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Divorce and legal separation

Luxembourg

1 What are the conditions for obtaining a divorce?

Luxembourg law provides for two forms of divorce: divorce by mutual consent and divorce due to irretrievable breakdown of the marital relationship.

Divorce by mutual consent

Divorce by mutual consent can be applied for jointly by the spouses where they agree on the breakdown of the marriage and its consequences.

If the spouses have property to be divided, a notary has to draw up an inventory and estimate its value. The spouses are then free to settle their respective rights to the property concerned. If, however, there is no property requiring an inventory, the services of a notary are not required.

The spouses must also agree on where they will live during the divorce proceedings, on the arrangements for their children during and after the proceedings, on the contribution that each spouse will make to the upbringing and maintenance of the children before and after the divorce and, finally, on the amount of any maintenance payments that one spouse will make to the other during the proceedings and after the divorce has been granted. This agreement must be in the form of a document (*convention*) drawn up by a lawyer or notary. The agreement must be approved by the court, which checks that it is in the best interests of the children and that it does not have a clearly disproportionate adverse effect on the interests of one of the spouses. The approved agreement forms an integral part of the divorce judgment.

Divorce due to irretrievable breakdown of the marital relationship

Divorce due to irretrievable breakdown of the marital relationship can be applied for by one of the spouses or, where there is agreement on the principle of divorce, but not on all its consequences, by both spouses jointly.

Irretrievable breakdown is proven where the spouses agree on the principle of divorce or where one spouse only applies for a divorce and continues with the application after a cooling-off period that cannot be longer than three months and that is renewable once.

2 What are the grounds for divorce?

Luxembourg law provides for two forms of divorce: divorce by mutual consent and divorce due to irretrievable breakdown of the marital relationship.

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

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

The divorce decree dissolves the marriage and ends the spouses' mutual obligations of fidelity, support and assistance.

Under Luxembourg law, no person may use a surname or forename other than those shown on their birth certificate: anyone who has ceased using them must resume their use. A change of civil status, for instance by marriage, does not therefore entail a change of surname by either of the spouses. Taking the surname of a spouse is not an acquired right. The other spouse must agree to the use of their surname.

The Luxembourg courts have ruled on the effect of divorce on the surname a person uses:

A divorced woman may continue to use her former husband's surname only if he authorises her to do so; he may withdraw that authorisation at any time.

The former husband is entitled to object to the use of his surname entirely at his discretion, such that the courts cannot authorise a divorced woman to continue to use her husband's surname for an unlimited period, even for professional reasons, if the husband objects to such use. However, the court may, in view of the reputation that the wife has gained in her profession under her husband's surname and in order to prevent any financial damage, set a time limit for her to inform her clients of her own surname – Court of Appeal (*Cour*) 24 May 2006, P. 33, 258.

3.2 the division of property of the spouses

The divorce decree orders the liquidation and division of the marital property of the spouses. If there is no marriage contract, the system that applies is the statutory community of marital property under which joint ownership extends only to acquisitions after the marriage. Divorce dissolves the community of marital property. There are two main stages in the division of property:

First, each of the spouses takes back any property that was never owned jointly, if it is in kind, or any assets that have replaced that property.

Second, the joint estate (assets and liabilities) is liquidated. For each spouse a statement is drawn up of what the joint estate owes to him/her and what he /she owes to the joint estate.

Where a spouse has been convicted, by a judgment that has become final, of an offence provided for in Articles 372, 375, 376, 377, 393, 394, 396, 397, 398, 399, 400, 401, 401 *bis*, 402, 403, 404, 405 and 409 of the Criminal Code (*Code pénal*) (indecent assault, rape, intentional assault and battery, homicide and intentional bodily injury, murder, assassination, infanticide and poisoning), committed during the marriage against the other spouse or a child living in the same household, or of an attempt to commit an offence provided for in Articles 372, 375, 376, 377, 393, 394, 396, 397, 401, 403, 404 and 405 of the Criminal Code against the same persons during the marriage, he/she forfeits, at the request of the other spouse, the marital benefits given to him/her by the latter. By contrast, the innocent spouse retains the benefits given to him/her by his/her spouse, even if those benefits were meant to be reciprocal and this condition is not met.

