Divorce and legal separation

Bélgica

1 What are the conditions for obtaining a divorce?

There are two kinds of divorce in Belgium: divorce on the grounds of the irretrievable breakdown of the marriage, and divorce by mutual consent.

A divorce on the grounds of irretrievable breakdown can be obtained in two ways:

By proving the irretrievable breakdown of the marriage, by any legal means (Article 229(1) of the Civil Code (*Code civil*/*Burgerlijk Wetboek*)). A breakdown is irretrievable where it has made it impossible for the spouses to continue to live together or resume living together.

On the basis of a de facto separation that has lasted some time. The marriage is deemed to have irretrievably broken down where the application for divorce is submitted jointly by both spouses **after more than six months of de facto separation**. If the de facto separation has lasted for less than six months and the spouses wish to submit a joint application for divorce, the marriage is deemed to have irretrievably broken down once the spouses have appeared before the court for a second time, following a period of reflection, and have repeated that they wish to divorce (Article 229(2) of the Civil Code). **Unilateral application after more than a year of de facto separation**: the marriage is deemed to have irretrievably broken down where the application for divorce is submitted by only one spouse after more than a year of de facto separation. If the de facto separation has lasted for less than a year and one of the spouses wishes to submit a unilateral application for divorce, the marriage is deemed to have irretrievably broken down once the spouse submitting the application has appeared before the court for a second time, following a period of reflection, and has repeated that he or she wishes to divorce (Article 229(3) of the Civil Code).

Divorce by mutual consent can be granted only if the spouses submit a comprehensive prior agreement determining all the effects of the divorce and both spouses continue to express their desire to end the marriage by mutual consent up to the point when the divorce is granted. The comprehensive prior agreement consists of a settlement setting out what the spouses have agreed with regard to their respective assets (Article 1287 of the Judicial Code (*Code judiciaire*/*Gerechtelijk Wetboek*)) and a divorce agreement relating to the place of residence of each spouse during the proceedings, parental authority, management of the assets of the couple's children and access rights during and after the divorce, maintenance contributions of each spouse for their children, and any maintenance payments between the spouses during and after the divorce (Article 1288 of the Judicial Code).

2 What are the grounds for divorce?

There are two kinds of divorce in Belgium: divorce on the grounds of the irretrievable breakdown of the marriage (Article 229 of the Civil Code) and divorce by mutual consent (Article 230 of the Civil Code).

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

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

Divorce breaks the bond of marriage for the future. The former spouses are no longer each other's legal heirs. They are free to remarry. In Belgium, marriage has no effect on the surname of the spouses. However, a married person is entitled to use the other spouse's surname. Following divorce, a person can no longer use the surname of a former spouse in everyday and professional life, with the exception of a trade name in certain circumstances.

3.2 the division of property of the spouses

The joint ownership of property is dissolved. In the event of a divorce on the grounds of irretrievable breakdown, the spouses lose all the benefits that they have conferred on one another in any prenuptial agreements and since they married, and the benefits of any contractual appointments as heirs, unless otherwise agreed. In the event of divorce by mutual consent, the spouses determine their respective rights in advance through the comprehensive prior agreement between them (see question 1).

3.3 the minor children of the spouses

Dissolution of the marriage by divorce has no effect on the rights of children born within the marriage (Article 304 of the Civil Code). Once the marriage has been dissolved by divorce, authority over the children and the management of the children's assets is exercised by the spouses jointly, or by the spouse to whom the children are entrusted by an approved agreement between the parties, or by an order of the presiding judge of the court made in interlocutory proceedings (*référé*/*kort geding*) (Article 302 of the Civil Code). The spouses are responsible, according to their means, for the children's accommodation, maintenance, supervision, education and training, up to the age of majority of the children or the completion of their education (Article 203 of the Civil Code), and must contribute their share of the ordinary and extraordinary costs resulting from that obligation (Article 203 *bis* of the Civil Code). Such a contribution is usually made in the form of a maintenance payment determined either by the courts or by agreement.

3.4 the obligation to pay maintenance to the other spouse?

