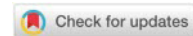


# THE CONCEPT, PROCEDURE AND CONSEQUENCES OF DIVORCE IN THE LEGAL SYSTEM OF THE REPUBLIC OF SERBIA

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**Abstract:** Marriage and divorce are closely related phenomena, since many divorces are actually the consequences of a lack of marriage that existed at the time of its conclusion. The importance of marriage and divorce is also reflected in the fact that the basis of both lies in the will of two people of different sexes. Marriage ends with the death of a spouse, annulment and divorce. Divorce as an institution is known to numerous cultures around the world, and has appeared in various forms throughout history. In the modern world, it is most often carried out by a court ruling. In all countries, divorce is regulated by the institutions of family law, or marriage law. The term divorce should be distinguished from the term separation, which denotes the actual termination of the joint life of two spouses while at the same time formally remaining in the marriage. In contrast, there are situations when formally divorced spouses continue to live together. The institution of divorce is characterized by the fact that it is opposed by the Roman Catholic Church, which is why it was introduced relatively late into the legal systems of Catholic countries such as Italy, Spain, Portugal, Ireland and Malta, or that it still does not exist in some countries, e.g. the Philippines.

**Keywords:** marriage, divorce, family, termination, consequences.

**Field:** Social Sciences

## 1. INTRODUCTION

The Family Law (Official Gazette of the Republic of Serbia”, No. 18/2005, 72/2011 – additional law and 6/2015) (hereinafter: the Family Law), defines marriage as a legally regulated union of life between a woman and a man. Marriage is considered “concluded” after the future spouses have given affirmative statements to the competent registrar that they freely consent to marry the other, after which the registrar declares that the marriage has been concluded.

It is assumed that divorce occurred when the marriage occurred, Voltaire wrote in his Philosophical Dictionary. This thought is only partially correct. Divorce did indeed occur when the marriage itself occurred, but here we are referring to a monogamous marriage. In the original community, there can be no talk of divorce in the legal sense of the word.

The causes that lead to the dissolution of a marriage are regulated by law, and they should be proven and acceptable to lead to the termination of a valid marriage.

## 2. THE CONCEPT OF DIVORCE

Divorce is the most common form of termination of a valid marriage. Marital unions in which the relations of the spouses have deteriorated to the extent that their further life together has become unbearable, end with divorce at the request of one or both spouses. However, many marriages actually end much earlier than they end with divorce. Due to the disruptions in marital relations, the spouses end their life together, although their marriage is still legally valid. Therefore, in life there is often a gap between the actual termination of a marriage and its dissolution by divorce. On the other hand, many actual terminations of a marital union are not justified from the point of view of the grounds for divorce, and do not lead to the legal dissolution of the marriage.

In legal science, the term termination of marriage by divorce is defined as the termination of a valid marriage during the lives of the spouses, for a reason provided by law, and based on a final decision of a competent court.

All states can be divided into four groups, depending on the position they take towards the possibility of divorce: (1) states that do not allow divorce, (2) states that accept the theory of sanctions (theory of guilt), (3) states that accept the theory of divorce as a legal remedy, and (4) states that accept the freedom of divorce.

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### 3. GROUNDS FOR DIVORCE

Modern legal systems contain examples of various grounds for divorce. The most important and common classification of grounds for divorce includes the following three divisions of grounds for divorce.

General (or general) grounds for divorce are those that are so stylized in the law that various, previously undefined facts or circumstances can be included under their broad and elastic formulation. Typical general grounds are “serious and permanent breakdown of marital relations”, “irretrievable breakdown of marriage”, “serious violation of marital duties”, “lack of spiritual and material community”, etc.

Absolute and relative grounds for divorce can be viewed in terms of their structure in that absolute grounds for divorce are characterized by the fact that the law gives them the meaning of independent grounds for divorce. On the contrary, relative grounds are not facts that have an independent meaning, but their presence is a necessary - but not sufficient - condition for divorce.

Hidden and non-hidden grounds for divorce represent a division related to the qualification of the behavior of the spouses in their common life. Hidden causes include facts or circumstances that qualify as unacceptable actions by one or both spouses (“adultery”, “malicious or unjustified abandonment”, “conviction for a shameful act”, “serious violation of marital duties”, etc.). Unhidden are those divorce causes that arise from the reality of life and have nothing to do with any arbitrary or incorrect action by the other spouse (“disappearance”, “mental illness”, “serious and permanent disruption of marital relations”, etc.).