Where a spouse stopped working or reduced their working hours during the marriage, he/she can retroactively purchase a pension from the general pension scheme, according to the conditions and criteria laid down by the applicable civil and social security laws. To that end, the spouse can ask the court ruling on the divorce, before the divorce is granted and provided that he/she is not over 65 years of age at the time of the request, to calculate a 'reference amount' based on the difference between the respective incomes of the spouses during the period when the spouse was not working or had reduced their working hours. The rules for calculating this amount are set out by the Grand-Ducal Regulation of 11 September 2018 on the calculation of the reference amount and on the rules for paying and refunding the amounts referred to in Article 252 of the Civil Code (*règlement grand-ducal du 11 septembre 2018 relatif au calcul du montant de référence et aux modalités de versement et de restitution des montants visés à l'article 252 du Code civil*). For the purpose of this retroactive purchase, the spouse who stopped working or reduced their working hours has a claim against the other spouse for 50 % of the reference amount, within the limits of the assets consisting of the community of marital property or jointly owned property available after the liabilities have been settled. An amount equal to this claim is payable by the creditor spouse.

3.3 the minor children of the spouses

In principle, the divorce of parents does not alter the conditions under which parental authority is exercised as this continues to be exercised jointly by both parents. They must continue to make together any important decisions concerning the life of their child (maintenance, upbringing, school guidance, etc.).

The court will only entrust exercise of parental authority to one parent where this is in the best interests of the child. In this case, the designated parent makes any decisions concerning the child on their own. However, the other parent retains the right to be informed and to monitor the maintenance and upbringing of their child. Unless there are serious grounds precluding this, this parent also has an access and residential right. As a result, if parents separate, each must maintain contact with the child and respect the latter's bond with the other parent.

In the event of divorce, the parents must continue to contribute together to the cost of the child's maintenance and upbringing, unless otherwise decided. This contribution takes the form of a maintenance allowance and does not automatically stop when the child reaches adulthood. It can be paid directly to an adult child and can be revised according to the child's needs and the changing means and expenses of each parent.

As regards the child's place of residence, there are two possible scenarios (excluding the exceptional case where the court decides to entrust the child to a third party):

The child lives with one of the parents. In this case, the other parent is granted an access and residential right, unless there are serious grounds precluding this.

The child lives alternately with each of the parents, in which case the court checks that this alternating residence is in the interests of the child. Alternating residence does not necessarily mean that the period of time during which the child lives with each parent is exactly the same.

Where the spouses agree on the exercise of parental authority, the domicile and place of residence of the child, the access and residential right, and the contribution to the child's maintenance and upbringing, they can submit this agreement to the court during the divorce proceedings. The court can take this agreement into account in its judgment if it considers that the agreement is in the best interests of the child and that the spouses have freely given their consent.

The parents' divorce does not deprive their children of the benefits that they would otherwise have received. In this respect, they are treated in exactly the same way as the children of nondivorced parents.

3.4 the obligation to pay maintenance to the other spouse?

The court may require one of the spouses to pay maintenance to the other spouse. This maintenance is set according to the needs of the spouse to whom it is paid and within the limits of the other spouse's capacity to contribute. If the spouses agree, the court can decide that this maintenance be paid as a lump sum the amount and terms of which it will set.

When determining the needs and capacity to contribute, the court will take the following points into account, among others:

age and health of the spouses;

length of the marriage;

time already spent or that will need to be spent raising children;

their professional qualifications and situation with regard to the labour market;

their availability for new jobs;

their existing and foreseeable rights;

their assets, in terms of both capital and income, after the marital property has been liquidated.

Maintenance cannot be paid for longer than the length of the marriage, except in exceptional circumstances.

Except where paid as a lump sum, maintenance can be revised and terminated.

Where a spouse has been convicted, by a judgment that has become final, of an offence provided for in Articles 372, 375, 376, 377, 393, 394, 396, 397, 398, 399, 400, 401, 401 *bis*, 402, 403, 404, 405 and 409 of the Criminal Code (indecent assault, rape, intentional assault and battery, homicide and intentional bodily injury, murder, assassination, infanticide and poisoning), committed during the marriage against the other spouse or a child living in the same household, or of an attempt to commit an offence provided for in Articles 372, 375, 376, 377, 393, 394, 396, 397, 401, 403, 404 and 405 of the Criminal Code against the same persons during the marriage, he/she forfeits, at the request of the other spouse, any right to maintenance.

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

Legal separation loosens the marital ties but does not dissolve them: the spouses no longer have to live together, but they continue to have duties of fidelity and support towards one another.

5 What are the conditions for legal separation?

The grounds for legal separation are identical to those for divorce due to irretrievable breakdown of the marital relationship.

6 What are the legal consequences of legal separation?

Legal separation always entails the separation of property. If the legal separation has lasted for three years, either spouse may apply to the court for a divorce. The court grants the divorce if the other spouse does not immediately agree to end the separation.

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

Marriage annulment means that the marriage is rendered null and void by a court decision. In other words, the marriage is deemed never to have been celebrated.

