

## Divorce - Germany



Моля, имайте предвид, че оригиналната езикова версия на тази страница [de](#) е била наскоро променена. Езикова версия, която търсите, в момента се подготвя от нашите преводачи.

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### 1 What are the conditions for obtaining a divorce?

A marriage can be dissolved only by a court judgment following a petition by one or both spouses (Section 1564(1), first sentence, of the Civil Code (*Bürgerliches Gesetzbuch*)).

A marriage can be dissolved if it has broken down. The marriage is regarded as having broken down if the parties are no longer cohabiting and it is not to be expected that they will resume matrimonial cohabitation (Section 1565(1) of the Civil Code). An irrebuttable presumption that the marriage has broken down arises if the spouses have lived apart for a year, and both petition for divorce or the respondent consents to the divorce. If the spouses have lived apart for three years, there is an irrebuttable presumption that the marriage has broken down, regardless of the positions the spouses take in the divorce proceedings (Section 1566(2) of the Code). Exceptionally, a marriage which has broken down may continue if and for as long as there are children of the marriage who are minors and there are special reasons why maintenance of the marriage is necessary in their interests. The same applies if and for as long as the divorce would represent such hardship for the respondent refusing it, as a result of extraordinary circumstances, that, exceptionally, maintenance of the marriage seems necessary despite the interests of the petitioner (Section 1568).

Under Section 1567(1), first sentence, of the Civil Code, spouses are considered to be living apart if they do not have a joint household and it is clear that one of them does not want to establish such a household because that spouse refuses marital cohabitation. These circumstances must be proved where necessary; problems arise primarily where spouses are living apart within the matrimonial home, a situation which the law specifically acknowledges (Section 1567(1), second sentence, of the 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)**

A divorced spouse keeps the name that the spouses chose when they were married. By making a declaration to a registrar, a divorced spouse may take the name they were given at birth, or a name used before the married name was adopted, or put their birth name before or after the married name (Section 1355(5) of the Civil Code).

A spouse's statutory right of inheritance right does not apply if the conditions for the divorce were met and the deceased petitioned for or consented to the divorce (Section 1933 of the Code). In this case, a testamentary disposition in favour of the spouse is ineffective, unless the testator would have made it even in the event of divorce.

### **3.2 the division of property of the spouses**

If the spouses live under the statutory matrimonial property regime, only increases in the value of their property during the marriage must be shared between the spouses (Sections 1372 et seq. of the Civil Code). An exception applies if sharing the increase in value would be grossly unfair. This arises particularly where the spouse who has brought about the smaller increase has been at fault in not meeting the economic obligations arising out of the matrimonial relationship over a long period (Section 1381 of the Code). No account is taken of any fault that may have contributed to the divorce.

If the spouses have agreed to own all property jointly, they must divide their entire property. There is no provision for penalties against a spouse whose fault may have contributed to the divorce.

If the spouses cannot agree on the disposal of the matrimonial home, the court may award it to one of them (Household Goods Regulations (*Hausratsverordnung*), Section 1). With rented property, the court may amend the lease to modify the legal position. The court here exercises its reasonable discretion.

As far as household contents are concerned, goods owned jointly are divided between the parties by the court on a fair and expedient basis. Household items owned by one of the parties are to be allocated to the other if the latter needs to continue using them and the owner can reasonably be expected to transfer them.

Pension rights accrued by the spouses during the marriage (e.g. rights in the statutory pension scheme, pension rights and rights to pension payments from occupational pension funds or private pension insurance contracts) must be shared on divorce by way of adjustment of entitlements to benefits.

### **3.3 the minor children of the spouses**

#### **aa) 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 for sole parental responsibility. Such an application must be granted if cancellation of joint parental responsibility and transfer to the applicant is

likely to be in the child's best interest. German law generally assumes that it is in child's best interest to have contact with both parents, and therefore grants the child a right to contact with both parents and provides that both parents have a right and a duty of contact.

#### bb) 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). The parents' duty of maintenance is subject to their ability to pay (Section 1603). However, parents' ability to pay in respect of their children is understood broadly, i.e. it is the achievable income, not merely the available income that matters (Section 1603(2)). 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 by caring for and looking after the child (Section 1606(3)).

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

#### 3.4 the obligation to pay maintenance to the other spouse?

The spouses must each provide for themselves after the divorce (Sections 1569 and 1577 of the Civil Code). They are accordingly required to engage in appropriate gainful employment. However, they must undergo education, further training or retraining where this is necessary in order to obtain appropriate gainful employment and it is likely that that education will be successfully concluded (Section 1574(3) of the Code).

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 as a result of physical or mental illness or incapacity at the time of the divorce (Section 1572);
- if they can no longer be expected to engage in gainful employment because of their age at the time of the divorce (Section 1571);
- as long as, and to the extent that, they are undergoing education, further training or retraining in order to make up for disadvantages caused by marriage; however, 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 that education must be expected to be successfully concluded;
- as long as, and to the extent that, they are unable to find appropriate gainful employment after the divorce (Section 1573(1)),
- 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;
- to the extent that the income from appropriate gainful employment is insufficient to cover the full cost of maintenance (Section 1573(2)).

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 old age and reduced earning capacity (Section 1578). 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).

#### 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. There is no provision for any judicial determination.

#### 5 What are the conditions for legal separation?

The spouses must live apart. The spouses are living apart if they no longer have a joint household and one of them refuses marital cohabitation.

#### 6 What are the legal consequences of legal separation?

If the spouses are living apart or if one of them wishes to live apart, one spouse may demand that the other spouse leaves them the matrimonial home, or a part of it, for their sole use, provided this is necessary in order to prevent unreasonable hardship.