### 4. DIVORCE ACCORDING TO THE FAMILY LAW OF THE REPUBLIC OF SERBIA

The Family Law of the Republic of Serbia from 2005 introduced significant innovations into our family law, which are the result of efforts to harmonize our legislation with global trends in this important area, especially with European ones. They are also the result of fulfilling the obligations of our country undertaken by signing two extremely important international documents, namely the UN Convention on the Rights of the Child and the European Convention on Human Rights and Fundamental Freedoms, as well as the obligations we assumed by becoming a member of the Council of Europe.

Spouses may request a divorce for the reasons prescribed in Article 41 of the Civil Code.

Our law has adopted a general, relative and undisclosed cause for divorce.

Judges in these proceedings must be persons who have acquired special knowledge in the field of child rights, and lay judges should be selected from a circle of experts who have experience in working with children and young people.

### 5. DIVORCE PROCEDURE

A marriage may be terminated only in a court proceeding, which is prescribed by the provisions of the law regulating the issue of matrimonial litigation, which relate to proceedings for annulment of marriage, divorce, as well as the establishment of the existence of marriage. The procedure in matrimonial litigation is regulated by Articles 209–246. PZ. In accordance with Article 202. PZ, in this matter, in the event of a legal gap, the Law on Civil Procedure (“Official Gazette of the Republic of Serbia”, No. 72/2011, 49/2013 - decision of the Constitutional Court, 74/2013 - decision of the Constitutional Court, 55/2014, 87/2018, 18/2020 and 10/2023 - other law) (hereinafter: the LPP).

The procedure in matrimonial disputes can be initiated: 1) by a lawsuit for the establishment of marriage, 2) by a lawsuit for the annulment of marriage, 3) by a lawsuit for divorce and 4) by a proposal for a divorce by mutual consent.

All submissions (claim, response to the claim, counterclaim, legal remedies), according to the Civil Procedure Act, which are submitted to the court, are submitted in writing and must be understandable and contain all information about the parties, representatives, proxies, the claim, the evidence on which it is based, with the signature of the submitter, and are submitted in a sufficient number of copies for the court and the opposing party.

A lawsuit for the establishment of the (non)existence of marriage and the absolute nullity of marriage may be filed by spouses, persons with a legal interest and the public prosecutor.

A lawsuit for divorce may be filed only by spouses.

The right to file a lawsuit for annulment and divorce does not pass to the heirs of the spouses.

Heirs may, in their own name, as persons with a legal interest, initiate proceedings in the event of absolute nullity of the marriage.

Heirs do not have the right to initiate, but may continue to initiate, divorce proceedings initiated by a lawsuit or a proposal for a divorce by agreement.

In a divorce, only court costs are paid. If a party does not have sufficient financial means to pay, they may use the institution of poor law through exemption from paying court costs under the Civil Procedure Code. According to Article 164 of the Civil Procedure Code, the court shall exempt from paying the costs of the procedure a party who, according to their general financial situation, is unable to bear the costs. When making a decision on exemption from paying the costs of the procedure, the court shall assess all circumstances, and in particular shall take into account the value of the subject matter of the dispute, the number of persons supported by the party, the income and property of the party and its family members. The party is obliged to submit a certificate of financial status from the competent authority with the proposal. The certificate of financial status is obtained from the tax administration on the prescribed form of the municipality in which the party lives. According to Article 166 of the ZPP, when a party is completely exempt from paying the costs of the procedure (Article 164, paragraph 2 of the ZPP), the first instance court will also recognize the party's right to free representation, if necessary for the protection of the party's rights.

According to the Civil Code, spouses have the right to: (1) divorce if they conclude a written divorce agreement and (2) divorce by lawsuit if the marital relationship is seriously and permanently disturbed or if the community of life of the spouses cannot be objectively achieved.

(1) Divorce by mutual consent is possible for those spouses who have maintained good mutual communication and who are willing to resolve all issues relevant to the divorce by agreement. In court proceedings, the spouses are the proposers, and the divorce proceedings themselves are initiated by a proposal for a divorce by mutual consent. The relevant issues relate to the exercise of parental rights and the division of any joint property (property acquired during the duration of the marriage).

The agreement of the spouses on the exercise of parental rights is entered into the operative part of the divorce judgment if the court assesses that this agreement is in the best interest of the child. The operative part of the judgment also includes the manner of seeing the child and the amount of maintenance.

A divorce judgment based on an agreement may be challenged only due to significant violations of the provisions of the civil procedure or if the agreement was concluded under duress or in error.

