

1 What are the conditions for obtaining a divorce?

In Portugal, a divorce can be obtained by mutual consent or by a contested action.

The first method involves the agreement of both spouses to the dissolution of the marriage and, in principle, to the payment of maintenance to the spouse in need, the exercise of parental authority with regard to minor children, and the disposal of the marital home.

A contested divorce is applied for in court by one of the spouses against the other, based on legally established facts which, regardless of the blame attached to the spouses, prove the irretrievable breakdown of the marriage.

2 What are the grounds for divorce?

In a divorce by mutual consent, the spouses do not have to give the reason for their application.

The following are further grounds for a contested divorce:

- a) *De facto* separation for one full year. It is understood that *de facto* separation exists for these purposes when there is no communal life between the spouses and one or both of them intends not to re-establish it;
- b) A change in the mental faculties of the other spouse which has lasted for more than one year and which, because of its seriousness, compromises the possibility of communal life;
- c) Absence, without any news from the absentee, for a period of not less than one year;
- d) Any other facts that, regardless of the fault attached to the spouses, prove the irretrievable breakdown of the marriage.

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

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

Divorce dissolves the marriage and has the same legal effects as dissolution by death, apart from the exceptions set out in law.

The effects of divorce are produced from the moment when the respective ruling becomes final and unappealable, but are backdated to the date on which the action was brought as regards the property-related relationships between the spouses.

If the process proves the *de facto* separation of the spouses, either of them may request that the effects of the divorce be backdated to the date on which the separation began, as decided on in the ruling.

Despite divorce, a spouse who has adopted the surname of the other spouse may retain it provided that the latter consents or the court gives its authorisation, bearing in mind the reasons stated. The consent of the former spouse may be given through a notary document, a document drawn up in court (a written record, in proceedings, of the declaration of intent of the party) or a declaration before a registry office official. The application for court authorisation to use the surname of the former spouse may be submitted within the divorce proceedings or in separate proceedings, even after the divorce has been decreed.

3.2 the division of property of the spouses

In the event of divorce, neither spouse may receive more than they would have received if the marriage had been entered into under the system of common ownership of property acquired *ex post facto*.

Each spouse loses all the benefits received or to be received from the other spouse or a third party with regard to the marriage or in consideration of the state of being married, whether this stipulation is prior to or after the celebration of the marriage. The donor may determine that the benefit accrues to the children of the marriage.

The effects of the divorce as regards the property-related relationships between the spouses are produced from the moment that the divorce ruling becomes final and unappealable, but are backdated to the date when the action was brought.

If the *de facto* separation of the spouses is proved in the proceedings, either of them may request that the effects of the divorce be backdated to the date on which the separation began, as decided on by the ruling.

The court may rent the marital home to either of the spouses at their request, whether it is jointly owned or owned by the other spouse, taking into particular account the needs of each spouse and the interests of the children of the marriage. Rental is subject to the rules on the renting-out of accommodation, but the court may define the conditions of the agreement, having heard the spouses, and may terminate the rental at the landlord's request when supervening circumstances so justify. The arrangements set, whether by approval of the agreement between the spouses or by court order, may be amended under the general terms of voluntary jurisdiction.

3.3 the minor children of the spouses

In the case of divorce, legal separation, declaration of nullity or marriage annulment, the arrangements for the children, the maintenance due to the latter and the method of paying maintenance will be governed by an agreement between the parents, subject to approval by the court (or the Public Registrar in proceedings for separation and divorce by mutual consent).

In the absence of an agreement, the court will take a decision in accordance with the interests of the minor, including that of maintaining a close relationship with both parents, encouraging and accepting agreements or making decisions that encourage ample opportunities for contact with both parents and the sharing of responsibility between them. Custody of the minor may be given to either parent, a third person or a re-education or care establishment.

For further information, please see the factsheet relating to 'Parental responsibility'.

3.4 the obligation to pay maintenance to the other spouse?

Each spouse must provide towards their sustenance following divorce. Either spouse is entitled to maintenance, regardless of the type of divorce. For obvious reasons of fairness, the right to maintenance may be denied.

