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Divorce and legal separation



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(in civil and commercial
matters)

1 What are the conditions for obtaining a divorce?

Pursuant to Section 1564, first sentence, of the Civil Code (*Bürgerliches Gesetzbuch*), a marriage may be dissolved by divorce only by judicial decision on the petition of one or both spouses.

A marriage can be dissolved if it has broken down (Section 1565(1), first sentence, of the Civil Code). The marriage is regarded as having broken down if the spouses are no longer cohabiting and it is not to be expected that they will resume matrimonial cohabitation (Section 1565(1), second sentence, of the Civil Code). Here it is a matter of the current state of the marriage and the prognosis for the future. Where the spouses have not yet lived apart for one year, the marriage may be dissolved by divorce only if the continuation of the marriage would entail unreasonable hardship for the petitioner for reasons that lie in the person of the other spouse (Section 1565(2) of the Civil Code). The legislator has established the following irrebuttable assumptions for the breakdown of a marriage:

- The spouses have already lived apart for a year and both spouses petition for divorce or the respondent consents to the divorce (Section 1566(1) of the Civil Code).
- The spouses have already lived apart for three years (Section 1566(2) of the Civil Code).

The spouses are living apart if they do not have a joint household and one of them recognisably does not intend to establish one as he or she refuses marital cohabitation (Section 1567(1), first sentence, of the Civil Code).

2 What are the grounds for divorce?

The only ground for divorce recognised by German law is the breakdown of the marriage. There is no divorce based on the fault of one of the spouses.

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

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

The divorced spouse retains the married name (Section 1355(5), first sentence, of the Civil Code). Spouses may, by declaration to the registry of births, deaths and marriages, reassume their birth name or the name that they had until the determination of the married name, or attach their birth name or the name they had at the time of the determination of the married name before or after the married name (Section 1355(5), second sentence, of the Civil Code).

3.2 the division of property of the spouses

3.2.1 Allocation of the home and the household effects:

In principle, the following applies pursuant to Section 1568a of the Civil Code concerning the joint home after the divorce: The spouse more dependent on the use of the home can demand the assignment of the home from the

other spouse. In this respect, the best interests of the children living in the household and the circumstances of both spouses must be taken into account; the assignment may however also follow the principle of equity for other reasons.

In the case of rented accommodation, the spouse to whom the home is assigned accedes to the lease relationship entered into by the spouse obliged to assign the home in the latter's stead, or continues alone a lease relationship entered into by both spouses (Section 1568a(3) of the Civil Code).

In the case of home ownership, the following applies:

- If only one of the spouses, individually or together with a third party, is the owner of the former home, the other spouse can demand the assignment only in exceptional cases, in particular if this is necessary to avoid inequitable hardship (see Section 1568a(2) of the Civil Code).
- If the home is jointly owned by both spouses, the principles referred to at the beginning of Section 1568a of the Civil Code apply.

In both cases, both a spouse entitled to assignment of the home and an individual entitled to accede to a lease relationship have a right to demand the establishment of a lease relationship at conditions that are customary locally.

Concerning household effects, a distinction is to be made between those jointly owned by the spouses and those belonging to just one of them. Pursuant to Section 1568b of the Civil Code, the spouse more dependent on the use of the jointly owned household effects can demand the assignment and transfer of the household effects from the other spouse. As in the case of the joint home (Section 1568a of the Civil Code), the best interests of the children living in the household and the circumstances of the spouses must be taken into account, whereby the assignment and transfer may also follow the principle of equity for other reasons.

The legal consequences are as follows:

- In the case of jointly owned household effects, the spouse who transfers ownership of a household effect pursuant to Section 1568b(1) of the Civil Code can demand appropriate compensation for this (Section 1568b(3) of the Civil Code).
- The other spouse has no claim to household effects belonging to only one spouse.

3.2.2 Equalisation of accrued gains:

Under German law, spouses live under the property regime of community of accrued gains unless they agree otherwise by marriage contract (Section 1363(1) of the Civil Code). The spouses' respective assets do not become their common assets. Pursuant to Section 1363(2), second sentence, of the Civil Code, however, the accrued gains that the spouses acquire in the marriage are equalised if the community of accrued gains ends.