8 What are the conditions for marriage annulment?

A marriage may be annulled on several grounds:

The marriage was contracted without the free consent of the spouses: this is the case if there was violence or the person concerned was mistaken as regards the other party's essential qualities.

The marriage was contracted without the consent of the parents (or authorisation of the court) where one of the spouses was a minor at the time of the marriage.

Bigamy: this is the case if either of the spouses was simultaneously married to another person.

The spouses are related to a certain degree.

It is a marriage of convenience for the purpose of obtaining a benefit in terms of residential status.

The formal requirements for the marriage were not met: the marriage was not publicly contracted, or was celebrated before a person who was not a properly authorised public officer.

9 What are the legal consequences of marriage annulment?

A marriage that is annulled nevertheless has legal effects (this is known as the 'putative marriage' (*mariage putatif*) theory):

in respect of both spouses, if they contracted the marriage in good faith;

in respect of one spouse who acted in good faith;

in respect of any child of the marriage, even if neither spouse acted in good faith.

However, a marriage that is annulled never has legal effects in respect of a spouse who did not act in good faith.

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

In Luxembourg, marriages may be dissolved only by court decision, and never by alternative non-judicial methods or by mediation. Family mediation may be used, however, for matters connected with the liquidation and division of joint property, maintenance obligations and contributions to the costs of the marriage, obligations to maintain children, or the exercise of parental authority.

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?

Where to lodge my application

Applications for divorce or legal separation must be submitted to the district court (*tribunal d'arrondissement*) in the place where the spouses have their common domicile or, failing this, in which the respondent or, in the event of divorce by mutual consent, one of the parties has their domicile, subject to compliance with the rules laid down in 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.

Marriage annulment applications must be submitted to the district court in the place where the family home is located or, if the parents live separately, to the district court in the place of residence of the parent with whom the minor children habitually reside where parental authority is exercised jointly or in the place of residence of the parent who exercises this authority alone, or, in other cases, to the district court in the place of residence of the person who has not brought the proceedings. For joint applications, the parties choose the district court in the place where one or other party lives. These rules apply subject to compliance with the rules laid down in the aforementioned Regulation (EC) No 2201/2003.

Applications are heard by a family judge (*juge aux affaires familiales*).

Formalities to be observed and documents to be submitted

In the procedure for **divorce by mutual consent**, there are several stages: if there is any property to be divided, the spouses must ask a notary to draw up an inventory and estimate of all their movable and immovable property. The spouses are free to settle their respective rights to the property concerned. In addition, they must settle various matters in an agreement, including the residence of the spouses during the proceedings, the administration of the person and property of any children, access rights, the contribution of the spouses towards the upbringing and maintenance of any children, and any maintenance to be paid by one of the spouses to the other. This agreement must be drawn up by a lawyer or notary.

The case is brought before the court through a joint application filed by both spouses with the registry. A lawyer is not required to bring the case before the court.

The application must contain:

its date;

the surnames, forenames, occupations and address(es) of the spouses;

the dates and places of birth of the spouses;

where applicable, the identity of any joint children;

the subject of the application;

a brief statement of the facts and grounds invoked.

In addition to the agreement mentioned above, the following documents must be submitted with the application:

marriage certificate;

birth certificates of the spouses;

birth certificates of any joint children;

a document proving the nationality of the spouses;

where applicable, the agreement designating the law applicable to the divorce of the spouses pursuant to Article 5 of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in accordance with the forms laid down by that Regulation. The spouses may also designate the law applicable to the divorce pursuant to Article 5 of Regulation (EU) No 1259/2010, in accordance with the forms laid down by said Regulation, in the agreement on divorce by mutual consent;

any other document that the spouses intend to use.

Instruments and documents that are submitted with the application and that the parties intend to use must be legalised, where applicable, where they are issued by a foreign public authority.

In the case of **divorce due to irretrievable breakdown of the marital relationship** or **legal separation**, a lawyer must be used. The case is brought before the district court through an application filed with the registry.

The application must contain:

its date;

the surnames, forenames, occupations and address(es) of the spouses;

the dates and places of birth of the spouses;

where applicable, the identity of any joint children;

the subject of the application;

a brief statement of the facts and grounds invoked.

The application can also contain requests for interim measures concerning the person, maintenance and property of the spouses and their children.