In setting the maintenance amount, the court must take account of the length of the marriage, the contribution made towards the family finances, the age and state of health of the spouses, their professional qualifications and employment possibilities, the time they will possibly have to spend on bringing up their joint children, their earnings and income and, in general, all circumstances affecting the needs of the spouse receiving the maintenance and the possibilities of the person paying the maintenance.

The court must give precedence to any maintenance obligations relating to a child of the debtor spouse over the obligation to the former spouse arising from the divorce.

The creditor spouse has no right to demand that the standard of living they enjoyed during marriage be maintained.

For further information, please see the factsheet on 'Maintenance'.

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

Legal separation does not dissolve the marriage but extinguishes the duties of cohabitation and assistance, without prejudice to the right to maintenance.

With regard to property, separation produces the effects which the dissolution of the marriage would produce.

Legal separation ends with the reconciliation of the spouses or the dissolution of the marriage.

5 What are the conditions for legal separation?

The conditions for legal separation, whether contested or by mutual consent, are the same as those for divorce by contested action, *mutatis mutandis*.

6 What are the legal consequences of legal separation?

As indicated in the answer to question No 4, legal separation extinguishes the duties of cohabitation and assistance, without prejudice to the right to maintenance. With regard to property, legal separation produces the effects that would be produced by dissolution of the marriage.

The provisions on divorce apply, *mutatis mutandis*, to legal separation.

Legal separation may be converted into divorce, although this is not a precondition for divorce or a stage in divorce proceedings.

Indeed, if the spouses have not been reconciled one year after the ruling decreeing the legal separation (whether contested or by mutual consent) became final and unappealable, either of them may apply for the separation to be converted into a divorce. If the conversion is applied for by both spouses, the period specified does not need to be observed and a judgment is handed down directly.

If the conversion is requested by one of the spouses, the other will be notified in person or via their legal representative to lodge an appeal - which may only be based on reconciliation of the spouses - within a period of 15 days. After evidence has been presented, the judge hands down a judgment on the appeal within 15 days.

The conversion of legal separation into divorce may also be requested at any civil registry office. The request, founded in fact and in law, must be submitted via an application lodged at the registry office providing the evidence and attaching documentary proof.

The respondent is summoned to lodge an appeal within 15 days, give evidence and attach documentary proof.

If there is no appeal and it is considered that the facts indicated by the applicant have been acknowledged, the registrar, after checking that the legal requirements are fulfilled, declares the application granted.

If an appeal is lodged, the registrar schedules an attempted reconciliation, to be held within 15 days, and may order the performance of legal acts and the production of the evidence necessary to verify the legal requirements.

If the respondent has lodged an appeal and it proves impossible to reach an agreement, the parties are notified to plead and request the production of new evidence within eight days. The case is then referred to the judicial court of first instance with jurisdiction over the matter within the constituency to which the registry office belongs.

With the case referred to the court of law, the judge orders the presentation of evidence and schedules the hearing.

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

'Marriage annulment' means terminating the legal effects of the marriage by invoking a significant defect affecting the marriage.

8 What are the conditions for marriage annulment?

Marriages entered into in the following circumstances can be annulled:

- a) where there is some invalidating impediment (absolute or relative);
- b) where there is a lack of consent or consent invalidated by an error or by duress on the part of one or both of the spouses;
- c) without the presence of witnesses, when required by law.

The following are absolute invalidating impediments, hindering the marriage of the person in question to any other:

- a) being under the age of sixteen;
- b) known dementia, even during lucid periods, and prohibition or incapacitation on account of a mental disorder;
- c) a previous undissolved marriage, whether Catholic or civil, even if the respective entry has not been made in the register of births, marriages and deaths.

The following are relative invalidating impediments, hindering the marriage of the persons in question to one another:

- a) direct line consanguinity;
- b) consanguinity in the second degree of the collateral line;
- c) affinity in the direct line;
- d) the previous conviction of one of the spouses of being the perpetrator of or accomplice in an attempt, even if not successful, to murder the spouse of the other party.