In the case of divorce, the accrued gains are equalised pursuant to Sections 1373-1390 of the Civil Code.

'Accrued gains' means the amount by which the final assets of a spouse exceed the initial assets (Section 1373 of the Civil Code).

'Initial assets' means the assets that belong to a spouse at the beginning of the property regime after deduction of the liabilities (Section 1374(1) of the Civil Code). Pursuant to Section 1374(2) of the Civil Code, this includes (after deduction of the liabilities) the assets that a spouse acquires after the beginning of the property regime and during the marriage, as a result of death or with regard to a future right of succession, by donation or as advancements, to the extent that in the circumstances they are not to be seen as income ('privileged initial assets').

'Final assets' means the assets that belong to a spouse at the end of the property regime after deduction of the liabilities (Section 1375(1) of the Civil Code). 'Disloyal reductions of assets' are not taken into account when calculating the final assets. This means that the final assets are increased by the amount by which the assets were diminished as a result of such a disloyal reduction of assets (Section 1375(2) of the Civil Code). The relevant reference date for the calculation of the final assets is the date on which the divorce petition becomes

pending at court (Section 1384 of the Civil Code).

Under Section 1378(1) of the Civil Code, if the accrued gains of one spouse exceed the accrued gains of the other spouse, then half of the surplus is due to the other spouse as an equalisation claim, with the aim being that a sum of money is paid.

In exceptional cases and on application by the creditor, the family court may order that individual assets should be transferred to the spouse entitled to equalisation (Section 1383 of the Civil Code). However, this is possible only if

- this is necessary to avoid gross inequity for the spouse entitled to equalisation, and
- this can reasonably be expected of the person required to pay the equalisation claim.

The value of these transferred assets is offset against the equalisation claim.

The provisions of Sections 1373-1390 of the Civil Code on the equalisation of accrued gains shall not apply if the spouses have opted in notarial form for one of the following property regimes (Section 1410 of the Civil Code):

- separation of property (Section 1414 of the Civil Code),
- community of property (Sections 1415-1518 of the Civil Code),
- optional regime of the community of accrued gains (Section 1519 of the Civil Code).

3.2.3 Implications for the spouses' pensions

Pension rights accrued by the spouses during the marriage (e.g. entitlement to benefits from the statutory pension scheme, the civil service pension scheme, a pension scheme offered by a professional group, an occupational pension scheme or private retirement and disability pension schemes) are in each case divided in half on divorce by means of the equalisation of pension rights. This ensures that both spouses share equally the rights acquired by them during their marriage and that each spouse receives independent pension rights.

3.3 the minor children of the spouses

3.3.1 Parental responsibility

If parents have joint parental responsibility, it continues after the divorce. Except in cases where the child is at risk, the question of parental responsibility will not be examined or decided on by the court unless one of the parents applies to the family court for transfer of parental responsibility or part of parental responsibility to himself or herself alone. Such an application must be granted if the other parent agrees and the child of at least 14 years of age does not object or if cancellation of joint parental responsibility and transfer to the applying parent is likely to be in the child's best interest (see Section 1671(1) of the Civil Code).

The child has a right of contact; both parents have a right and a duty of contact with the child (Section 1684(1) of the Civil Code). German law generally assumes that it is in the child's best interest to have contact with both parents. This applies irrespective of the allocation of parental responsibility. Contact is typically only determined by the courts following separation or divorce if one of the parties to the proceedings lodges an application to this effect. The court can however also determine contact arrangements on an *ex officio* basis if this is necessary on grounds relating to the child's well-being.

3.3.2 Maintenance claims

Parents have a duty to maintain their children (Section 1601 of the Civil Code). Children are entitled to be maintained if they are incapable of maintaining themselves (Section 1602 of the Civil Code). The parents' duty of maintenance is subject to their ability to pay (Section 1603 of the Civil Code). However, parents' duty of maintenance in respect of children living in the household who are minors or under the age of 21 is understood broadly, i.e. as regards the ability to pay, it is the achievable income, not merely the available income that matters (Section 1603(2) of the Civil Code). Fundamentally, parents must pay maintenance for their children in proportion to their earning power and financial circumstances. However, a parent looking after a child fulfils their maintenance obligation as a rule in the care and upbringing of the child (Section 1606(3) of the Civil Code). After the divorce of the parents, it is therefore as a rule only the parent in whose household the child does not live who is liable to pay cash maintenance (Section 1612a(1), first sentence, of the Civil Code).

