 of the Notary Public Law implementing regulations, with subsequent modifications, after the issuance of the certificate of divorce, the notary public shall immediately send a copy to the town hall of the city where the marriage was registered or where the Certificate of Marriage was rewritten in order to add the specifications about the divorce in the certificate of marriage, and another copy to the Register of Births, Deaths and Marriages, kept by the County Directorate for Persons' Records. Together with the issuance of the Certificate of Divorce, the notary public shall give the spouses the Certificate of Marriage with the mention *The Marriage has been ended through the certificate of divorce no. ....*

Both in the case of admittance and in the case of dismissal of the divorce petition, the notary public shall immediately communicate the solution electronically with the purpose of the closure of the position in the National Register of Records for the Divorce Petitions.

The date when the marriage ends is the date when the Certificate of Divorce is issued, according to the provisions of art. 382, paragraph 3, the NCC, and the heritage elements of the divorce become opposable to third parties on the day the advertising formalities are fulfilled<sup>8</sup>.

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<sup>7</sup>Doina Rotaru(in group), *Notarial Practice Guide* (Ghid de practică notarială), București, 2011, pages 232-234.

<sup>8</sup> E. Florian, *quoted operas.*, page 254.

## 2. JUDICIAL PROCEDURE FOR THE DIVORCE WITH SPOUSES' AGREEMENT

### 2.1. Preliminary Information

The annulment of the marriage with spouses' agreement has been initially mentioned in the Family Code (art. 38, paragraph 2). According to it, only the judgment instance could pronounce the divorce based on the agreement of both spouses and only if there have been accomplished the following conditions: at least one year had passed since the conclusion of the marriage, no minor children resulted from the marriage at the introduction date of the divorce request.

The Law no. 202/2010 concerning some measures for the acceleration of the judgments, anticipating big changes that will be determined by the New Civil Code, has modified the art. 38 and it has introduced the art. 38<sup>1</sup>-38<sup>4</sup>, dispositions by which there have been eliminated the cumulative conditions concerning the duration of the marriage and the inexistence of minor children resulted from the marriage, this dissolution form of the marriage not having any obstacle excepting the interdiction of one of the two spouses<sup>9</sup>.

In the New Civil Code, the main material is constituted by the dispositions of the law mentioned in the art. 373 letter a, and in the art. 374 from the Chapter VII –The Second Book.

The new dispositions concerning the divorce are applicable no matter the conclusion moment of the marriages, before or after its application.<sup>10</sup>

The judicial procedure of the divorce by reciprocal agreement observes the special dispositions mentioned by the code of civil procedure that is in force at the moment when the request had been handed in, conclusion resulted from the interpretation of the dispositions of the art. 24-25 from the New Code of civil procedure and of the art. 3, paragraph 1 of the Law no. 76/2012<sup>11</sup>. As a consequence, after the entering into force of the New Code of Civil Procedure<sup>12</sup>, the judgment instance will apply two codes of civil procedure, as it follows<sup>13</sup>: The code of civil procedure from 1865 will be applied for the cases in judgment and the New code for the trials introduced for judgment after its application.

The special procedure of the judicial divorce is mentioned in the old Code of civil procedure in the Book VI, Chapter VI, art. 607-619. In the New Code of Civil Procedure, the main material concerning the common dispositions is in the Book VI, Title I, Chapter I, art. 914-927, while the divorce by agreement, a form of the remedy divorce, is regulated in the Chapter II, art.928-931.

### 2.2. The Judicial Divorce by Spouses' Agreement. Notion. Forms. Conditions.

The Judicial Divorce by spouses' agreement has two forms depending on the moment when there appears the common agreement concerning the annulment of the marriage: the consensual divorce itself, when the divorce request is formulated by both spouses and the imperfect consensual divorce, when it happens at the request of one of the two spouses, accepted by the other one<sup>14</sup>.

Concerning the incidence of the dispositions concerning the imperfect consensual divorce, the provisions of the art. 374 NCC are applicable in all the cases when the spouses- the accused person, agrees with the divorce asked by the claimant, no matter if the divorce is based on the separation in fact for a bigger period than 2 years (art. 379 paragraph 2 -art. 373 letter c) or if the divorce is promoted from the spouse's guilt (the accused person), who recognizes his facts, situation when the

<sup>9</sup> *Ibidem*, page 100.