The marriage can be annulled on grounds of lack of consent:

- a) if at the time the marriage was celebrated, one of the parties was not aware of their actions owing to accidental disability or other causes;
- b) if one of the parties was misled with regard to the physical identity of the other party;
- c) if the declaration of consent was extorted by physical coercion;
- d) if consent has been simulated.

The error invalidating consent is only relevant for the purposes of annulment when it is based on essential personal qualities of the other spouse and is excusable, and it is proven that the marriage would not reasonably have been concluded without it.

Marriages celebrated under moral coercion can be annulled if one of the parties is being seriously and unlawfully threatened and their fear of consummation is justified.

If someone, knowingly and unlawfully, extorts the declaration of consent from the other party with the promise of freeing them from unforeseeable harm or harm caused by others, this is equivalent to an unlawful threat.

The declaration of consent, in the act of celebration, constitutes the presumption not only that the spouses wish to marry, but that their consent is not vitiated by error or coercion.

9 What are the legal consequences of marriage annulment?

The annulment of a civil marriage, when contracted in good faith by both spouses, takes effect in relation to these and to third parties when the respective ruling becomes final and unappealable.

If only one spouse entered into the contract in good faith, then only that spouse can claim the benefits of marital status and oppose them to third parties, provided that this is simply a reflection of the relationship between the spouses.

The spouse who enters the contract of marriage in excusable ignorance of the defect causing nullity or annulment or whose declaration of consent has been extorted by physical or moral coercion is considered to have entered into the marriage in good faith.

State courts are solely responsible for the judicial knowledge of good faith. The good faith of the spouses is assumed.

Once the marriage has been declared null or annulled, the spouse in good faith retains the right to maintenance after the decision becomes final and unappealable or the decision is registered.

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

Before starting the divorce process, the Civil Registry Office or the court must inform the spouses of the existence and objectives of family mediation services. Family mediation is a non-judicial method to resolve conflicts arising within family relationships, in which the parties, with their personal and direct participation and aided by the conflict mediator, try to reach an agreement.

The use of this alternative means of dispute resolution can resolve conflicts resulting from the regulation, amendment and failure to comply with the exercise of parental responsibility, divorce and legal separation, conversion of legal separation into divorce, reconciliation of separated spouses, assignment and amendment of provisional or definitive maintenance, assignment of the family home, denial of the right to use the surname of the other spouse and authorisation to use the surname of the former spouse.

The Family Mediator is a professional licensed by the Ministry of Justice (*Ministério da Justiça*) who is responsible for conducting meetings with independence and impartiality to help the parties reach an agreement amongst themselves.

Divorce by mutual consent can be applied for at the civil registry office, except in situations arising from an agreement obtained within the proceedings for a contested divorce and provided that the application for divorce by mutual consent is accompanied by a detailed list of the couple's communal property, agreement on the disposal of the marital home, agreement on the payment of maintenance to the spouse in need of maintenance and a certificate of the court judgment regulating the exercise of parental responsibility or agreement on the exercise of parental responsibility with regard to any minor children, where this has not been previously ruled on by the courts.

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?

Separation and divorce by mutual consent

Separation and divorce by mutual consent are applied for at the civil registry office by both spouses, by mutual agreement. The application must be accompanied by the following documents:

- a) a detailed list of the communal property specifying their respective values, or, if the spouses choose to share this property, an agreement on sharing or an application to draw up such agreement;
- b) a certificate of the court judgment ruling on the exercise of parental authority or an agreement on the exercise of parental authority with regard to any minor children, where this has not been previously ruled on by the courts;
- c) an agreement on the payment of maintenance to the spouse in need of maintenance;
- d) an agreement on the disposal of the marital home;
- e) a certificate of the prenuptial agreement, if one exists.

Unless otherwise specified in the documents submitted, it is understood that the agreements apply both to the period of the proceedings and to the subsequent period.

Proceedings for legal separation or divorce by mutual consent are brought by submitting an application signed by the spouses or their representatives to the civil registry office. The application is lodged with the above-mentioned documents and a certificate containing a full copy of the record of marriage. Having received the application, the registrar invites the spouses to a meeting during which they must check that the legal prerequisites are met. At the meeting, the spouses are informed of the existence of family mediation services; if the spouses still intend to divorce, the agreements are considered and the spouses are invited to amend them if they do not duly protect the interests of one of them or of the children. Legal acts may be performed and evidence taken for this purpose. If the legal requirements are met and the aforementioned procedures observed, the registrar grants the application.