Maintenance of the child covers all the child's living requirements, including the cost of an appropriate education (Section 1610 of the Civil Code).

3.4 the obligation to pay maintenance to the other spouse?

The spouses must each provide for themselves after the divorce (Section 1569 of the Civil Code). They are accordingly required to engage in appropriate gainful employment (Section 1574(1) of the Civil Code). Where this is necessary to obtain appropriate gainful employment, they must undergo education, further training or retraining if it is likely that that education will be successfully concluded (Section 1574(3) of the Civil Code).

However, divorced spouses are entitled to maintenance in the following circumstances:

- as long as, and to the extent that, they cannot be expected to engage in gainful employment because they are looking after a child for whom they have joint responsibility (Section 1570 of the Civil Code) or by reason of illness or other infirmities or weakness of their physical or mental capacity (Section 1572 of the Civil Code),
- as long as, and to the extent that, they can no longer be expected to engage in gainful employment because of their age at a certain point in time, in particular at the time of the divorce or the end of the care or upbringing of a child of the spouses (Section 1571 of the Civil Code),
- as long as, and to the extent that, the divorced spouse is undergoing education, further training or retraining in order to make up for gaps in his or her education or disadvantages caused by marriage; they must commence the education, further training or retraining as soon as possible in order to achieve appropriate gainful employment which will provide a long-term living, and the education must be expected to be successfully concluded (Section 1575 of the Civil Code),
- as long as, and to the extent that, they are unable to find appropriate gainful employment after the divorce (Section 1573(1) of the Civil Code),
- as long as, and to the extent that, they cannot be expected to engage in gainful employment for other serious reasons and it would be grossly unreasonable to refuse maintenance, taking account of the interests of both spouses (Section 1576 of the Civil Code),
- to the extent that the income from appropriate gainful employment is insufficient to cover the full cost of maintenance (Section 1573(2) of the Civil Code).

The level of the maintenance is determined by the matrimonial living conditions and also covers the costs of appropriate insurance against sickness and the need for care as well as, under certain circumstances, old age and reduced earning capacity (Section 1578 of the Civil Code). If the spouse who is obliged to provide maintenance is incapable, on the basis of their earnings and financial circumstances and having regard to their other obligations, of providing maintenance to the party entitled to it without endangering their own proper maintenance, they need provide maintenance only to the extent that this is reasonable, having regard to the needs and to the earning power and financial circumstances of the divorced spouses (Section 1581, first sentence, of the Civil Code). In any case, the needs of the spouse who is obliged to provide maintenance must be preserved, whereby these needs are based on the matrimonial living conditions.

The maintenance may be reduced and/or limited in time where continued payment of a maintenance claim without restriction would be inequitable (Section 1578b of the Civil Code). The possibility for a reduction/time limit under Section 1578b of the Civil Code extends in particular to Sections 1570-1573 of the Civil Code, whereby, according to Section 1570 of the Civil Code, the considerations of equity necessary for the prolongation of the maintenance for care after the child's third birthday, for reasons relating to the child or parents, represent a special time limit arrangement.

The interests of a child of the spouses entrusted to the spouse entitled to maintenance for care or upbringing must be taken into account in the evaluation under Section 1578b of the Civil Code. In addition, consideration must be given to the extent to which disadvantages caused by marriage have arisen with regard to the possibility for the spouse to take care of their own maintenance. Disadvantages exist if the income earned by the spouse entitled to maintenance is lower than it would have been without the marriage. According to Section 1578b(1), third sentence, of the Civil Code, such a disadvantage may arise in particular from childcare and from the organisation of household management and gainful employment. When assessing the disadvantages caused by marriage, all circumstances of the specific individual case must be taken into account in the comprehensive assessment, including the duration of a marriage.

