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Dutch

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**Divorce and legal separation**

## Netherlands

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

A petition for divorce may be filed by one of the spouses (a unilateral petition) or by both spouses (a joint petition). The procedure is the same (see question 11).

In either case the parties must be represented by a lawyer during the proceedings. A petition for divorce is dealt with by the district court (*rechtbank*) of the place where the petitioner or one of the petitioners is resident. A petition for divorce may be filed at any time following the marriage; the parties are not required to have been married for a certain period of time. The divorce takes effect when the court order is entered in the register of births, marriages and deaths (*burgerlijke stand*). The divorce can be entered in the register only once the order is no longer open to appeal (becomes *res judicata*). The divorce must be entered in the register within six months of the order becoming *res judicata*, otherwise the order loses its effect, in which case the divorce can no longer be entered in the register. If the marriage took place abroad and the foreign marriage certificate was not filed in a Dutch register, the Dutch divorce order is to be entered in the special register of births, marriages and deaths of the municipality of The Hague.

**2 What are the grounds for divorce?**

Under Dutch law, the sole ground for divorce is the irretrievable breakdown of the marriage. A marriage is deemed to have broken down irretrievably if the spouses find living with one another intolerable and there is no prospect of proper marital relations being restored. Where a petition is filed by just one of the spouses, the petitioner must submit that the marriage has broken down irretrievably, and if this is denied by the other spouse the petitioner must produce evidence. Whether the marriage has broken down irretrievably is determined by the court. In the case of a joint petition, the divorce order will be granted on the basis that both spouses believe that their marriage has irretrievably broken down.

**3 What are the legal consequences of a divorce as regards:****3.1 the personal relations between the spouses (e.g. the surname)**

Divorce can have implications for the use of an ex-spouse's surname. Once a divorce is final, a divorced person may remarry or enter into a civil partnership.

**3.2 the division of property of the spouses****Statutory regime (joint ownership of all property)**

The Netherlands has a fairly unusual regime for dealing with income and property during a marriage. The ordinary arrangement, laid down by statute, is joint ownership of all property (*algehele gemeenschap van goederen*). In principle, all property acquired by either spouse before or during the course of the marriage forms part of the joint property. The two spouses' assets are merged. In principle, all debts incurred before or during the marriage are likewise joint liabilities, irrespective of which spouse incurred the debt. A creditor can recover the debt from the spouses' joint property. The property ceases to be joint property upon divorce, i.e. when the divorce order is entered in the registers of births, marriages and deaths. The spouses' assets are no longer merged, and the joint property must be divided. It has to be established what each spouse is entitled to from the joint property. The general rule is that each of the spouses is entitled to half. The spouses may decide to depart from this rule, and make other arrangements, in a divorce settlement (*echtscheidingsconvenant*) or at the time of division (*verdeling*).

**Prenuptial and postnuptial agreements**

Spouses may choose a regime other than the ordinary statutory arrangement if they enter into a prenuptial agreement or (rarely) a postnuptial agreement. These agreements *also* lay down the rules for the division of property in the event of divorce.

**3.3 the minor children of the spouses****Custody**

Following a divorce, both parents continue to have joint custody of any children, as they did during the course of their marriage. The court may be asked to grant custody to one parent in exceptional cases only. A petition for sole custody may be filed by either parent or by both. A parent who is not granted custody has a right to visit the child. Either parent or both may petition the court to lay down rules governing visiting rights.

**Child maintenance**

If the parents continue to share custody following the divorce, the intention is that they should come to an agreement on how the financial burden of raising their children is to be shared. They may also petition the court to record what they have agreed. If they are unable to reach agreement, the court may determine a sum to be paid as maintenance. If one of the parents is granted sole custody, he or she may petition the court to ascertain how much the other parent should contribute toward the children's everyday living costs. As a general rule the parents are expected to organise payment themselves. For further information in this regard, please see the website of the National Agency for the Collection of Maintenance Payments (*Landelijk Bureau Inning Onderhoudsbijdragen*) (<http://www.lbio.nl/>).

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

The spouses' obligation to maintain each other continues after the dissolution of the marriage. Where an ex-spouse's income is not sufficient to meet his or her living costs, and he or she cannot reasonably be expected to earn the necessary level of income, he or she may petition the court to order the other ex-spouse to make maintenance payments towards his or her living costs. The court may do this in the divorce order or in a subsequent order. When calculating maintenance payments, the court considers the needs of the spouse who will be receiving the payment and the means of the other spouse. Non-financial

factors may also be taken into account, such as the duration of the marriage, or how long the spouses lived with one another. If the court sets no limit on the duration for which maintenance is to be paid, the duty to pay maintenance will cease after 12 years. In cases where the spouse requiring maintenance is experiencing particular financial difficulty, he or she may petition the court to extend this period. In principle, if a marriage was short (less than five years) and produced no children, the period over which maintenance payments must be made will not exceed the duration of the marriage itself. If the spouses or former spouses are in agreement regarding maintenance payments they can record the agreement in a divorce settlement.