<sup>10</sup> Art. 39 paragraph 2 of the Law 79/2011.

<sup>11</sup> Law no. 76/2012 concerning the application of the Code of civil procedure.

<sup>12</sup> The New Code of Civil Procedure has been applied on the 15<sup>th</sup> of February 2013.

<sup>13</sup> Ghe. Piperea (in group), *The New Code of civil procedure. Notes. Correlations. Explanations.*, CH Beck Publishing House, Bucharest, 2012, page. 24.

<sup>14</sup> E. Florian, *quoted operas*, page. 104.

claimant agrees, the instance pronounces a decision for the annulment of the marriage by agreement without a serious analysis of the reasons of divorce<sup>15</sup>.

So, although legislatively, in the art. 373 letter a) it generically refers to the possibility of marriage annulment by agreement, with both spouses' agreement, or with the agreement of one of them (obviously based on the another one guilty), request accepted by the accused person- spouse, and at the letter c) it mentions the divorce at the request of one of the spouses for a separation in fact bigger than 2 (taking into consideration the claimant's guilt), the instance can pronounce the divorce based on the art. 373 lit. a) any time the accused person agrees with the divorce request promoted by the spouse -claimant, independently of the mentioned reason<sup>16</sup>.

Now the divorce by agreement is not anymore conditioned<sup>17</sup> under the aspect of the marriage duration and nor under the aspect of the inexistence of minor children resulted from the marriage, the art. 374 NCC expressly mentioning that the divorce can be pronounced no matter the marriage duration and the existence or the inexistence of minor children resulted from the marriage. The syntagm „children resulted from the marriage” reeferes to the children born from the marriage and also to the children born from the common life of the two before the marriage, and also to the children adopted by the two spouses during their marriage<sup>18</sup>.

Although, according to the art. 373 paragraph 1 and to the art.374 NCC, the judgment instance can pronounce for the annulment of the marriage by agreement, only if:

- both spouses have formulated a divorce request or just one of them, the request being accepted by the accused persons- spouse

- both spouses have full exercise ability, none of them being subjected to a judgment interdiction

- both spouses personally express their agreement for the annulment of the marriage

- the common agreement is free and not corrupted

Concerning the reasons of the divorce request, if the divorce by the agreement itself, does not interferes the judgment instance and is not necessary to be indicated. If the divorce by the imperfect agreement, the request being formulated by a spouse against the another one that accepts then the divorce by agreement, the reasons are not verified anymore, even if they are mentioned in the request addressed to the judgment instance, resting just simple affirmations<sup>19</sup>.

## 2.3. Procedural Aspects

### 2.3.1. The Competence for the Solution of the Divorce Request

According to the art. 914 NCC, the divorce request is the competence of the law court belonging to the circumscription of the last common house of the spouses. If the spouses did not had a common house or of none of them does not live anymore in the circumscription of the law court where their last common house had been, the competent law court is the one from the circumscription of the house of the accused person (spouse), and if the accused person has no house in the country and the Romanian judgment instances are also internationally competent, it is the competence of the law court from the circumscription of the claimant's house.

<sup>15</sup> Art.613<sup>1a</sup> of the old Code of civil procedure ( applicable for the divorces in judgment in the application moment of the New Code of civil procedure). The dispositions are also mentioned by the New Code of civil procedure in the art. 931 paragraph 1.

<sup>16</sup> Gabriela Frențiu, The observations of the New Civil Code. Family. Hamangiu Publishing House, Bucharest, 2012, page. 284.

<sup>17</sup> Art. 38 of the Family Code, before its modification by the Law 202/2010 put a condition for the annulment of the marriage by spouses' agreement: till the introduction date of the divorce request, there should be passed at least 1 year since the marriage conclusion and there should not exist any minor children resulted from the marriage.

<sup>18</sup> The New Civil Code. Observation on articles - Coordinators Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constatinovic, Ioana Macovei – CH Beck Publishing House, Bucharest 2012, page 401.