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

Either spouse may live separately, if they so wish, without any particular formalities. Sections 1361-1361b of the Civil Code contain regulations concerning the duration of living apart (see Question 6).

5 What are the conditions for legal separation?

The spouses must live apart. The spouses are living apart if they do not have a joint household and one of them recognisably does not intend to establish one as he or she refuses marital cohabitation. The matrimonial relationship also no longer exists if the spouses live apart within the matrimonial residence (Section 1567(1) of the Civil Code).

6 What are the legal consequences of legal separation?

If the spouses are living apart or if one of them intends to do so, one spouse may demand that the other spouse assigns them the matrimonial home, or a part of it, for their sole use, provided this is necessary in order to prevent unreasonable hardship (Section 1361b of the Civil Code). If the spouse in receipt of this demand, unlawfully and with intent, causes the other spouse to suffer physical harm, harm to health or loss of liberty, or unlawfully threatens such harm or loss or makes threats against the other spouse's life, the shared residence is generally to be assigned for sole use.

The allocation of household effects can also be regulated when spouses are living apart (Section 1361a of the Civil Code) Either spouse may require the other to give them the household effects which belong to them. However, they must allow the other spouse to use them if the other spouse needs them to maintain their new separate household and this transfer is equitable in the particular circumstances (e.g. transfer of the washing machine to the spouse with whom the children are living). Household effects that are jointly owned by the spouses are allocated between them in line with the principles of equity. Unless otherwise agreed by the spouses, the ownership of the household effects shall not however be affected by this.

In addition, while the spouses are living apart, one spouse may demand from the other the maintenance appropriate with regard to the standard of living and the earnings and property situation of the spouses, in accordance with Section 1361 of the Civil Code. Maintenance during separation is the result of marital solidarity and is intended to ensure that spouses are not in need as the result of a separation. In addition, this also opens up the opportunity for the spouses to return to married life, irrespective of the economic constraints. The spouses are therefore still responsible for one another to a comparatively large extent, so only limited requirements exist for economic autonomy and the obligation to earn a living. A spouse living separately is entitled to maintenance if this person is not in a position to meet their needs from their income and assets.

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

There is no such thing as a ‘declaration of invalidity’ under German matrimonial law.

Under Section 1303, second sentence, of the Civil Code, however, a marriage cannot be effectively entered into with a person who has not yet attained the age of 16. In such cases the family court can determine the invalidity of the marriage.

A marriage can also be annulled by judicial decision on petition (Sections 1313 et seqq. of the Civil Code).

Proceedings aimed at the annulment of a marriage or a finding that a marriage is invalid are rare in practice.

8 What are the conditions for marriage annulment?

The grounds for marriage annulment are violations of the law or vitiated consent on marriage. An exhaustive list is provided in Section 1314 of the Civil Code.

9 What are the legal consequences of marriage annulment?

A marriage is dissolved when the relevant decision becomes final and binding (Section 1313, second sentence, of the Civil Code). The consequences of a marriage annulment are only in part dictated by the provisions on divorce (in the cases referred to in Section 1318 of the Civil Code).

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

In the event of divorce, parents are entitled to advice in the context of children's and youth services from the youth welfare office (Jugendamt). The advice is intended to assist parents who are separated or divorced in creating the conditions for carrying out their parental responsibilities in a way oriented towards the best interests of the child or young person. The parents are supported, with appropriate involvement of the child or young person concerned, in developing a plan for consensus-based provision of parental care. There is a database of all advice centres at <https://www.dajeb.de/>. It is also possible to resolve conflict and come to an amicable agreement with the aid of mediation. More information about family mediation is available at <https://www.bafm-mediation.de/>.

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?

Only dissolution of marriage (divorce), marriage annulment or the establishment of the existence or non-existence of a marriage between the participants exist under German law (Section 121 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*)).

The application in matters of marriage must generally be lodged at the family law divisions of the local courts (family courts) (Section 23b of the Courts Constitution Act (*Gerichtsverfassungsgesetz*), Section 111(1) and Section 121 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction). Geographical jurisdiction is based on Section 122 of this Act. Representation by a lawyer is mandatory for the spouses (Section 114 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction).