The court may not accept an agreement reached by the parents on the manner of exercising parental rights after the termination of the marriage if this does not correspond to the best interests of the child. The court does not have the authority to assess an agreement on the division of joint property (except, perhaps, if the agreement violates the best interests of the child in some aspect), e.g. if the agreement assigns all joint property to one parent and all children to the other parent. Although legally simple, disputes over the division of joint property have proven to be factually complicated and lengthy in practice. According to the Family Law, spouses are not obliged to agree on alimony during a divorce by agreement.

The Civil Code does not have the previous legal restriction, which was provided for by the Law on Marriage and Family Relations (in Article 84, paragraphs 2 and 4), that during the period of a woman's pregnancy and until the child's first birthday, only an amicable divorce is possible, and on the right of the court to reject the agreement if it is contrary to the interests of a common minor child.

According to the Civil Code, there are three different initial acts in a divorce case: 1) a lawsuit for divorce, 2) a joint proposal for divorce if the spouses have common minor children (if one spouse withdraws, this act is converted into a lawsuit for divorce) and 3) a proposal for amicable divorce, if the spouses do not have common children (the legal plural is not necessary: it is sufficient that they do not have a common child), with the proviso that in the case of withdrawal of one partner - the procedure is suspended.

The marriage rules of the Serbian Orthodox Church do not recognize divorce by mutual consent.

(2) Spouses have the right to file for divorce: if marital relations are seriously and permanently disturbed or if the community of life of the spouses cannot objectively be realized.

The court is obliged to determine the state of the marital relations of the parties and the existence of prospects for establishing marital union. If it determines that there is a serious disturbance and that there are no realistic prospects for ending the crisis, the marriage is dissolved. The marriage may not be saved only to satisfy the spouse who is considered injured. The decision on divorce is quite liberal, because the court does not engage in determining guilt.

The lawsuit is filed with the Basic Court (actual jurisdiction) according to the place of residence, i.e. the place of stay of the defendant or the court in whose territory the spouses had their last common residence and the court according to the place of residence of the plaintiff (special territorial jurisdiction).

The proposal, or complaint, is accompanied by supporting evidence: marriage certificates, birth certificates for children, proof of ownership, income, etc.

In the first instance, marital disputes are tried by a panel consisting of one judge and two lay judges. The judges must have special knowledge in the field of child rights, and lay judges are selected from among experts who have experience working with children and young people. In the second instance (appeal proceedings), a specialized panel consisting of three judges is tried. This composition of the court achieves specialization and quality in the trial, primarily protecting the interests of minor children.

A lawsuit for divorce can be filed by either spouse. Since the right to sue for divorce is a personal right, it does not pass to the heirs of the deceased spouse. The guardian of an incapacitated spouse may file a lawsuit for divorce only with the prior consent of the guardianship authority (the Social Work Center). The spouse, or party to a marital dispute, may have a proxy who must have a power of attorney certified and issued solely for the purpose of representing the spouse in a marital dispute, which must contain the grounds for divorce - by agreement or by complaint. When the court receives the complaint, it first examines it, determines whether it is suitable for discussion, and schedules a mediation procedure within 15 days of receipt.

The divorce procedure is preceded by a mediation procedure, which may be conducted by the court, the guardianship authority, as well as marriage or family counseling centers and other institutions specializing in mediation in marital disputes.

Mediation in the Family Court includes a procedure for attempting reconciliation (conciliation) and a procedure for attempting to end the dispute by agreement (settlement).

Mediation is regularly conducted in conjunction with proceedings in a marital dispute initiated by a lawsuit filed by one of the spouses.

Mediation in a marital dispute is not conducted: (1) if one of the spouses does not agree to mediation; (2) if one of the spouses is incapable of judgment; (3) if the whereabouts of one of the spouses are unknown; and (4) if one of the spouses lives abroad.

The purpose of mediation is the current legal interest, the interest of the parties (reducing the intensity of the conflict, reducing the time and financial costs of resolving the dispute) and the future legal interest (reducing the conflict between ex-marital partners, helping to create a better atmosphere and raising a common child) and the public interest (less conflict between citizens and more efficient judiciary).

Mediation is conducted by a single judge, with the possibility, when the parties agree, of entrusting it to a guardianship authority, a counseling center or another institution that deals with mediation.

According to Article 231, paragraph 2 of the Civil Procedure Code, a lawsuit for divorce or annulment of marriage shall be submitted along with the summons to the mediation hearing.

## 6. LEGAL EFFECTS OF MARRIAGE TERMINATION

It is known that spouses can agree on three options when entering into marriage: that each retains their own surname, that one spouse takes the surname of the other, or that one spouse adds the surname of the other spouse to their own surname, or that the other spouse adds their own surname to the surname of the other spouse.

