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ADMISSIBILITY CONDITIONS FOR DIVORCE BY NOTARY PROCEDURE

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Abstract:
In Romanian law, the dissolution of marriage is possible in any of the three following ways: by administrative procedure, by judicial procedure or by notary procedure. The general conditions for divorce require an agreement from the parties, full capacity and exercise of civil rights and the freely expressed and non vitiated consent of the spouses. The special condition required from notary divorce is the agreement of both spouses. The spouses must be in agreement not only in regard to the request for the dissolution of marriage, but also in regard to all aspects which derive from that, namely the names the spouses will have after the divorce, the custody of the minor children who resulted from the marriage or who were adopted.

Keywords: *conditions, spouses, minors, agreement, notary procedure.*

1. Certain aspects regarding family and marriage

The notion of family is not defined by the lawmaker, as it is not a legal institution in itself. Family is a fact, but also a legal situation when it regards the relations of marriage, as marriage is the ach which creates family[1]. Thus, marriage is unconceivable without family.

The Civil Code states in article 259 first alignment as follows "marriage is the freely consented union between a man and a woman, concluded under the conditions of law". From the lawmaker's phrasing, we mention the following legal characteristics of marriage[2]: it represents the union between a man and a woman, as Romanian law forbids same sex marriage[3]; the right to enter into marriage is an absolute right, acknowledged by both internal and international law[4]; marriage is a

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[1] Malaurie Ph., Fulchiron H., *La famille*, 4e ed., Defrenois Publishing House, Paris, 2011, p. 5-12

[2] Malaurie Ph., Fulchiron H., *op cit*., p. 54-58

[3] In regard to this aspect, we believe the lawmaker is intensely preoccupied to redefine family as a response to the challenges of civil society which is in permanent change

[4] Article 16 of the Universal Declaration of Human Rights states the following:

„1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses." Similarly, article 12 of the European Convention on Human Rights states that "Men and women of marriageable age have the right to marry and to found a family, according to the national laws

lifelong commitment of fidelity, moral and material mutual help, a commitment for maternity and paternity within the family, but also towards society[5]; marriage is an institution, governed by legal provisions.

Also, marriage is monogamous, solemn, and laic, founded on the equality of rights and obligations[6].

More than a freely consented union, marriage is a bilateral legal act, a solemn act, concluded among living people, a personal condition, namely a manifestation of will with the purpose of creating a legal report.

Marriage is also an institution, namely a legal statute, characterized by rights and obligations specific to the spouses, both on a personal level and on a patrimonial one[7].

From a judicial point of view, marriage has significant importance as it is not only regards the cohabitation of spouses, but it also gives rise to a series of judicial effects. These effects can be patrimonial (in regard to matrimonial regimes) and non patrimonial (in regard to the mutual obligations of the spouses, such as mutual respect, fidelity, moral support, cohabitation, the obligation to carry a mutual name or the obligation to fulfill conjugal duties)[8].

2. The dissolution of marriage

Although marriage is an act concluded for life, the parties are free to decide the dissolution of marriage and their right to decide so can't be restricted. This is why the lawmaker regulated three possibilities to end the marriage: the closure of marriage, the annulment of marriage and the dissolution of marriage.

Marriage ends by the death of one of the spouses; this fact causes effect only for the future, as the quality of spouse is kept until the time of death.

Marriage is annulled when it is affected by a cause of annulment. According to the principles of annulment, it causes effect ex tunc, from the time the marriage was concluded, as marriage is considered to never have been concluded. An exception from this principle is putative marriage, in case the husband was of good faith when entering into marriage, he is able to keep the status of husband from a valid marriage for the period of time between the conclusion of marriage and the time the court definitively rules on the annulment of the marriage.

Marriage can also end by divorce, as a manifestation of the spouses' will. As the new Civil Code regulates, divorce can occur in any of the three following

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governing the exercise of this right". In internal law, matrimonial freedom is a constitutional principle stated in article 48 first alignment, according to which family is based on the freely consented marriage between spouses.

