Divorce and legal separation

Austria

1 What are the conditions for obtaining a divorce?

Three forms of divorce are available under Austrian law: fault-based divorce, divorce following separation for at least 3 years and divorce by consent.

A spouse can petition for divorce if, as the result of serious marital misconduct or dishonourable or immoral conduct on the part of the other, the marriage has broken down so irretrievably that there is no prospect of resumption of a true marital relationship.

If the couple have been living apart for 3 years, either spouse may petition for divorce on the grounds that the marriage has broken down irretrievably.

If the spouses have been separated for at least 6 months, they both admit that the marriage has broken down irretrievably and they mutually consent to a divorce, they may jointly petition for divorce.

2 What are the grounds for divorce?

The basic ground for divorce is the irretrievable breakdown of the marriage. The breakdown may be the result of serious marital misconduct on the part of one partner, in particular where one spouse has been unfaithful or has inflicted physical violence or serious psychological suffering on the other. Even if the behaviour cannot be regarded as marital misconduct because it is due to a mental illness or comparable disorder, but the marriage has nevertheless broken down so irretrievably that there is no prospect of resumption of a true marital relationship, or if one spouse suffers from a highly infectious or repulsive disease, the other spouse may petition for divorce. In all such cases the spouse petitioning for divorce must prove the grounds on which he or she relies. However, if the spouses have been separated for 3 years, marital misconduct need not be asserted or established.

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

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

As a rule, both spouses retain the surname they used when they were married. However, if either spouse adopted the other's surname on marriage, they may go back to using their previous name.

3.2 the division of property of the spouses

In principle, the spouses can agree to divide up their property as they wish. They may do this by mutual renunciation (meaning that the legal separation of property during the marriage is maintained after the marriage has been dissolved), by the division of any property held in common under a property agreement or by the transfer of property from one spouse to the other.

If the spouses have not reached agreement on their property, either of them may ask the court to divide certain property belonging to both spouses. What are known as 'matrimonial assets' and 'matrimonial savings' will be divided between them. Matrimonial assets are the matrimonial home and household effects and any other things actually used by both spouses in their day-to-day lives while they were married. Matrimonial savings are all assets accumulated by the spouses while they were living together as a married couple.

Anything which the spouses brought to the marriage or inherited or were gifted by a third party is excluded from the division of the property, as is anything which one spouse alone used for personal purposes or for his or her occupation, as well as companies and shares in companies, unless they were merely investments.

The court must distribute the property equitably, with due regard for all relevant circumstances, and in particular the importance and size of each spouse's contribution towards the acquisition of the matrimonial assets and the accumulation of the matrimonial savings, as well as the welfare of the children. A spouse's contribution can include the provision of upkeep, contribution of earnings, running the joint household, the care and upbringing of the children they have in common and any other matrimonial support.

3.3 the minor children of the spouses

Since the 2001 Act Amending the Act on Children (*Kindschaftsrechts-Änderungsgesetz*) came into force on 1 July 2001, separated parents have had extensive scope to make their own parental responsibility arrangements. In the event of divorce, both parents usually retain joint parental responsibility for underage children. However, if they wish to retain full joint parental responsibility as in marriage, they must file an agreement on the child's primary place of residence with the court within a reasonable time limit. The parents may also enter into an agreement before the court under which one parent has sole parental responsibility or one parent's parental responsibility is limited to specific matters.

Since the 2013 Act Amending the Act on Children and Names (*Kindschafts- und Namensrechtsänderungsgesetz*), the court may award joint parental responsibility against the wishes of one or both parents, if it finds that this is in the child's best interests. The parents must also then agree which parent the child will live with. If joint parental responsibility is not in the child's best interests, the court must decide which parent is to be awarded sole parental responsibility.

3.4 the obligation to pay maintenance to the other spouse?

The spouse who was solely or predominantly at fault must pay the other spouse sufficient maintenance to maintain their lifestyle if the latter has insufficient income from assets or from work which they can reasonably be expected to do in the circumstances. If both spouses are to blame for the divorce, but neither is more to blame than the other, the spouse unable to maintain himself or herself may be awarded a contribution towards his or her maintenance, if that is equitable with regard to the needs, assets and earnings of the other spouse. Any such compulsory contribution may be subject to a time limit. In the event of divorce by consent, the spouses can freely agree whether one should pay the other maintenance, or whether they mutually waive any maintenance claims.

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

There is no such arrangement under Austrian law.

5 What are the conditions for legal separation?

See answer to Question 4.

6 What are the legal consequences of legal separation?

See answer to Question 4.