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

A legal separation (*scheiding van tafel en bed*) is a legal means by which spouses cease living with one another without actually ending the marriage between them. Legal separation is of interest to spouses who wish to separate and address the legal consequences of doing so, but who wish to remain married, perhaps for religious or financial reasons. Legal separation leaves the way open for a reconciliation, yet can also serve as a stepping stone in the dissolution of the marriage. A legal separation takes effect when the court order is entered in the matrimonial property register. As in the case of divorce, this must be done within six months.

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

The sole ground for legal separation is the irretrievable breakdown of the marriage.

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

The implications of legal separation for the matrimonial property, child custody (visiting rights), maintenance payments and pensions are the same as those for divorce. The marriage continues to exist. The law stipulates that spouses that are party to a legal separation do not inherit each other's property in the event of death. If, following a legal separation, the spouses decide that they do wish to part ways entirely, they can still apply for a divorce. Parties to a legal separation may live with a new partner and build a new life, but they cannot remarry or enter into a civil partnership.

Where following a legal separation a petition for divorce is brought unilaterally, certain restrictions apply. Unilateral petitions are subject to a three-year waiting period. This period may be reduced to one year by the court in certain cases. The three-year period commences on the date that the legal separation is entered in the register. If a petition for divorce following a legal separation is brought jointly, there is no waiting period. The dissolution of the marriage takes effect when the order is entered in the register of births, marriages and deaths.

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

A marriage may be annulled only by a court order. Annulment proceedings are commenced by the lodging of a petition. A marriage entered into by the parties is therefore never automatically null and void: a marriage continues to be valid until it is annulled. The law indicates what constitutes grounds for annulment and who may file a petition.

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

The law provides the following grounds for a nullity petition: the parties married despite the presence of:

impediments to marriage (minimum age requirements, lack of consent to the marriage of a minor, bigamy, prohibited degree of kinship);  
duress or mistake;  
a sham marriage;  
mental disorder of one of the spouses;  
lack of competence of the registrar; or  
insufficient witnesses.

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

An annulment has retroactive effect and applies from the time of marriage. This means that, following annulment by the court, the marriage will be treated as if it never existed. An exception will be made in certain circumstances, in which case annulment has the same effect as divorce. For instance, the children born of an annulled marriage remain related to both parents. Another exception relates to a putative spouse, i.e. a spouse who was unaware that the marriage was defective. Please see also the conditions for marriage annulment, as listed under question 8. A spouse in good faith may, for example, request that the other spouse pay maintenance.

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

Mediation is common in divorce cases in the Netherlands. With the help of a mediator and, where necessary, the spouses' lawyers, the spouses can try to come to an agreement regarding the divorce and its consequences. These arrangements are laid down in a divorce settlement (*rechtscheidingsconvenant*), which is a written document. The settlement may cover issues such as the division of property, any duty to pay maintenance to a spouse, and a parenting plan. The court may incorporate the settlement drawn up during the mediation process into its order.

There is an Association of Family Lawyers and Divorce Mediators (*Vereniging van Familierechtadvocaten en Scheidingsbemiddelaars*) whose members specialise in fields such as divorce and maintenance payments. They also specialise in divorce mediation and everything that that entails. For further information, please refer to: <http://www.vas-scheidingsbemiddeling.nl/>.

#### **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?**

##### **Petition**

Divorce proceedings always commence with a petition to the court (*verzoekschrift*). This petition must specify the surname, first names and domicile or place of residence of the spouses. If minor children are affected by the divorce, the same details must be provided in respect of those children. The petitioner may also apply for ancillary relief (*nevenvoorzieningen*). This petition is related to the divorce. The court can grant ancillary relief for the following, among other things:

custody and visiting rights in relation to minor children;  
maintenance of a child or spouse;  
division of the matrimonial property or enforcement of the regime agreed in a prenuptial or postnuptial agreement;  
use of the marital home; and  
pension equalisation.

The petitioner's lawyer (*advocaat*) must file the petition with the district court (*rechtbank*). If the petitioner lives in the Netherlands, the petition can be filed with the court in the district where the petitioner lives. If the petitioner does not live in the Netherlands, but the other spouse does, the petition must be sent to the court in the district where the other spouse lives. If both spouses live outside the Netherlands, the petition must be filed with the District Court of The Hague.