When an agreement is submitted on the exercise of parental authority over minor children, the proceedings are referred to the Public Prosecution service at the court of first instance having jurisdiction in the matter within the judicial district in which the civil registry office is situated, so that this service can give an opinion on the agreement within 30 days.

If the public prosecution service considers that the agreement does not duly protect the interests of the minors, the applicants can alter it as required or submit a new agreement. In the latter case, the agreement will be resubmitted to the public prosecution service. If the latter considers that the agreement duly protects the interests of the minors or if the spouses have altered the agreement as indicated by the public prosecution service, the divorce will be decreed.

In cases in which the applicants do not agree with the alterations indicated by the public Prosecution Service and still intend to divorce and/or the agreements submitted do not sufficiently protect the interests of one spouse, approval will not be granted and the divorce proceeding will be forwarded to the court in the district where the civil registry office is situated.

After receiving the case, the judge considers the agreements that the spouses have submitted, inviting them to amend them if they do not protect the interests of either of them or their children.

The judge will then determine the consequences of divorce on issues which the spouses have not amended. If any of the agreements do not sufficiently protect the interests of either of the spouses they may, for this purpose and for the consideration of the proposed agreements, order the performance of acts and the production of the evidence required. When determining the consequences of divorce, the judge should not only encourage but also take into account the agreement of the spouses.

Divorce by mutual consent is then decreed and recorded in the corresponding registry.

Applications for legal separation or divorce by mutual consent are submitted to the court, provided the parties do not attach any of the aforementioned agreements to it.

In this case, the divorce application is lodged in court. Once the application has been received, the judge considers the agreements that the spouses have submitted, inviting them to amend them if the agreements do not protect the interests of either of them or their children. The judge determines the consequences of divorce on the issues which the spouses have not agreed upon, and may, for this purpose and for the consideration of the agreements submitted, order the performance of acts and the production of the evidence required. In determining the consequences of divorce, the judge should not only encourage but also take into account the agreement of the spouses. Divorce by mutual consent is then decreed and recorded in the corresponding registry.

Contested separation or divorce

Applications for contested separation or divorce are submitted to the family and minors division (*Juízo de Família e Menores*) or, if no such division exists, to the local civil division (*Juízo Local Cível*) or the general division (*Juízo de Competência Genérica*) with territorial jurisdiction. Territorial jurisdiction is defined according to the domicile or residence of the applicant (the person bringing the action).

The provisions on divorce apply, *mutatis mutandis*, to legal separation.

Legal separation ends with the reconciliation of the spouses or the dissolution of the marriage.

Either spouse may request a contested divorce on the grounds of *de facto* separation for one full year, a change in the mental faculties of the other spouse which has lasted for more than one year and which, because of its seriousness, compromises the possibility of communal life, the absence, without any news from the absentee, for a period of not less than one year, and other facts that, regardless of the fault attached to the spouses, prove the irretrievable breakdown of the marriage.

The aggrieved spouse has the right to seek compensation for the damage caused by the other spouse under the general terms of civil liability and in the ordinary courts.

The spouse who filed for divorce on the grounds of a change in the mental faculties of the other spouse must compensate them for the personal injury caused by the dissolution of marriage; the application must be lodged in the divorce proceedings themselves.

If the grounds for divorce are a change in the mental faculties of the other spouse which has lasted for more than a year and which, owing to its seriousness, compromises the possibility of communal life, and the absence, without any news from the absentee, for a period of not less than one year, then only the spouse who invokes the change in mental faculties or the absence of the other spouse can file for divorce.

Where the spouse able to file for divorce is prohibited from doing so, the action may be brought by their legal representative, authorised by the family council; where the legal representative is the other spouse, the action may be brought, on behalf of the holder of the right to act, by any of their relatives in the direct line or up to the 3rd degree of the collateral line, provided this is also authorised by the family council.