The most common question asked by a spouse who changed their surname when entering into marriage is how to restore the surname they had before entering into marriage.

The right to choose a surname is accompanied by the right to change their surname after the termination of marriage, which means that a spouse who changed their surname upon entering into marriage may, after the termination of marriage, take the surname they had before entering into marriage. That spouse may exercise this right only within 60 days from the date of termination of marriage (Art. 348, Paragraph 2 of the Civil Code).

A spouse who changed his or her surname upon marriage, however, does not have to change his or her surname after divorce.

The spouse, together with the descendants of the deceased, enters the first line of succession. If in a specific case there are no descendants of the deceased or no descendants want to be heirs or cannot be heirs, then the spouse of the deceased enters the second line of succession. In the second line of succession, the spouse, in principle, receives half of the estate, and the other half is received by the deceased's parents, or by right of representation and right of accrual, the deceased's collateral relatives.

The consequences of the termination of marriage result in the regulation of mutual relations related to: 1) parental rights, which can be exercised independently (one parent) or jointly by both parents), 2) maintenance of the unsecured spouse, as well as of the minor child, and 3) joint property.

Law on Obligatory Relations ("Official Gazette of the SFRY", No. 29/78, 39/85, 45/89 - decision of

the Constitutional Court of the Socialist Federal Republic of Yugoslavia and 57/89, "Official Gazette of the Socialist Federal Republic of Yugoslavia", No. 31/93, "Official Gazette of the Socialist Federal Republic of Yugoslavia", No. 1/2003 - Constitutional Charter and "Official Gazette of the Republic of Serbia", No. 18/2020) (hereinafter: ZOO), provides that the spouse has the right to monetary compensation for non-pecuniary damage in the event of death or severe disability.

Upon the termination of marriage, certain family rights arise, e.g. According to the Housing Law ("Official Gazette of the Republic of Serbia", No. 50/92, 76/92, 84/92 - amended, 33/93, 53/93, 67/93, 46/94, 47/94 - amended, 48/94, 44/95 - other law, 49/95, 16/97, 46/98, 26/2001, 101/2005 - other law, 99/2011 and 104/2016 - other law), after the death of the tenant or after divorce, it is determined who will have the status of tenant. In the event of divorce, if there is no agreement between the former spouses, then the court, at the request of one of them, determines who will be the tenant of the apartment and who will continue to use the apartment. The criteria for the court decision are the housing needs of the divorced spouses and their children, their financial and health status, who was the tenant of the apartment, etc.

In the past, the termination of marriage was a common life circumstance for the emergence of a right. The return of gifts can also be made during the marriage, but most often the return of gifts received during the marriage occurs after the termination of the marriage.

For some family law relationships, the termination of marriage is irrelevant. For example, in-law kinship exists during the marriage and exists with the same intensity of legal importance after the termination of the marriage.

Domestic violence, according to Article 197, paragraph 3, item 1. of the Family Code, exists between spouses, but also between "former spouses". Likewise, the termination of marriage has an impact on the manner, that is, on the choice of the authorized entity that will exercise parental rights according to the rules in Articles 75-78. Serbian National Defense.

Most children survive their parents' divorce with relatively few problems or lasting negative consequences. For others, however, divorce can leave lasting trauma. The changes in their environment, time with their parents, education, and lifestyle can all cause a child to feel angry or fearful. But when a child is unable to express these emotions appropriately or process them mentally, they feel helpless. Many children believe that it is their fault that their parents are divorcing. They remember times when they fought with their parents, got bad grades, or got into trouble. A child can draw harmful conclusions about their parents' divorce in various ways. That is why it is necessary to talk to the child, to discover his errors in thinking and to correct them. When they decide to divorce, parents should prepare the child for this, but also to talk to him often during and after the divorce about what he is experiencing. Just as it is pathological to accuse a child of being to blame for the divorce, it is pathological when a parent who does not want a divorce expects the child to save his marriage.

British researchers within the National Study of Child Development have determined a tendency for children from divorced marriages to achieve lower success in school, to enter less promising careers, and to be more often beneficiaries of social assistance than their peers from intact families. It has also been found that children from broken families are more likely to experience the breakup of their own relationships as adults, as well as to suffer from depression.

## 7. RECOGNITION OF A FOREIGN COURT DECISION IN SERBIA

The procedure for the recognition of a foreign court decision is initiated by submitting a proposal to the Higher Court competent for first instance decisions. The subject of the recognition and enforcement of foreign court decisions in Serbia is regulated by the Law on the Resolution of Conflicts of Laws with the Regulations of Other Countries ("Official Gazette of the SFRY", No. 43/82, 72/82, "Official Gazette of the FR Yugoslavia", No. 46/96, "Official Gazette of the RS", No. 46/2006).