Divorce on the grounds of irretrievable breakdown: The spouses can agree a maintenance payment following the divorce, its amount and the terms under which the agreed amount may be reviewed. In the absence of agreement, the court can, at the request of the spouse in need, order a maintenance payment to be made by the other spouse. The court can refuse the request for a maintenance payment if the respondent proves that there was a serious fault on the part of the applicant that made it impossible to continue living together. A maintenance payment can under no circumstances be granted to a spouse who has been found guilty of acts of physical violence towards the other spouse. If the respondent proves that the applicant's state of need is the result of his or her own decision and was not motivated by the needs of the family, the court can excuse the respondent from having to pay maintenance, or can reduce the amount of the payment (Article 301(1), (2) and (5) of the Civil Code). The amount of the maintenance payment should at least meet the beneficiary's needs, but cannot exceed one-third of the income of the spouse obliged to make the payment. Maintenance is payable for a period no longer than the length of the marriage. This period can be extended in exceptional circumstances (Article 301(3), (4), (6), (8) and (9) of the Civil Code).

Divorce by mutual consent: The spouses determine their respective rights in advance through the comprehensive prior agreement between them (see question 1). During and after the divorce proceedings, they can agree the amount of any maintenance payment and the terms under which this amount is to be indexed and reviewed (Article 1288, first paragraph, subparagraph 4, of the Judicial Code).

In all cases, the maintenance payment can be increased, reduced or terminated by the court if the amount is no longer appropriate as a result of new circumstances beyond the control of the parties. In the event of divorce on the grounds of irretrievable breakdown only, the court can also adjust the amount of the maintenance payment if the divorce results in a change in the financial position of the spouses.

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

Legal separation (*séparation de corps*/*scheiding van tafel en bed*) does not break the bond of marriage, but reduces the mutual rights and obligations of the spouses: it removes the obligation to live together, and divides the property.

5 What are the conditions for legal separation?

The conditions for legal separation are the same as those for divorce.

6 What are the legal consequences of legal separation?

Legal separation does not break the bond of marriage, but reduces the mutual rights and obligations of the spouses. With regard to the spouses themselves, legal separation removes only the obligation to live together and the obligation to assist one another (*devoir d'assistance*/*bijstandsplicht*). The obligation of fidelity and the obligation of material support (*devoir de secours*/*hulpplicht*) remain (Article 308 of the Civil Code). Legal separation results in the division of the property (Article 311 of the Civil Code). With regard to children, the effects of legal separation are the same as those for divorce. Spouses who have separated do not qualify for maintenance payments, but they can invoke the obligation of material support (Article 213 of the Civil Code).

The effects of legal separation by mutual consent are the same as those for divorce by mutual consent and are governed by the prior agreements between the spouses, although the bond of marriage is not broken. The obligations of fidelity and material support also remain.

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

Nullity of marriage is a civil penalty applied when a marriage has taken place in breach of the law, despite the prior checks carried out by the registrar.

8 What are the conditions for marriage annulment?

There is 'absolute' nullity of a marriage in the following cases:

One of the spouses is a minor and has not been released from the age requirement (Article 144 of the Civil Code): the minimum age to marry is 18 years.

Lack of consent (Article 146 of the Civil Code).

Sham marriage (Article 146 *bis* of the Civil Code): there is no marriage where a combination of circumstances reveals that the intention of at least one of the spouses was clearly not to form a lasting partnership, but simply to obtain an advantage in terms of residence conferred by the status of spouse.

Forced marriage (Article 146 *ter* of the Civil Code): there is no marriage where the supposed marriage is entered into without the free consent of both spouses and the consent of at least one of the spouses was given as a result of violence or threat.

Bigamy (Article 147 of the Civil Code).

Breach of an impediment to a marriage based on family ties by blood or marriage, or on a court order requiring a presumed biological father to make maintenance payments, or on family ties by adoption (Articles 161 to 164, 341 and 3561, first and second paragraphs, and Article 35313 of the Civil Code).

Lack of authority of the public official who solemnised the marriage (Article 191 of the Civil Code) (optional absolute nullity).

Clandestine marriage (Article 191 of the Civil Code) (optional absolute nullity).

There is 'relative' nullity of a marriage in the case of a defect of consent of one or both spouses or mistaken identity (Articles 180 and 181 of the Civil Code).

9 What are the legal consequences of marriage annulment?

Annulment, the declaration of nullity, has the effect of voiding the marriage with regard to both the past and the future. It has retroactive effect to the date of the marriage. All the effects of the marriage disappear. The marriage is deemed never to have taken place.

Where the spouses married in good faith, in other words where they were unaware of a ground for annulment, the court can rule that the marriage be annulled only with regard to the future, with its past effects being retained. Where only one spouse married in good faith, the effects of the marriage can benefit that spouse only.

Those effects of the marriage that benefit children are retained, even where neither spouse married in good faith. Any children born during the annulled marriage or within 300 days of the annulment continue to be considered the children of the husband in the annulled marriage.