The following documents must be submitted with the application:

marriage certificate;

birth certificates of the spouses or applicant;

birth certificates of any joint children;

a document proving the nationality of the spouses or applicant;

where applicable, the agreement designating the law applicable to the divorce of the spouses pursuant to Article 5 of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in accordance with the forms laid down by that Regulation;

where applicable, a draft agreement on the effects of the divorce on which the spouses are agreed;

where applicable, a copy of the judgment convicting a spouse of one of the offences referred to in questions 3.2 and 3.4 above;

any other document that the applicant(s) intend(s) to use.

Instruments and documents that are submitted with the application and that the parties intend to use must be legalised, where applicable, where they are issued by a foreign public authority.

For a **marriage annulment** application, the case is brought before the court through an application filed with the registry. A lawyer is not required to bring the case before the court. The application must contain:

its date;
the surnames, forenames and addresses of the parties;
the dates and places of birth of the parties;
the subject of the application;
a brief statement of the facts and grounds invoked.

Instruments and documents that are submitted with the application and that the parties intend to use must be legalised, where applicable, where they are issued by a foreign public authority.

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

People whose income is regarded as insufficient under Luxembourg law can receive legal aid. To receive this aid, they must complete a questionnaire that can be obtained from the Luxembourg bar association (*Barreau de Luxembourg*) and send it to the president of the bar association (*Bâtonnier de l'Ordre des avocats*) of the place, who will take the decision.

Legal aid covers all costs arising from the court proceedings, procedures or actions for which it is granted. It covers, for example, stamp duties and registration costs; clerks' fees, lawyers' fees, bailiffs' expenses and fees, notaries' expenses and fees, technicians' expenses and fees, witness allowances, and translators' and interpreters' fees; fees for certificates stating the position in foreign law (*certificats de coutume*); travelling expenses; duties and fees relating to formalities for registration, mortgage and encumbrance; and where necessary costs for notices in newspapers.

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

It is possible to appeal against this kind of decision in Luxembourg. In principle, the time limit for an appeal is 40 days, but this may be extended if the applicant is resident abroad. The competent court for any appeal is the Supreme Court of Justice (*Cour supérieure de justice*).

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?

In accordance with 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, judgments regarding divorces, legal separations or marriage annulments given by the court of another Member State of the European Union are automatically recognised in the Grand Duchy of Luxembourg. No steps need to be taken to obtain recognition of a decision.

No preliminary procedure is required for the correction of civil records in Luxembourg following a judgment given by a court of a Member State of the European Union that has become final. A reference to the decision of the court granting the divorce must be entered in the margin of the marriage certificate and the birth certificates of the spouses. If the marriage was celebrated abroad, the decision of the court must be entered in the civil registers of the municipality in which the marriage was recorded, or in the civil registers of the city of Luxembourg, and a reference must also be entered in the margin of the birth certificates of each spouse.

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?

Any interested party may apply to the President of the district court for a decision refusing to recognise a judgment regarding divorce, legal separation or marriage annulment given by a court of another country of the European Union.

The President of the district court rules without delay. The person against whom the decision to refuse recognition is requested may not submit any observations at this stage in the proceedings. The application is admissible only on the following grounds:

the judgment is manifestly contrary to public policy,
the rights of the defendant have not been respected,
the judgment is incompatible with a decision given in related proceedings.

Either party may appeal to the court of appeal (*Cour d'appel*) against the decision of the President of the district court. At the appeal stage both parties must be heard. The decision of the court of appeal can be appealed on points of law before the Court of Cassation (*Cour de cassation*).

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?

The Grand Duchy of Luxembourg applies Council Regulation (EC) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, which has applied since 21 June 2012 between Austria, Belgium, Bulgaria, Estonia (since 11 February 2018), France, Germany, Greece (since 29 July 2015), Hungary, Italy, Latvia, Lithuania (since 22 May 2014), Luxembourg, Malta, Portugal, Romania, Slovenia and Spain. This Regulation states that the spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following:

the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
the law of the State where the spouses were last habitually resident, insofar as one of them still resides there at the time the agreement is concluded; or
the law of the State of nationality of either spouse at the time the agreement is concluded; or
the law of the *forum*.

Under the same Regulation, in the absence of a choice pursuant to the above paragraph, divorce and legal separation are subject to the law of the State: where the spouses are habitually resident at the time the court is seized; or, failing that where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seized, insofar as one of the spouses still resides in that State at the time the court is seized; or, failing that of which both spouses are nationals at the time the court is seized; or, failing that where the court is seized.

Where Regulation (EC) No 1259/2010 does not apply, divorce and legal separation are governed, under Luxembourg law:

by the national law of the spouses, if they have the same nationality;
by the law of the effective common domicile of the spouses, if they have different nationalities;
by the law of the *forum*, if spouses of different nationalities do not have an effective common domicile.

Related links

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