A foreign court decision is equal to a decision of a domestic court and produces legal effect in Serbia only if it is recognized by the Court of the Republic of Serbia. A settlement concluded before a court (court settlement) is also considered a foreign court decision. Also, a foreign court decision is considered a decision of another body that is equal to a court decision, or a court settlement, in the country in which it was made. In order for the court to recognize a foreign court decision, the applicant for recognition must submit, along with that decision, a certificate from a competent foreign court, or another body, stating that the decision is legally binding under the law of the country in which it was made. The applicant for enforcement of a foreign court decision, in addition to the certificate of legal validity, must also submit a certificate of enforceability of that decision under the law of the country in which it was made. An objection to a proposal for recognition of a foreign court decision is submitted to the court to which the proposal for recognition was submitted, i.e. to the Higher Court as the one with actual jurisdiction.

According to the provision of Article 35 of the Law on Resolving Conflicts of Laws with Regulations of Other Countries for Divorce, the law of the country of which both spouses are citizens at the time the lawsuit is filed shall apply. If the spouses are citizens of different states at the time of filing the lawsuit, the laws of both states of which they are citizens shall be applicable to the divorce. If the marriage could not be dissolved under the law determined in this way, the law of Serbia shall be applicable to the divorce, if one of the spouses had a residence in Serbia at the time of filing the lawsuit. Likewise, if one of the spouses is a citizen of the Republic of Serbia, who does not have a residence in Serbia, and the marriage could not be dissolved in the manner described, the law of Serbia shall be applicable to the divorce.

## 8. SOCIAL NETWORKS AND DIVORCE

A study by the American Academy of Matrimonial Lawyers shows that social networking sites, especially Facebook, are the cause of one in five divorces in this country. In addition, the number of those who use this form of communication in search of extramarital affairs is growing. There is no doubt that marriages and partnerships are increasingly threatened by virtual love. A few years ago, French futurologist Jacques Attalius claimed that this would be the case. He went one step further, predicting that a specific time of polygamy, a strange mixture of real and virtual love, or real and virtual partners, is coming.

The computer has become an indispensable third player in many partnerships. This is confirmed by the latest data from the American Academy of Matrimonial Lawyers, as well as similar figures that show the same trend in most technologically developed countries.

A US minister recently publicly called Facebook a "gateway to infidelity", and divorce lawyers testify that suspicious partners have used this very network to find evidence of infidelity. Courts accept them, and statistics show that in 66 percent of cases the source of evidence is Facebook, followed by MySpace and Twitter, but in negligible percentages.

Stories of those whose marriages were destroyed by affairs started on social networks can be found on the Internet. The pitfalls of virtual communication are numerous. While there are no foolproof security rules to follow, there are barriers that can help avoid the risk of an online relationship getting out of hand..

## 9. CONCLUSION

Based on research in the Republic of Serbia, a constant decline (with occasional stagnation) in the marriage rate is observed. There is an increasing convergence towards the Western European type of marriage, which is characterized by late marriage and postponing marriages, which in turn leads to a reduced birth rate and therefore the appearance of increasingly frequent negative natural growth, as well as a decrease in the number of inhabitants of certain areas.

Regarding divorce in the Republic of Serbia, there is first a decline, and then, since 2000, a slight increase in the divorce rate.

What represents the biggest problem is the large number of children affected by the divorce of their parents, and this number is quite high in all countries. A problem that must certainly be taken into much greater account.

Children, when faced with the divorce of their parents, face numerous novelties. The uncertainty that an announced divorce brings with it can be unbearable for a child. They know that something will change in their daily life, but since they are not able to imagine it, numerous fears and anxieties arise. They know that contact with one of their parents will be reduced. They may also be expected to move or change schools, as well as a decline in their standard of living. Anticipating all these changes on a practical, everyday level is just one of the things that provoke stress. The emotional dimension of the whole story is even more significant. During this period, children struggle with feelings of abandonment, but very often also with feelings of guilt, convinced that they are, in part or even completely, responsible for their parents' separation. Research has shown that children whose parents are divorced are more likely to divorce themselves, and that they are less likely to decide to get married. However, these negative consequences can be avoided if children are approached in the right way during divorce. Another study showed that if the divorce is not accompanied by major conflicts and if the parents have managed to protect the child from stress as much as possible during this period, children from divorced marriages can have equally successful development and emotional stability as children from intact families.

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