<sup>19</sup> Gabriela Frențiu, quoted operas, page 283.



The new dispositions have taken from the old regulation the law text referring to the material and territorial competence concerning the divorce, replacing only the syntagm „domicile” with the syntagm „ house”, that refers to the place where the person effectively and stably lives, even if this does not correspond to the domicile.

### 2.3.2. The Divorce Procedure by the Agreement Itself

The divorce request will comprise, besides the mentioned stipulated by the law for the summon request, also specific mentions concerning the names of the minor children resulted from the marriage or adopted. If the two spouses have no minor children, this mention will be done. If the spouses have reached to an agreement concerning the solution manner of the accessory requests, they will mention this in the divorce request.

The accessory requests of the divorce concern the names of the spouses after the annulment of the marriage, the realization of the parental authority, the parents’ contribution to the expenses for children’ growth and education, the children’ house and the parents’ right of having personal connections with them, the family’ house.

The requests having as an object the payment of expenses for the moral or material prejudices suffered after the divorce, as well as those concerning the compensatory performance are incompatible with the consensual divorce, because they have as a basis exactly the excusive guilt of one of the two spouses.

According to the art. 929 NCPC, the judgment instance receiving the request will proceed to the verification for the existence of the free and uncorrupted consensual agreement of both spouses and it will fix a term for the solution of the request in the Council Chamber.

The divorce request formulated by the two spouses together should be signed by both spouses or by a common mandatory with a special authentic power of attorney, but if one of the spouses had not signed, this aspect can be completed in the first judgment term. If till this moment the divorce request is not signed by both spouses, the judgment instance discuss about this aspect, having the possibility of reconsidering the request in a common law one<sup>20</sup>.

In the first judgment term, the judgment instance will verify if the spouses still want to annul the marriage based on their agreement, and if not so, it will retains the parties’ reconciliation, and in case of a positive answer, it will pronounce the divorce, without administrating proofs concerning the reasons for divorce.

Concerning the accessory request for the exercise of the parental authority there has been considered that in order to solve it, it is obligatory to exist in the file an psycho- social enquiry report from the part of the tutelary authorities, the pronounciation upon the request without this report being excluded<sup>21</sup>.

According to the art. 930 paragraph 1, by the same decision the judgment instance will take into consideration the parties’ agreement concerning the accessory requests. The Art. 396 NCC disposes that the judgment instance will decide upon the reports between the divorced parents and their minor children, taking into consideration the interest of the minor children, the conclusion of the psycho- social enquiry report and the parties’ agreement.

In the sense of the art. 264 paragraph 1 of the NCC it is obligatory to hear the child that has reached the age of 10 years, but it is possible to also hear him even if he had not reached the age of 10 years, but the judgment instance considers necessary for the solution of this case even taking into consideration the interest of the minor child.

If the spouses had not reached to an agreement upon the solution manner of the accessory requests, the judgment instance will proceed to the administration of the tests in order to solve them, being obliged to also pronounce upon the requests concerning the names of the spouses after the

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<sup>20</sup> Ghe. Piperea (in group), *quoted operas*, pages. 902.

<sup>21</sup> Gabriela Frențiu, *quoted operas*, page. 287.

divorce, the exercise of the parental authority, as well as the parents contribution to the children's expenses for growth and education.

This decision is definitive and irrevocable concerning the divorce, and it cannot be subjected to an attack mean.

The dispositions of the art. 930 paragraph 3 stipulate that, if there it will be case the judgment instance can continue the judgment concerning the other accessory requests, pronouncing a decision subjected to the attack means, in the legal conditions.

### 2.3.3. The Divorce Procedure by Imperfect Agreement

According to the art. 931 NCPC, if the divorce request is based on the guilt of the accused person- spouse, and this one recognizes the facts that have lead to the destruction of their life together, the judgment instance, with the claimant's agreement, will pronounce the divorce without a serious analysis of the divorce reasons and without making any mention concerning the guilt for the marriage annulment, the divorce being pronounced based on the art. 373 letter a).