[5] Malaurie Ph., Fulchiron H., *op cit.*, p. 57

[6] Lupaşcu D., Crăciunescu C.M., *Family law*, Universul Juridic Publishing House, Bucharest, 2012, p. 57-58

[7] Avram M., *Civil law. Family*, Hamangiu Publishing House, Bucharest, 2013, p. 26

[8] Similarly, see Ionaş D., *The preciput clause. A legate contained in the matrimonial convention*, Universul Juridic Publishing House, Bucharest, 2016, p. 14

procedures: by judicial procedure, by administrative procedure and by notary procedure.

As the subject of the present article is divorce by notary procedure, we will present the conditions of the amicable divorce by notary procedure.

3. Divorce by notary procedure

In case the spouses agree on the fact that continuing the marriage is no longer possible, they have the right to request the dissolution of marriage by non contentious procedure, amicably, namely by notary procedure.

This possibility of dissolution of marriage was regulated by Law no 202/2010 as a response to the new social realities and as an acknowledgement of the character of bilateral legal act of marriage, which, as it was born by an agreement of will of the parties, can also cease by an agreement of will of the parties (according to the principle mutuus conssensus mutuus dissensus).

Initially, the competence of the notary extended only to marriages where there were no minor children; subsequently, by law 71/2011[9], the Civil Code reconsidered the institution of divorce by spousal agreement, by allowing the spouses to use then notary procedure even when they have minor children.

The reason for such a solution is the fact that the spouses' agreement in regard to their minor children is subject to censorship and control of tutelary authority and the public notary, as they are obliged to respect the superior interest of the minor (even if he can't appreciate on it). Thus, as long as the minor's best interest is guaranteed by institutions of the state, even if they have non contentious activity, there are no valid reasons which prevent the spouses from deciding in matters regarding their minor children.

The notary procedure has several obvious advantages; it is time efficient, less expensive, matters which are significant during such stressful times both for the spouses and their children. Another important advantage is the confidentiality of the debates.

In order for a divorce application to be admissible, it must meet certain conditions which result from the legal provisions which apply in this matter. These conditions can be classified in two categories: general admissibility conditions of divorce and special admissibility conditions of divorce by notary procedure.

A first general condition required by law, regardless of whether divorce is pronounced by judicial, administrative of notary procedure, is full exercise capacity of both spouses. Thus, article 374 second alignment of the Civil Code states that divorce by agreement of the parties can't be performed if one of the spouses does not have full capacity. Exercise capacity is part of civil capacity and it entails a person's ability to conclude legal acts on its own. Full exercise capacity is a

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[9] Law no 71/2011 for the enactment of Law no. 287/2009 regarding the Civil Code published in the Official Bulletin no 409 of June 10th, 2011

formal condition, general and essential for the validity of the legal act; it is acquired once the person reaches 18 years old (or previously under the conditions stated by article 39 and 40 of the Civil Code) and is lost when the person dies or is placed under interdiction (or, exceptionally, by ruling on the annulment of the marriage concluded by a minor or by annulment of the marriage concluded by a minor of bad faith). Thus, placing a person under interdiction causes the loss of exercise capacity and the impossibility of divorce by spousal agreement. As it is an essentially personal act, this application can only be filed by the person itself. Full exercise capacity must exist both at the time the application for divorce is flied and subsequently, throughout the entire procedure; otherwise the application will be rejected.

The parties are required to inform the notary if either of them is placed under interdiction. The opposability of interdiction requires it to be mentioned on the act of birth of that specific person.

The National Union of Public Notaries holds the National Notary Register regarding the capacity of people, administered by CNARNN – Infonot; however it is not yet functional, as the parties are not obliged to mention if they are placed under interdiction; in the lack of any such mention, capacity is presumed to exist.

In case the person who is placed under interdiction files an application for divorce and the public notary is unaware of his lack of capacity, his application is admissible and divorce is pronounced. But is the divorce certificate valid? The answer is yes, but it is merely temporary, provided it is not annulled. We believe that, in this case, by applying the general rules, only the legal guardian of the person who is placed under interdiction will be able to request an annulment of the divorce certificate and only in case it can be proven that the spouse will full exercise capacity was aware that the other spouse was placed under interdiction. In case the other spouse was unaware of the face that his spouse was placed under interdiction, the spouse is presumed to have had capacity throughout the entire procedure, thus annulment of the divorce certificate wouldn't be possible. The capable spouse would not be able to annul the divorce certificate regardless of whether he was of good faith or bad faith and regardless of whether the publicity formalities were performed or not, as the placing under interdiction is a measure meant to exclusively protect the person who is placed under interdiction. As it is a civil act, according to the provisions of article 100 of the Civil Code, the annulment of the divorce certificate is possible only by judicial means.