The right to divorce is not transferred by death, but the author's heirs may continue the action for the purposes of the estate if the applicant dies during the proceedings; to the same effect, the action may continue against the respondent's heirs.

Once the petition has been presented, if the action can proceed the judge will appoint a time for an attempted reconciliation and both the applicant and the respondent will be summoned to attend in person.

If reconciliation fails, the court will seek the agreement of the spouses for divorce by mutual consent; if an agreement is reached or if the spouses opted for divorce by mutual consent at any point in the process, the process will follow the course of that type of divorce, *mutatis mutandis*.

If the judge is unable to obtain the agreement of the spouses regarding divorce or separation by mutual consent, he will seek to obtain the agreement of the spouses on maintenance and the regulation of the exercise of parental responsibility. The judge will also seek to obtain the agreement of the spouses on the use of the marital home during the period while the process is pending, where applicable.

In an attempt to reconcile or at any other point during the proceedings the parties may agree to divorce or legal separation by mutual consent, provided the necessary prerequisites are met.

When the agreement of one party is lacking or reconciliation proves impossible, the judge orders the respondent to submit their defence within 30 days; at the time of notification, a duplicate of the original petition is delivered to the respondent.

If the whereabouts of the respondent are unknown, all efforts provided for in procedural law have been made to locate them, and all have proven equally unsuccessful, the day appointed for reconciliation shall be void and the respondent shall be summoned by public notice to submit their defence.

After the deadline for submission of the defence has passed, the process follows the terms of the common procedure. During that procedure, the object of the dispute is identified and the basis of evidence announced. The final hearing takes place during this process along with production of evidence. Upon conclusion of the final hearing, the case is closed and sent to the judge, who hands down a decision within 30 days.

Legal separation may be applied for in a counterclaim, even if the applicant has filed for divorce; if the applicant has filed for legal separation, the respondent may also file for divorce in counterclaim. In these cases, divorce should be decreed if the application of the action and the counterclaim are granted.

Annulment of marriage

Marriage annulment may not be invoked in any terms, either judicial or non-judicial, until it is recognised by a judgment in an action brought specifically for this purpose.

This action is brought in the family and minors division by submitting an initial application which, in the form of pleadings, identifies the parties, describes the relevant facts and concludes with a request.

The legal entitlement to bring such action varies depending on the grounds of the claim (*please see the answer to question 8*).

The spouses or any of their relations in the direct line or up to the fourth degree in the collateral line, the heirs and adoptive parents of the spouses and the public prosecution service have the legal right to bring or continue an action for annulment based on an invalidating impediment. In addition, the guardian or trustee in the case of minority, prohibition or incompetence due to a mental disorder and the first spouse of the offender in the case of bigamy may also bring or continue an action.

Annulment due to misrepresentation may be applied for by the spouses themselves or by any persons prejudiced by the marriage. In other cases involving a lack of consent, annulment proceedings may be brought only by the spouse whose consent is lacking. However, the latter's relations by marriage in the direct line and their heirs or adoptive parents may continue the action if the applicant dies during the proceedings.

Annulment proceedings based on defects in consent may be brought only by the spouse who was the victim of the error or of duress, but their relations by marriage in the direct line and their heirs or adoptive parents may continue the action if the applicant dies during the proceedings.

Annulment proceedings based on a lack of witnesses may be brought only by the public prosecution service.

Annulment proceedings based on an invalidating impediment should be brought:

- a) In cases of minority, prohibition or incompetence due to a mental disorder or known insanity, where brought by the incompetent person, within six months of their having reached majority, their prohibition or incompetence having been removed or their insanity having ceased; where brought by another person within three years of the celebration of the marriage, but never after the attainment of majority, the removal of the incapacity or the cessation of the insanity;
- b) In the case of conviction for the murder of the spouse of one of the parties, within three years of the celebration of the marriage;
- c) In other cases, within six months of the dissolution of the marriage.

Only the public prosecution service may bring the action before the marriage is dissolved.

Annulment proceedings based on the existence of a previous undissolved marriage may not be brought or continued when proceedings are pending to declare the nullity or annulment of the first marriage of a bigamist.