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

A person whose personal and financial circumstances are such that they are unable to afford the costs of conducting proceedings, or who can afford to pay only part of the costs or can pay them only in instalments, can apply for legal aid for proceedings before the family courts. Approval is conditional upon the intended legal action or defence having sufficient prospects of success and not appearing malicious. This ensures that those who are financially less well-off also have access to the courts. Depending on the available income or assets, legal aid pays the party's own contribution to the court costs, in whole or in part. The costs of legal representation are assumed if the court assigns a lawyer. You can find further information in the brochure on legal aid and advice '*Beratungshilfe und Prozesskostenhilfe*' on the webpage of the Federal Ministry of Justice at <https://www.bmj.de/>.

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

An appeal may be lodged against the decision pronouncing the divorce or the annulment of marriage under Section 58 et seqq. of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction. The Higher Regional Court (*Oberlandesgericht*) rules on the appeal. Representation by a lawyer is again mandatory.

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?

The following applies to decisions in judicial proceedings instituted prior to 1 August 2022:

Such a decision (unless issued in Denmark) is automatically recognised in Germany under Council Regulation (EC) No 2201/2003 of 27 November 2003 (the 'Brussels IIa' Regulation), i.e. without separate recognition proceedings. Brussels IIa generally requires the divorce, legal separation, annulment or nullity proceedings to have been instituted after 1 March 2001 (see Article 64, Brussels IIa for the exceptions to this). It is primarily the predecessor to Brussels IIa, i.e. Brussels II, which applies to even older cases.

Decisions from Denmark still usually require separate recognition proceedings under Section 107 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction.

The following applies to decisions in judicial proceedings instituted on or after 1 August 2022:

Such a decision (unless issued in Denmark) is automatically recognised in Germany under Council Regulation (EU) 2019/1111 of 25 June 2019 (the 'Brussels IIb' Regulation), i.e. without separate recognition proceedings.

It should be noted that under the Brussels IIb Regulation, authentic instruments formally drawn up or registered and agreements registered on or after 1 August 2022 on matters relating to divorce and legal separation which have a legally binding effect in the original Member State are also automatically recognised.

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 following applies to decisions in judicial proceedings instituted prior to 1 August 2022:

Where Council Regulation (EC) No 2201/2003 of 27 November 2003 applies, the court with jurisdiction to hear an application for non-recognition of such a decision is generally the local court (family court) subject to the territorial jurisdiction of the higher regional court in the district of which:

- the respondent is normally resident, or
- where no such jurisdiction applies, there is a manifest interest in the determination or there is a need for care,
- or otherwise the Pankow Family Court.

An exception applies in Lower Saxony, where jurisdiction for all three higher regional court districts according to these criteria is concentrated centrally in the Local Court of Celle.

The procedural requirements of the provisions of the International Family Law Procedure Act in the version applicable on 31 July 2022 in conjunction with the provisions of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction and the Code of Civil Procedure apply.

It should be noted that the same procedure generally also applies to applications for non-recognition of a formally drawn up or registered authentic instrument or for non-recognition of a registered agreement in matters relating to divorce and legal separation.

The following applies to decisions in judicial proceedings instituted on or after 1 August 2022:

Where Council Regulation (EU) 2019/1111 of 25 June 2019 applies, the court with jurisdiction to hear an application for non-recognition of such a decision is generally the local court (family court) subject to the territorial jurisdiction of the higher regional court in the district of which:

- the respondent is normally resident at the time when the proceedings are instituted, or

- where no such jurisdiction applies, there is a manifest interest in the determination or a need for care is known,
- or otherwise the Pankow Family Court.

An exception applies in Lower Saxony, where jurisdiction for all three higher regional court districts according to these criteria is concentrated centrally in the Local Court of Celle.

The procedural requirements of the provisions of the International Family Law Procedure Act in conjunction with the provisions of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction apply.

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?

In Germany and now 16 other Member States of the European Union, the law applicable to divorce in situations involving a conflict of laws is governed by the provisions of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (the 'Rome III' Regulation). The law designated under the Rome III Regulation is then to be applied whether or not it is the law of a participating Member State.

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