The second general admissibility condition for divorce by spousal agreement is the freely expressed and non vitiated consent of both spouses. Consent is a formal, general and essential condition for the validity of the legal act; it entails the exteriorization of the decisions to conclude a legal act[10], namely divorce. In order

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[10] Boroi G., Anghelescu C.A., *Civil law course. The general part,* Hamangiu Publishing House, Bucharest, 2011, p. 127

for it to be valid, it must meet the general conditions, namely to be exteriorized, to be expressed with the purpose of causing legal effects, to come from a person with reason and to not be affected by vices.

In regard to the first conditions of consent, in the matter of divorce, the manifestation of will must be express and contained in a written request by both spouses, personally or through their legal representative and with predetermined content. By exteriorizing their will, the spouses aim to cause legal effects, namely the dissolution of their marriage. The current Civil Code does not provide an express definition of judgment but, by interpreting the provision of article 211 of Law no 71/2011 for the coming into force of the Civil Code[11] and, considering the provisions of article 5 letter k of the Law on mental health and the protection of people with mental disease no 487/2002, republished[12], judgment can be defined as a person's ability to exercise its rights and obligations by analyzing and correctly anticipating the potential consequences which derive from its actions[13].

French doctrine defines judgment as a permanent or temporary alteration of the mental capacity likely to exclude the conscientious and clear will of a person[14].

The existence of judgment is presumed in case of people with full exercise capacity. The existence of judgment is searched at the time the application is filed but also throughout the entire procedure of divorce; the lack of judgment causes the annulment of the divorce certificate. Disrespecting the conditions regarding judgment must be proven by those who invoke it and, given that it is a state of fact, it can be proven by any means available.

In order to be valid, consent must be free and unaffected by vices. The vices which can affect consent in the matter of divorce are error, fraud and violence. Lesion is excluded given the patrimonial character of the acts which are affected by it. Without analyzing each of them, we only mention that the sanction, in case consent is affected by vices, is the annulment of the divorce certificate released under these conditions; annulment can only be ruled upon by judicial means under the conditions of common law.

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[11] Article 211 of Law no 71/2111 for the enactment of Law no 287/2009 regarding the Civil Code: „In the understanding of the Civil Code, as well as the current civil law, mental disease or mental illness is a psychological condition which renders a person psychologically incompetent of acting critically and impairs on his ability to predict the social-legal consequences which can derive form the exercise of his civil rights and obligations"

[12] Article 5 letter k) of the law on mental health and the protection of people with mental disease no 487/2002, republished (Official Bulletin nor 652 of September 13th, 2012): "(…) k) judgment is that certain component of mental capacity which refers to a certain fact and from which derives the possibility of that certain person to appreciate on the content and consequences of this fact"

[13] Szekely R., *General configurations of judgment in Romanian Civil law*, in Studia Universitatis Magazine Babeş-Bolyai –Iurisprudentia series no 4/2013, available at http://studia.law.ubbcluj.ro/articol.php?articolId=584 accessed on 27.11.2014

[14] Renault-Brahinsky C., *Droit des successions,* 6e ed., Gualino, Paris, 2011, p. 110

The special condition of divorce by notary procedure, the sine qua non condition of such a procedure, pertains to the agreement of spouses. The agreement can be defined as the common will of the spouses, manifested as such, in order to end the relation of marriage and to solve the patrimonial and non patrimonial subsequent aspects.

The agreement of spouses must pertain not only to the investment of the public notary to end their marriage but also in regard to all aspects which derive from it, such as the name they will have after the marriage ends, the agreement in regard to their minor children, resulted from the marriage or outside of marriage or by adoption.

Although notary activity is exercised outside the borders by the diplomatic and consular offices of Romania, they are not competent to handle notary divorce procedures. Thus, from a material point of view, the competence of pronouncing divorces by notary procedure belongs only to public notaries.