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

The law provides for two forms of mediation: voluntary mediation, where the parties engage the services of a mediator themselves, without the intervention of a court, and judicial mediation, proposed by the parties or the court in the course of judicial proceedings, which are then suspended. Mediation can be employed in disputes relating to marriage obligations (Articles 201 and 203 of the Civil Code), the rights and obligations of spouses (Articles 221 to 224 of the Civil Code), the effects of divorce (Articles 295 to 307 *bis* of the Civil Code), parental authority (Articles 371 to 387 *bis* of the Civil Code), divorce on the grounds of irretrievable breakdown (Article 229 of the Civil Code), divorce by mutual consent (Articles 1254 to 1310 of the Judicial Code) and de facto cohabitation. Each party is free to propose recourse to the voluntary mediation process (Article 1730 et seq. of the Judicial Code). The court hearing the case can also order judicial mediation at any stage of the proceedings (Article 1734 et seq. of the Judicial Code). In both cases, where the parties come to an agreement as a result of mediation, the agreement can be submitted to the court for approval. Approval can be refused only if the agreement is contrary to public policy or to the interests of minor children.

The granting of a divorce remains the responsibility of 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?

An application for divorce or legal separation on the grounds of irretrievable breakdown or an application to convert a legal separation into a divorce is heard by the court of first instance (*tribunal de première instance*/*vredegerecht*) of the place of the last marital residence or of the place where the respondent has his or her address (*domicile*/*woonplats*) (Article 628, first paragraph, subparagraph 1, of the Judicial Code).

In the event of divorce by mutual consent, the spouses choose a court of first instance (Article 1288 *bis*, second paragraph, of the Judicial Code).

An application for marriage annulment is heard by the court of first instance of the place where the respondent has his or her address (Article 624 of the Judicial Code).

In the event of divorce on the grounds of irretrievable breakdown, the application is lodged: 1. by means of notice served by a bailiff (*huissier de justice*/*gerechtsdeurwaarder*), pursuant to Article 229(1) of the Civil Code; 2. jointly, pursuant to Article 229(2) of the Civil Code, by means of a joint application, in accordance with Article 1026 et seq. of the Judicial Code, signed by each spouse or at least a lawyer or notary (Article 1254(1) of the Judicial Code); or 3. unilaterally, pursuant to Article 229(3) of the Civil Code, by means of an application for ordinary adversarial proceedings, in accordance with Articles 1034 *bis* to 1034 *sexies* of the Judicial Code. In all cases, the document instituting the proceedings must contain, in addition to the information usually required, a detailed description of the facts and a statement giving particulars of any children (Article 1254(1) of the Judicial Code). The marriage certificate, birth certificates of any children, and proof of the identity and nationality of each spouse must also be submitted, unless they appear in the population register or register of foreign nationals (Article 1254(2) of the Judicial Code).

A divorce by mutual consent is requested by means of an application to the court (*requête*/*verzoekschrift*). In addition to the documents required for a divorce on the grounds of irretrievable breakdown, the prior agreements concluded by the parties and, where applicable, an inventory of their property must also be submitted.

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

The ordinary rules apply. See the factsheet on 'Legal aid'.

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

Any decision granting or refusing an application for divorce or legal separation on the grounds of irretrievable breakdown or an application for marriage annulment can be challenged within one month of the date of service of the judgment, whether it is a judgment given in default of appearance or a judgment given after both parties have been heard (Article 1048, first paragraph, and Article 1051, first paragraph, of the Judicial Code).
An appeal (*appel*/*hoger beroep*) against a judgment granting a divorce will be admissible only if it is based on non-compliance with the legal conditions for granting divorce or on the reconciliation of the spouses. Such an appeal can be lodged by the public prosecutor within one month of the judgment. In that case, it is served on both parties. It can also be lodged by one spouse or both spouses, separately or jointly, within one month of the judgment. In that case it is served on the public prosecutor and, if lodged by one spouse only, on the other spouse. An appeal that is based on reconciliation must in all cases be lodged jointly by both spouses within one month of the judgment. Such an appeal is served on the public prosecutor (Article 1299 of the Judicial Code). An appeal against a judgment refusing a divorce or legal separation by mutual consent will be admissible only if it is lodged by both parties, separately or jointly, within one month of the judgment (Article 1300 of the Judicial Code).

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?

Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (the 'Brussels IIa Regulation') has been in force since 1 March 2005. The Regulation applies within the European Union (with the exception of Denmark). A judgment given in a Member State must be automatically recognised in the other Member States without any special procedure being required (Article 21(1) of the Brussels IIa Regulation). No special procedure is required for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State (Article 21(2) of the Brussels IIa Regulation). A judgment relating to a divorce, legal separation or marriage annulment will not be recognised if such recognition is manifestly contrary to public policy, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence, or if it is irreconcilable with a judgment given earlier in proceedings between the same parties (Article 22 of the Brussels IIa Regulation). During the review, the jurisdiction of the court of origin may not be reviewed (Article 24 of the Brussels IIa Regulation) and under no circumstances may a judgment be reviewed as to its substance (Article 26 of the Brussels IIa Regulation). In addition, the recognition of a judgment may not be refused because Belgian law would not allow divorce on the same facts (Article 25 of the Brussels IIa Regulation). The documents to be produced so that a foreign court's judgment can be recognised are listed in Article 37 of the Brussels IIa Regulation.
Where the Brussels IIa Regulation does not apply, judgments made after 1 October 2004 are subject to the provisions of the Belgian Code of Private International Law (*Code de droit international privé*/*Wetboek van Internationaal Privaatrecht* — Article 126(2) of the Code). Under Article 22 of the Code, recognition is automatic without any legal proceedings being required. A foreign court's judgment will not be recognised where the effect of recognition is manifestly contrary to public policy, where the rights of the defence have been infringed, where the judgment results from an infringement of the law, where the judgment is still open to appeal, where the judgment is irreconcilable with a Belgian judgment or with a judgment previously given abroad that can be recognised in Belgium, where the foreign proceedings were instituted after proceedings were instituted in Belgium between the same parties and relating to the same subject-matter and which are still pending, where only the Belgian courts had jurisdiction to hear the proceedings, where the jurisdiction of the foreign court was based solely on the presence in the country to which that court belonged of the respondent or of property not directly connected with the dispute, or where recognition is frustrated by one of the grounds for refusal listed restrictively in the Code (in the area of personal and family law, the only such grounds are name, adoption and repudiation) (Article 25(1) of the Code). During the review, under no circumstances may the foreign judgment be reviewed as to its substance (Article 25(2) of the Code). The documents to be produced so that a foreign court's judgment can be recognised are listed in Article 24 of the Code.

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?

The fundamental principle of both the Brussels IIa Regulation and the Code of Private International Law is automatic recognition without any special procedure being required. However, where recognition is based on the Brussels IIa Regulation, any interested party may, in accordance with the procedures provided for in Section 2, apply for a decision that the judgment be or not be recognised (Article 21(3) of the Brussels IIa Regulation). Where the Brussels IIa Regulation does not apply, any interested person, or the public prosecutor, may, in accordance with the procedure in Article 23 of the Code, apply for a declaration that the judgment must be recognised, in whole or in part, or cannot be recognised (Article 22(2) of the Code).

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?

Article 55(1) of the Code contains the choice-of-law rule for divorces and legal separations with an international dimension. Divorce and legal separation are governed:
1. by the law of the country in whose territory both spouses are habitually resident at the time when the application is lodged;
2. if both spouses are not habitually resident in the same country, by the law of the country in whose territory the spouses had their last common habitual residence, provided one of them is habitually resident in that country at the time when the application is lodged;
3. if neither of the spouses is habitually resident in the country where they had their last common habitual residence, by the law of the country of which both spouses are nationals at the time when the application is lodged;
4. in other cases, by Belgian law.
The concept of 'habitual residence' is defined in Article 4(2) of the Code. 'Common habitual residence' does not necessarily mean residence at the same address or in the same municipality, but rather residence in the same country. The law indicated in Article 55(1) of the Code cannot be applied where that law does not recognise the institution of divorce. In that case, the law to be applied is the law indicated by the next alternative criterion in paragraph 1 (Article 55(3) of the Code).
Spouses also have a limited opportunity to choose the applicable law themselves: they can opt for the law of the country of which both are nationals at the time when the application is lodged, or for Belgian law (Article 55(2) of the Code). This choice can be made at the latest during the first appearance before the court hearing the application for divorce or legal separation.
The applicable law indicated in Article 55 of the Code determines the rules governing: the admissibility of an application for legal separation; the grounds and conditions of the divorce or legal separation or, in the case of a joint application, the conditions of consent, including the way in which this is expressed; the obligation for the spouses to agree on measures relating to the person, maintenance and property of the spouses and children for whom they are responsible; and the dissolution of the bond of marriage or, in the event of separation, the degree of relaxation of that bond (Article 56 of the Code).

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