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

Austrian marriage law provides for 'nullity of marriage' (*Ehenichtigkeit*). A marriage is null and void if it was not contracted in the prescribed form, if one of the spouses was legally incapacitated, unconscious or temporarily mentally disturbed when the marriage was contracted, or if the marriage was contracted solely

or primarily for the purpose of enabling one spouse to take the other's surname or to acquire his or her nationality without any intention of creating a marital relationship. A marriage is also null and void if one of the spouses was living in lawful matrimony with a third party when the marriage was contracted or if the marriage was unlawfully contracted between blood relations.
A marriage may be annulled by court judgment if, at the time it was concluded, the legal capacity of one of the spouses was limited and his or her legal representative did not consent to the marriage, if one of the spouses did not know that they were entering into matrimony or if they did know but did not wish to declare their willingness to enter into matrimony, if one of the spouses was mistaken as to the identity of the other spouse, or about any circumstances pertaining to the other spouse that would have prevented them from entering into matrimony had they known of the situation and properly appreciated the implications of marriage, if they were induced into entering into matrimony by malicious deception as to essential facts, or if they were unlawfully forced by threats to enter into matrimony.

8 What are the conditions for marriage annulment?

See answer to Question 7.

9 What are the legal consequences of marriage annulment?

If a marriage is annulled, it is treated as if it had never taken place. It is enough for only one of the spouses to have been unaware of the marriage's nullity when it was contracted for the rules which apply in the event of divorce to govern the situation between the spouses in relation to their property. Any children born of a marriage will be regarded as legitimate even after the marriage has been annulled.

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

Divorce or annulment can only be granted by the courts, but problems in connection with the divorce may be settled out of court (e.g. through mediation).

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?

Disputes relating to divorce or annulment, or the existence or non-existence of a marriage fall within the jurisdiction of the District Courts (*Bezirksgerichte*). Such disputes fall within the exclusive jurisdiction of the District Court for the district in which the spouses are or were last habitually resident together. If, when the petition was filed, neither spouse was habitually resident in that district or if they had no joint habitual residence in Austria, the court in the district where the respondent is habitually resident or, if the respondent has no habitual residence in Austria, the court in the district where the petitioning spouse is habitually resident or, failing that, the District Court of Central Vienna (*Bezirksgericht Innere Stadt Wien*) has sole jurisdiction. Such disputes fall within the domestic jurisdiction of the Austrian courts if either spouse is an Austrian national, if the respondent or, in the case of a petition for annulment from both spouses, if at least one of them is habitually resident in Austria, or if the petitioner is habitually resident in Austria and either both spouses had their last joint habitual residence in Austria or the petitioner is a stateless person or was an Austrian national at the time marriage was contracted. Although this is an exclusive jurisdiction, a different place of jurisdiction may be agreed.
Divorce petitions must comply with the general formalities for a petition. Petitions for divorce by consent, on which a ruling is handed down under the non-contentious procedure, must be signed by both spouses. In all cases, a marriage certificate must be enclosed. It is also advisable to attach any other documents that support the petition.

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

It is possible to apply for legal aid in divorce cases in accordance with the general rules on legal aid (see 'Legal Aid – Austria'). In divorce proceedings there is a relative requirement for legal representation, meaning that a party who does not wish to appear before the court in person can be represented only by a lawyer.

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

Appeals may be lodged against rulings by a court of first instance on divorce or annulment or on whether a marriage did or did not exist before the relevant superior court, i.e. the Regional Court (*Landesgericht*) which acts as the court of second instance for the competent District Court.
Rulings by the appeal court may be appealed against on a point of law only if the decision depends on resolving a question of substantive law or procedural law which is important in terms of maintaining legal consistency or legal certainty or developing the law, for example because the appeal court deviates from the case-law of the Supreme Court or there is no such case-law or it is inconsistent.

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?

Such decisions (unless from Denmark) are recognised in Austria automatically, that is without any special recognition procedure being required, in accordance with Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ L 178, 2.7.2019, p. 1) (the 'Brussels IIb' Regulation). Brussels IIb applies *ratione temporis* to proceedings instituted after 31 July 2022 and to authentic instruments drawn up and court settlements concluded after that date. Old cases are governed primarily by Regulation (EC) No 2201/2003 (Brussels IIa), the Regulation that preceded Brussels IIb, although that also allowed decisions on such cases to be recognised without any special procedure. Decisions from Denmark still generally require separate recognition proceedings.

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?

An application for non-recognition of a decision dissolving a marriage that has been handed down abroad must be made to the District Court in the district where the parties have or last had their joint habitual residence. If neither party was habitually resident in that district or if they had no joint habitual residence in Austria, the District Court in the district where the respondent is habitually resident or, if the respondent has no habitual residence in Austria, the District Court in the district where the petitioner is habitually resident or, failing that, the District Court of Central Vienna (*Bezirksgericht Innere Stadt Wien*) has jurisdiction (§ 76 of the Austrian Law on Jurisdiction (*Jurisdiktionsnorm*)).
Proceedings are governed by the Act on Judicial Proceedings in Non-Contentious Matters (*Außerstreitgesetz*). Under Article 31 Brussels IIb, the petitioner must produce a copy of the judgment and the certificate issued by the competent court or authority of the Member State of origin under Article 36 Brussels IIb.

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 law to apply to the dissolution of marriage in cases with a connection to the law of another state is determined by 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 (OJ L 343, 29.12.2010, p. 10) (the 'Rome III' Regulation). The rules on conflict of laws in Rome III have universal application, meaning that they apply even where the law to be applied is not the law of a participating Member State.

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