From a territorial point of view, the competence of ruling on divorce is alternative and it belongs to the notary who is located in the same county where the marriage was concluded or to the public notary who is located where the spouses had their final common residence. The territorial competence of public notaries named in Bucharest County is extended throughout the county. Proof of the place where the marriage was concluded is achieved by the marriage certificate. The last common residence is the last residence where the spouses lived together. Proof is usually achieved by the identification papers of the spouses. In case such proof is impossible as their identification papers have different domiciles, competence will belong to the public notary of the county where the spouses declare to have had their final common residence. Thus, from a legal point of view, what is of concern is not the last domicile, but the last place where the spouse have effectively lived together.

When receiving the application for divorce, the first obligation of the public notary is that of verifying his competence. In case he finds the competence does not belong to him, he will refuse to register the application and will direct the parties towards the competent notary. Although the notary procedure in non contentious, there is a possibility the parties might insist to register the application for divorce, in which case the public notary will be forced to register it and reject is, as the provisions regulating competence are imperative.

As the notary procedure entails, as previously shown, an agreement from both spouses, the application for divorce is filed by both spouses, personally or by legal representative. In case the representative represents both spouses, it is necessary for the mandate to respect the provision of article 1304 of the Civil Code regarding double representation. The possibility of representing one of the spouses is limited to filing the divorce application, as the law imperatively requires the spouses to be present in front of the public notary. Thus, the public notary is required to verify

the general and special conditions for the admissibility of the divorce by spousal agreement.

If and after the spouses agreed on investing the public notary with pronouncing their divorce, an agreement must be reached in regard to the non patrimonial aspects resulted from marriage, such as the names the spouses will have after the marriage ends and in regard to their minor children.

Spousal agreement regarding the last name the spouses will carry after divorce is a bilateral act provided the suspense condition[15] of admission of divorce application. This agreement can be modified at any time within the 30 day reflection term provided there is a request by both spouses.

Spousal agreement regarding the common children resulted from marriage, from outside of marriage or by adoption, must exist from the time the divorce application is registered until the time divorce is pronounced. This entails the parties reach an agreement regarding the following aspects: the common exercise of parental activity, establishing the residence of minor children, the ways by each of the parents will maintain a relation with each child and the expenses necessary for the education and professional training of minors.

In regard to these aspects, we must state that both spouses can only decide on commonly exercising parental authority and contribute to the growth, education and professional training of the minor.

This agreement must be stated in an express manner, in writing and even in the divorce application, but it is subject to confirmation by the tutelary authority. Thus, even if the parents are the legal representatives of the minors, their will regarding the minors is subject to control of the tutelary authority. This control entails the respect of the superior interest of the minor and is stated in a psychosocial inquiry report.

The psychosocial inquiry report is drafted by the tutelary authority located at the domicile of the parent with whom the minor will reside. In order for the tutelary authority to draft this report, the public notary is required that, right after he registers the divorce application, to provide the tutelary authority with a copy of the divorce application which states the agreement of the spouses regarding the minors; he also must communicate the term in which the divorce procedure must be finalized.

In order to finalize the divorce procedure, it is necessary that the psychosocial inquiry must be filed until the term indicated by the public notary. At that time, the public notary will proceed to hear the minor who is above the age of 10. In case the conclusions of the inquiry and the opinion of the minor are in agreement with the parents' decision, nothing prevents the notary from pronouncing the divorce. What happens if the conclusion of the inquiry indicates that the superior interest of

[15] Negrilă D., *Divorce by notary procedure. Theoretical and practical studies,* Universul juridic Publishing House, Bucharest, 2014, p. 88

the child is divergent from the parents' agreement? Or what happens if the opinion of the minor does not coincide with the conclusions of the psychosocial inquiry? In both situations, the public notary will be forced to reject the divorce application as he is not authorized to appreciate on the superior interest of the minor.

4. Conclusions

The admissibility of divorce by notary procedure is subject to some general and special conditions, which are expressly stated by law. As it is a non contentious procedure, if any of these conditions is not met, the application for divorce is rejected, by motivated decisions. The motivated refusal of the public notary is not subject any means of attack.