Which documents need to be submitted?

original extracts (issued within the last three months) from the population register, for both spouses, indicating nationality, civil status and, in the case of non-Dutch nationals, the date of entry into the Netherlands; in cases where one of the spouses is a Dutch national and the other is not, the date of settlement in the Netherlands must be specified;  
original extracts from the register of births (issued within the last three months) for any minor children;

an original extract from the marriage register (which can be obtained from the town hall in the place of marriage, and must have been issued within the last three months); in the case of marriages that took place abroad, the original marriage certificate or an older extract will suffice; and if minor children are involved, a parenting plan; a parenting plan lays down arrangements agreed between the parents with regard to their children, and may make provision for the day-to-day care of the children, their education, sports attendance, medical care, arrangements for special days such as holidays and public holidays, finances, and practical arrangements (picking up and dropping off the children).

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

If the litigant is unable to bear the costs or the full costs of a lawyer or mediator, he or she may be eligible for legal aid, subject to certain conditions. The Legal Aid Board (*Raad voor de Rechtsbijstand*) grants legal aid only through mediators that are registered with the Board. For further information regarding the eligibility conditions, please refer to <http://www.rvr.org/>.

Entitlement to legal aid also applies to cross-border disputes if the applicant lives outside the Netherlands but within the EU. This is regulated by the European Directive on legal aid in cross-border disputes (OJ L 26, 31.1.2003). A request for legal aid can be submitted to the Legal Aid Board in The Hague using the standard form established under the Directive, which is identical in all Member States. If necessary, the Legal Aid Board can help applicants to choose a lawyer. For further information, please refer to: <http://www.rvr.org/>.

In certain cases, where a treaty exists, a litigant living outside the EU may be able to obtain legal aid in the Netherlands. The following treaties are relevant in this respect: the Hague Convention on Civil Procedure (1954), the European Agreement on the Transmission of Applications for Legal Aid (1977) and the Hague Convention on International Access to Justice (1980). These treaties include a provision that essentially stipulates that nationals of the contracting States are eligible for legal aid in all of the other contracting States, under the same conditions as nationals of those other States. Where such cases arise in the Netherlands, a declaration of lack of insufficient means (*verklaring van onvermogen*) must be requested from the competent authority in the litigant's habitual place of residence. The application for legal aid and the declaration of insufficient means will be sent by this authority to the competent authority in the country where legal aid is to be granted. The latter will then assess whether the litigant is entitled to legal aid.

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

Yes, an appeal can be lodged with the registry of the court of appeal (*gerechtshof*) within three months of the date of the divorce order. The ruling of the court of appeal can usually be challenged on a point of law in the Supreme Court (*Hoge Raad der Nederlanden*). Litigants require legal representation in these proceedings also.

#### **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?**

On 1 March 2005, what is known as the 'Brussels II bis Regulation' (or the 'Brussels IIa Regulation') entered into force in the EU Member States; its full name is 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. The Brussels II bis Regulation applies to divorce, legal separation and marriage annulment. Under the terms of the Regulation, divorce orders issued in the other Member States (with the exception of Denmark) are recognised in the Netherlands without any special procedure being required (Article 21(1)). Similarly, no special procedure is required for updating civil-status records, e.g. when a marginal note recording a divorce has to be entered on a marriage certificate.

Any interested party may institute legal proceedings to determine whether or not a divorce order from another country is to be recognised. The Brussels II bis Regulation provides a number of grounds for refusing to recognise the divorce. For instance, recognition of the divorce must not be contrary to public policy. It will also be considered whether the defendant (the party that did not file a divorce petition) was duly informed of the proceedings. The judgment itself, however, cannot be reviewed. Pursuant to the Brussels II bis Regulation, the court of the Member State where the judgment originated must, at the request of any interested party, issue a certificate with regard to said judgment (using a standard form). This certificate includes information regarding the country of origin of the judgement, the details of the parties, whether the judgment was given in default of appearance, the type of judgment, e.g. divorce or legal separation, the date of the judgment, and which court delivered the judgment.

#### **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?**

If an interested party wishes to oppose the recognition of a foreign divorce order in the Netherlands, he or she may file a petition for non-recognition with the judge of interim relief (*voorzieningenrechter*) of the court in the district where he or she is habitually resident.

#### **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?**

On 1 January 2012, Book 10 of the Dutch Civil Code (*Burgerlijk Wetboek*) entered in force. Book 10 of the Civil Code includes the conflict of law rules that determine the law applicable.

The main rule is that the courts will always apply the divorce law of the Netherlands, irrespective of the nationality and habitual residence of the spouses. If, for example, a petition for divorce is filed in the Netherlands by a married couple both of whom are Belgian nationals living in the Netherlands, the divorce law of the Netherlands is applied automatically. The only instance in which this is not the case is when the spouses choose which law is to be applied to the divorce. The spouses can specifically opt for their common national law to be applied during the divorce proceedings, rather than Dutch law. A Belgian couple can therefore opt for Belgian divorce law to be applied.

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