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Divorce and legal separation



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1 What are the conditions for obtaining a divorce?

To obtain divorce in Malta, a married couple must file a joint petition, or one spouse must file a petition for divorce from the other. At the time that divorce proceedings commence, the spouses must have lived apart for a period or periods totalling at least four years during the five years immediately preceding the petition, or at least four years must have elapsed from the date of legal separation. The court must also be satisfied that there is no reasonable prospect of reconciliation of the spouses. Another condition is that the spouses and all their children must receive adequate maintenance where it is due, but this right to maintenance can be renounced by the parties at any time. A divorce pronounced between spouses who have been separated by contract or by judgement does not produce any change in what has been ordered or agreed to between the parties, except for the effects that result from divorce according to law. It should be noted that before seeking divorce it is not necessary for the spouses to have been separated by contract or by judgement.

2 What are the grounds for divorce?

The law does not refer to the grounds for divorce. However, as already stated in the reply regarding the conditions, at the date of the commencement of divorce proceedings the spouses must have lived apart for a period or periods totalling at least four years during the five years immediately preceding the request, or at least four years must have elapsed from the date of legal separation.

3 What are the legal consequences of a divorce as regards:

3.1 the personal relations between the spouses (e.g. the surname)

A divorce pronounced between spouses who have been separated by contract or by judgement does not produce any change in what has been ordered or agreed to between the parties, except for the effects that result from divorce according to law. The law of separation applies regarding surnames and therefore, the wife may, after separation, choose to revert to her maiden name, but this choice must be done by declaration in the public deed of separation, and in the case of judicial separation the wife shall make this declaration by means of a note filed in the records of the case before judgement. When divorce is pronounced, all civil effects and the obligation of the parties to live together cease. Moreover, the spouses' succession rights also cease, with effect from the date of the granting of the decree or judgement of divorce becoming *res iudicata*.

3.2 the division of property of the spouses

A divorce pronounced between spouses who have been separated by contract or by judgement does not produce any change in what has been ordered or agreed to between the parties. Section 66D(5) of the Maltese Civil Code provides that where the community of acquests or the community of residue under separate administration shall have ceased, the parties shall have a right, in any case, if they both agree, to divorce without liquidating the assets which they hold in common.

3.3 the minor children of the spouses

When divorce is pronounced this has no effect on the parents' rights and obligations in regard to their children or in regard to any agreement reached between the parties on the care and custody of the children. However, one of the parties may claim that the other party is not fit to have the custody of their minor children, and when the court makes such a declaration, the party declared unfit will not be able, upon the death of the other party, to take over the custody of the minor children without court authorisation. Maintenance in favour of the minors remains in force until they reach their eighteenth year: in the event that the child continues his studies, maintenance continues up to 23 years unless otherwise agreed.

3.4 the obligation to pay maintenance to the other spouse?

A divorce pronounced between spouses separated by contract or judgement does not change what has been ordered or agreed to between them. Therefore, the obligation of maintenance is not removed through divorce unless the parties decide otherwise. The court may, in the judgement accepting the petition for divorce, and at the request during the hearing of the case of the party to whom maintenance was due — for that party or for the children — from the other party, order that the payment of maintenance from the other party be safeguarded by means of an appropriate and reasonable guarantee, in accordance with the circumstances of the parties. That guarantee shall not be of an amount exceeding the amount of maintenance for five years. This request may also be made at any time after the said judgement, when maintenance is due.

Where a petition for divorce is filed in the competent civil court by either of the spouses, or by both spouses after having agreed that their marriage is to be dissolved, and where the spouses are not separated by means of a contract or a court judgement, before granting leave to the spouses to proceed for divorce, the court shall summon the parties to appear before a mediator, either appointed by it or with the mutual consent of the parties, for the purpose of attempting reconciliation between the spouses, and where that reconciliation is not achieved, and where the spouses have not already agreed on the terms of the divorce, for the purpose of enabling the parties to conclude the divorce on the basis of an agreement. The said agreement shall be made on some or all or of the following terms:

- care and the custody of the children;
- access of the two parties to the children;
- maintenance of the spouses or of one of them and of each child;
- residence in the matrimonial home;
- division of the community of acquests or the community of residue under separate administration

4 What does the legal term “legal separation” mean in practical terms?

Legal separation refers to the filing by one of the spouses of the relevant action against the other spouse and the Court delivers a judgement on the rights and obligations that the spouses have when they are legally separated.