The simplified procedures applied only if there have been cumulatively accomplished the following conditions:

1. the summon request should be based on the guilt of the accused person- spouse

In the introduction moment of the divorce request, the claimant cannot have the certitude that the accused person will recognize, sense when all his tries belong to the classical model of the divorce by guilt<sup>22</sup>.

2. the accused persons should recognize the mentioned facts that have lead to the destruction of their life together

According to the art. 931 paragraph 1 the accused person can recognize the facts determined by him, and the judgment instance, if the claimant also agrees, will pronounce the divorce without a serious verification of the reasons of divorce. In this sense, the opinion<sup>23</sup> is that the accused person can recognize the facts determined by him and mentioned by the claimant till the end of the judgment research.

The accused person can recognize the facts determined by him by appeal or by the answers given to the interrogatory addressed to him

3. the claimant should agree with the divorce without administrating proofs and without indicating in the divorce decision the guilt of the accused person

The judgment of the divorce request initially introduced by a spouse and accepted by the accused person- spouse, not having a special legal derogatory disposition concerning the judgment of such request in the Council Chamber, will take place in a public session according to the art 213 NCPC.

As in the case of the divorce by agreement itself, the decision pronounced by the judgment instance concerning the marriage dissolution, is definitive and irrevocable and it will not comprise references to the guilt of the accused person- spouse.

The accessory requests will be solve taking into consideration the parts' agreement, without being necessary to administrate proofs. Also, the requests concerning the payment of damages for the moral and material prejudices suffered after the divorce, as well as those referring to the compensatory performance are incompatible with the imperfect consensual divorce, for the same reasons that have been previously mentioned referring to the divorce by agreement itself.

The decision concerning the accessory requests is subjected to the attack means, in the conditions of the law (art. 930 alin.4-art. 931 paragraph 2).

No matter the form of the agreement by which the divorce appears, agreement itself or imperfect agreement), the marriage will be annulled since the date when the decision upon the main

<sup>22</sup> E. Florian, *quoted operas*, page. 112.

<sup>23</sup> *Ibidem*, page.113, Gabriela Frențiu, *quoted operas*, page. 284.

request had remained definitive, so since the pronouncement date according to the dispositions of the art. 382 paragraph 3 NCC.

The Art. 927 paragraph 4 NCPC mentions that the judgment instance, in order to accomplish the publicity forms, will send the definitive decision, by itself, towards the Civil Status Service where the marriage has been concluded, towards the national Register of the matrimonial regimes, as well as towards the Trade Register, if one of the spouses had been a professional.

As a conclusion, according to the new regulations, the divorce by the spouses' agreement, with or without minor children resulted from the marriage of the two spouses or adopted, represents a true legislative innovation, being clear the legislator's preference for the divorce in this manner, because the annulment of the marriage by agreement is not conditioned anymore by the marriage duration, nor by the inexistence of minor children, but also by the institution of the simplified procedure of the divorce initiated by the guilt against the accused person and consensually ended, without administration of proofs.

If both spouses reach to an agreement concerning the annulment of the marriage they can address to the public notary or to the judgment instance, and if they don't have minor children resulted from their marriage they can also chose the administrative procedure of marriage annulment.

If the parties also beneficiate of extrajudicial procedures, the reason for the existence of the possibility for the dissolution by agreement consists in the facts that the parties that have agreed upon the divorce, cannot agree upon the accessory requests of the divorce<sup>24</sup>. Based on the art. 930 paragraph 2 NCPC, if the spouses do not reach to an agreement concerning the accessory requests, the judgment instance will administrate the proofs admitted by the law for their solution, and based on the parties' request, it will pronounce a decision concerning the divorce, also solving the requests concerning the name taken by the spouses after the divorce, the exercise of the parental authority, as well as the parents' contribution to the expenses necessary for the minor children' growth and education. The paragraph 3 of the same article also mentions the possibility of the judgment instance of continuing the judgment of other accessory requests, pronouncing a decision subjected to the attack means, in the legal conditions.

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<sup>24</sup> Flavius-Antoniou Baias (Coordinator), *quoted operas*, page 374.