Annulment proceedings based on a lack of consent of one or both of the parties may be brought only within three years of the celebration of the marriage or, if the applicant was unaware of this, within six months of the moment when they become aware of this.

Annulment proceedings based on defects in consent will lapse if not brought within six months of the cessation of the defect.

Annulment proceedings based on a lack of witnesses may be brought only within one year of the celebration of the marriage.

The marriage certificate and possibly (if age is the ground for the application) the birth certificate of the party in question must accompany the initial application.

After the deadline for submission of the defence, the process follows the aforementioned terms of the common procedure.

The annulment is considered to be resolved and the marriage considered valid from the moment of its celebration if any of the following events takes place before the annulment judgment becomes final and unappealable:

- a) if a child of non-marriageable age confirms their marriage before an officer of the civil registry and two witnesses, after they have reached majority;
- b) if a person who is legally incapacitated or disabled by a mental disorder confirms their marriage, in the terms of the previous paragraph, after their disability or incapacity has been lifted or, in the case of insanity, after the insane person has judicially checked their state of mental health;
- c) if the first marriage of a bigamist is declared nullified or annulled;
- d) if the lack of witnesses is due to justified circumstances, such as those recognised by the registrar, provided there are no doubts about the celebration of the act.

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

Yes, the legal aid scheme applies in all courts, whatever the form of the proceedings.

For further information, please see the factsheet on 'Legal aid'.

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

Yes. In these actions it is always possible to appeal.

14 What should I do to have a decision on divorce/legal separation/marriage annulment issued by a court in another Member State recognized in this Member State?

If the decision in question was delivered in a Member State of the European Union other than Denmark, it is recognised in the other Member States in accordance with Council Regulation (EC) 2201/2003 of 27 November 2003.

If the decision was delivered in Denmark, the special process for review of a foreign judgment is applied.

In this process, the document containing the decision to be reviewed is submitted with the application and the opposing party notified has 15 days in which to submit a response. The applicant may respond within 10 days of the notice of submission of that response. Once the parties have submitted all their pleadings and the steps regarded as essential have been taken, all the documents are provided to the parties and the public prosecution service, each for 15 days.

In order for the judgment to be confirmed:

- a) there must be no doubts as to the authenticity of the document recording the judgment or the soundness of the decision;
- b) the judgment must have become final according to the law of the country in which it was delivered;
- c) the judgment must come from a foreign court whose jurisdiction has not been invoked in breach of the law and must not involve a matter falling within the exclusive jurisdiction of the Portuguese courts;
- d) it must not be possible to invoke the defence of *lis pendens* or *res judicata* based on a case in a Portuguese court, except where it was the foreign court which prevented the initiation of proceedings;
- e) the respondent must have been duly served in respect of the action, under the law of the country of the court of origin, and the principles of the right of defence and equal protection of the parties must have been observed in the process;
- f) it must not involve a decision whose recognition leads to a result which is manifestly incompatible with the principles of the public international order of Portugal.

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?

In the Member States of the European Union, except for Denmark, if the party concerned decides to apply for recognition of a decree of divorce, legal separation or marriage annulment, the application is submitted to the Family Proceedings Court. The court having territorial jurisdiction is determined by the internal law of the Member State in which the application for recognition has been brought.

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?

According to the national conflict-of-law rules, in divorce and legal separation the common national law of the spouses is applicable. If they are not of the same nationality, the law of their joint habitual residence is applicable; in the absence of this, the law of the country with which their family life is most closely associated is applicable.

If, however, during the marriage, there is a change in the applicable law, only a fact relevant at the time of its occurrence can provide grounds for separation or divorce.

Further information

The up-to-date provisions that apply to divorce laid down in the Civil Code (*Código Civil*), the Code of Civil Procedure (*Código de Processo Civil*) and Decree-Law No 272/2001 can be found here: http://www.pgdlisboa.pt/leis/lei_main.php.

Final Note:

The information contained in this factsheet is of a general nature and is not exhaustive. It is not binding on the contact point, the European Judicial Network in civil and commercial matters, the courts or any other persons. It is not intended to replace consultation of the applicable legislation in force.

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