5 What are the conditions for legal separation?

The conditions for the granting of legal separation are one or more of the following:

- Adultery;
- Acts of domestic violence;
- Excesses, cruelty, threats or grievous injury by one party against the plaintiff, or against any of his or her children;
- The spouses cannot reasonably be expected to live together as the marriage has irretrievably broken down;
- Desertion.

6 What are the legal consequences of legal separation?

With regard to maintenance, the spouse against whom the separation is pronounced is required to supply maintenance to the other party and the children until they reach the age of eighteen years and up to the age of twenty-three years if they are remain in full-time education, training or learning. The amount due to the other

party and children is established by taking into consideration all the circumstances of the spouses and the children, including the following:

- the needs of the children, after considering all their circumstances;
- any disability, whether such disability is physical or mental;
- circumstances of illness which are of such seriousness and gravity as to compromise the ability of the spouses or of the children to maintain themselves;
- whether the earning capacity of the party to whom maintenance is due was diminished by reason of that party having, during the marriage, taken care of the household, the other party and the upbringing of the children of the marriage;
- all income or benefits that the spouses, or one of the spouses, receive according to law;
- the accommodation requirements of the spouses and of the children;
- the amount which would have been due to each of the parties as a benefit, including, but not limited to, a benefit under a pension scheme, which by reason of the separation that party will forfeit the opportunity or possibility of acquiring.

The matrimonial home may be given by the court on demand of one of the parties to one party, to the exclusion of the other party, and for that period and under those conditions that the court may deem fit: the court may also rule that the matrimonial home should be sold when it is satisfied when both parties and their children will have alternative and appropriate accommodation and that the proceeds of the sale shall be assigned to the parties as the court deems fit; or, if the matrimonial home belongs to both parties, it shall assign the matrimonial home to one party and the latter shall compensate the other party for the financial loss sustained.

When delivering a judgement of personal separation, the court shall also direct to which of the spouses custody of the children shall be entrusted, the paramount consideration being the welfare of the children. However, the court may, at the request of one of the parties, declare that the other party is not fit to have the custody of the minor children of the parties, and where the court issues such a declaration, the party so declared, upon the death of the other party, shall not be entitled to assume the custody of the minor children without the authorisation of the court.

The wife may, on separation, choose to revert to her maiden surname but a declaration of such choice shall be made in the public deed of separation, and in the case of a judicial separation, by a note filed in the records of the case before judgment.

In all cases, the effects of personal separation shall not cease in regard to third parties, except from the day on which the deed is registered in the Public Registry.

7 What does the term “marriage annulment” mean in practice?

Marriage annulment means that the marriage has no effect. That marriage is declared void.

8 What are the conditions for marriage annulment?

A marriage is null if:

- the formalities required for its validity by the law of the country where the marriage is celebrated are not observed;
- if the consent of either of the parties is obtained by violence, whether physical or moral, or fear;
- if the consent of either of the parties is invalidated by reason of an error concerning the identity of the other party;
- if the consent of either of the parties is obtained by fraud about some quality of the other party which could of its nature seriously disrupt matrimonial life;
- if the consent of either of the parties is invalidated by a grave lack of discretion of judgment on matrimonial life, or on its essential rights and duties, or by a serious psychological anomaly which makes it impossible for that party to fulfil the essential obligations of marriage;
- if either of the parties is impotent, whether such impotence is absolute or relative, but only if such impotence is antecedent to the marriage;
- if the consent of either of the parties is obtained with a view to the positive exclusion of the marriage

itself, or of any one or more of the essential elements of matrimonial life, or of the right to the conjugal act;

- if either of the parties subjects his or her consent to a condition referring to the future;
- if either of the parties, although not interdicted or infirm of mind, did not have at the time of contracting marriage, even on account of a transient cause, sufficient powers of intellect or volition to elicit matrimonial consent;
- if the marriage has not been consummated.