Account must be taken of the ownership of the home and of rights of residence. For example, the home might be allocated to the wife if the only other possibility was a women's refuge. If one spouse has physically abused or threatened the other, the injured or threatened party will usually be allocated the whole home for their sole use. However, the allocation of the home does not serve to prepare for or facilitate the divorce.

Use of the household goods may also be regulated for the period of the separation. Either spouse may require the other to give them the household items which belong to them. They must, however, allow the other to use them if they need them to maintain their new separate household and this is reasonable in the particular circumstances.

### **7 What does the term "marriage annulment" mean in practice?**

A marriage can be annulled (*aufgehoben*) only by a court judgment following an application. There is no declaration that the marriage was always void.

### **8 What are the conditions for marriage annulment?**

The requirements for annulment of the marriage under Section 1314 of the Civil Code are:

- at the time of the marriage, one spouse had not reached the age of majority or had not been validly exempted from this requirement;
- at the time of the marriage, one spouse did not have the capacity to contract;
- at the time of the marriage, one spouse was already married;
- the spouses are related to one another in direct line of descent, or are full or half siblings, even if the family relationship has been extinguished by adoption;
- the spouses did not make their declarations of marriage together and in person before the registrar, or made those declarations subject to a condition or time limit;
- one spouse was unconscious or their mental faculties were temporarily disturbed when they entered into the marriage;
- at the time of the marriage ceremony, one spouse did not know that a marriage was taking place;
- one spouse was induced to enter into the marriage by deceit;
- one spouse was unlawfully induced to enter into the marriage by duress;
- at the time of the marriage, both spouses were agreed that they did not intend to enter into a matrimonial relationship.

A distinction is to be made from cases in which no marriage took place, in the following circumstances:

- the marriage was not entered into before a registrar;
- the declarations were made before a registrar who had made it clear that he or she was not prepared to assist in concluding the marriage;
- during the wedding ceremony, the engaged parties did not make declarations so as to conclude the marriage;
- the marriage was entered into between two people of the same sex; same-sex couples may enter into a registered civil partnership, which is not, however, a marriage.

### **9 What are the legal consequences of marriage annulment?**

Any increase in the value of the property will also be shared where the marriage is annulled, unless this would be grossly unreasonable in view of the circumstances when the marriage was entered into or, in the case of a bigamous marriage, in view of the interests of the third party (Section 1318(3) of the Civil Code).

The arrangements for the household goods and matrimonial home apply in the same way as for divorce; particular account must be taken here of the circumstances in which the marriage was entered into and, in the case of a bigamous marriage, the interests of the third party (Section 1318(4)).

Any pension entitlements acquired by the spouses during the marriage will be shared unless this would be grossly unreasonable (Section 1318(3)).

The spouse's right of inheritance is extinguished as in the case of a divorce, namely when the conditions for the annulment exist and a corresponding application has been served on the spouses. In addition, the spouse's right of inheritance does not apply if, at the time the marriage was entered into, the inheriting spouse was already aware that there were grounds for annulment – legal incapacity, bigamy, family relationship, breach of formalities or mental disturbance (Section 1318(5)).

As with divorce, maintenance rights exist under Section 1318(2) of the Civil Code in the following circumstances:

- in favour of a spouse who was not aware of the grounds for the annulment of the marriage or who, in cases of deceit and unlawful duress, has been deceived or threatened by the other spouse or with that spouse's knowledge;
- in favour of both spouses where the prohibitions on bigamous marriage and certain family relationships apply and also where the marriage formalities have not been observed, if both spouses were aware that the marriage was capable of being annulled; this does not apply to the prohibition against bigamy if a spouse's claim for maintenance would adversely affect a corresponding claim by the third spouse.

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

In the event of divorce, the parents are entitled to advice from the children's and youth services. 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 which is in 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 an agreed plan for the provision of parental care. There is a database of all advice centres at [www.dajeb.de](http://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 can be found at [www.bafm-mediation.de](http://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?**

The application for divorce/annulment of the marriage must generally be lodged at the local court (*Amtsgericht*)/family court (*Familiengericht*) (Section 606 of the Code of Civil Procedure (*Zivilprozessordnung*) and Section 23(b) of the Judicature Act (*Gerichtsverfassungsgesetz*)). Geographical jurisdiction normally lies with the family court in whose district the spouses have their usual joint residence.

#### **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 claim legal aid, among other things in respect of proceedings before the civil courts. The aid 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, legal aid for the proceedings pays the party's own contribution to the court costs and the costs of the party's own lawyer, in whole or in part.

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

Yes. The usual rules apply to appeals against decisions relating to divorce or marriage annulment, i.e. an appeal is permissible subject to the provisions of Section 511 of the Code of Civil Procedure. The higher regional court (*Oberlandesgericht*) decides on the appeal.

#### **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?**

Such a decision (unless issued in Denmark) is automatically recognised in Germany under Council Regulation (EC) No 2201/2003 of 27 November 2003 ('Brussels IIa'), i.e. without separate recognition proceedings. Brussels IIa generally requires the divorce, dissolution or annulment proceedings to have been instituted after 1 March 2001 (see Article 64 Brussels IIa for the exceptions to this). Decisions from Denmark still require separate recognition proceedings.

#### **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?**

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

- the respondent is normally resident, or

- where no such jurisdiction applies, there is a manifest interest in the determination,
- or otherwise the Pankow/Weißensee Family Court.

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

The procedural requirements in family matters and in non-contentious proceedings 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?**

Since 21 June 2012, in Germany and 13 other Member States of the European Union, the law applicable to the requirements for, and consequences of, divorce in situations involving a conflict of laws has been governed by the provisions of the 'Rome III' Regulation (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 rules on conflict of laws in Rome III have universal application, meaning that they apply even where the law to be applied is not the law of a participating Member State.

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