9 What are the legal consequences of marriage annulment?

The effects of a valid marriage shall be deemed to have always existed with reference to the children born or conceived during a marriage that is declared to be null and void, as well as with reference to children born before such marriage and acknowledged before the judgment declaring the annulment. If only one of the spouses acted in good faith, such effects shall apply in his or her favour and in favour of the children. If both spouses acted in bad faith, the effects of a valid marriage shall apply only in favour of the children born or conceived during the marriage declared to be null and void. The spouse who was responsible for the nullity of the marriage is bound to pay maintenance to the other spouse in good faith for a period of five years: this duty shall cease if the party who acted in good faith marries during the said period.

10 Are there alternative non-judicial means for solving issues relating to the divorce without going to court?

No, there are no other alternatives; this can only be done in court.

11 Where should I lodge my application (petition) for divorce/legal separation/marriage annulment? Which formalities must be respected and which documents should I attach to my application?

An application for divorce, for judicial separation or annulment of a civil marriage must be filed in the Civil Court (Family Section), while a registration of an annulment granted by the Ecclesiastical Tribunal in Malta must be filed in the Court of Appeal. The divorce, separation and annulment of civil marriage application must be sworn on oath. The reply to the application must be filed within twenty days. The documents which have to be attached vary according to what one wants to prove. However, in the case of a registration of an annulment by the Ecclesiastical Tribunal, a copy of the judgement delivered by the Metropolitan Tribunal of Malta, the decree issued by the Regional Tribunal of Second Instance, the decree of enforcement and a certificate of marriage must be attached.

Each party to an action for separation may, at any time during the case but not after the case has been adjourned for judgement, demand, by means of an application, that the petition for separation made in that case be instead considered as a petition for the pronouncement of divorce.

12 Can I obtain legal aid to cover the costs of the procedure?

Yes, legal aid may be given as long as the requirements laid down in Section 912 of the Code of Organisation and Civil Procedure are observed.

13 Is it possible to appeal against a decision relating to divorce/legal separation/marriage annulment?

Yes, it is possible to appeal a decision relating to divorce, judicial separation or annulment. However, it should be kept in mind that the decree for the registration of an annulment granted by the Ecclesiastical Tribunal of Malta cannot be appealed.

14 What should I do to have a decision on divorce/legal separation/marriage annulment issued by a court in another Member State recognized in this Member State?

A decision by a foreign court regarding the status of a married person or affecting that status is recognised for all purposes of Maltese law if the decision is given by a competent court of the country in which one of the parties in the proceedings is domiciled or is a citizen. This is effected in Malta in the Public Registry (Evans Building, Merchant's Street, Valletta VLT 2000).

Apart from Maltese law, European law applies as well, that is to say Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. Article 22 of this Regulation refers to the grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment, that is:

'(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;

(c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought'.

15 To which court should I turn to oppose the recognition of a decision on divorce/legal separation/marriage annulment issued by a court in another Member State? Which procedure applies in these cases?

The Civil Court (Family Section) is where one opposes a recognition of a decision on divorce, judicial separation or annulment. The applicable procedure is the one laid down in Malta by Cap 12 of the Laws of Malta.

16 Which divorce law does the court apply in a divorce proceeding between spouses who do not live in this Member State or who are of different nationalities?

The courts of civil jurisdiction have jurisdiction to hear and decide on petitions for divorce only if at least one of the following requirements is satisfied:

- at least one of the spouses was domiciled in Malta at the date of the filing of the petition for divorce in the competent civil court; or
- at least one of the spouses had his/her ordinary residence in Malta during a one-year period immediately before the petition for divorce is filed.

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