Divorce and legal separation

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1 What are the conditions for obtaining a divorce?

Pursuant to Section 1564, first sentence, of the Civil Code (Bürgerliches Gesetzbuch, BGB), a marriage may be dissolved by divorce only by judicial decision on the petition of one or both spouses.

A marriage can be dissolved if it has broken down (Section 1565(1), first sentence of the Civil Code). Here it is a matter of the current state of the marriage and the prognosis for the future. The legislator has drawn up the following assumptions for the breakdown of the marriage:

The marriage is regarded as having broken down if the parties are no longer cohabiting and it is not to be expected that they will resume matrimonial cohabitation (Section 1565(1), second sentence, of the Civil Code).

Pursuant to Section 1566 of the Civil Code, it is irrebuttably presumed by the court that the marriage has broken down if the spouses have lived apart for a certain time and if:

both spouses petition for divorce and have already lived apart for a year, or

one of the spouses petitions for divorce and the other consents to divorce, and they have already lived apart for a year, or

one of the spouses petitions for divorce and the other does not consent to divorce, but the spouses have already lived apart for three years.

Where the spouses have not yet lived apart for one year, the marriage may be dissolved by divorce only in a few exceptional cases, for instance if the continuation of the marriage would be unreasonable for the petitioner for reasons that lie in the person of the other spouse (e.g. in the case of physical abuse by the other spouse) (Section 1565(2) of the Civil Code).

2 What are the grounds for divorce?

The only ground for divorce recognised by German law is the breakdown of the marriage. There is no divorce based on the fault of one of the spouses.

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

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

The divorced spouse retains the married name as determined by the spouses. Spouses may, by declaration to the registry of births, deaths and marriages, reassume their birth name or the name that they had until the determination of the married name, or attach their birth name or the name they had at the time of the determination of the married name before or after the married name (Section 1355(5) of the Civil Code).

3.2 the division of property of the spouses

3.2.1 Allocation of the home and the household effects:

In principle, the following applies pursuant to Sections 1568a and 1568b of the Civil Code concerning the joint home and the division of the household effects after the divorce: the spouse more dependent on the use of the home or the household effects can demand the assignment of the home or the household effects from the other spouse. In this respect, the circumstances of both spouses and the best interests of their children must be taken into account.

In the case of rented accommodation, the spouse who is permitted to remain in the home takes over the tenancy arrangement – irrespective of whether previously both or only one of the spouses was the tenant.

In the case of home ownership, the following applies:

If only one of the spouses is the owner of the former home, the other has a right of use only in exceptional cases, in particular if this is necessary to avoid unfair hardship, see Section 1568a(2) of the Civil Code.

If the home is jointly owned by the spouses, the principle referred to in the first paragraph applies.

In both cases, both the spouse to whom the home has been assigned and the spouse who may no longer use his or her property have a claim for a tenancy agreement to be concluded between them and for a typical local rent to be agreed.

Concerning household effects, a distinction is to be made between those jointly owned by the spouses and those belonging to just one of them:

In the case of household effects belonging to them jointly, the principles referred to in the first paragraph relating to this question apply. The spouse who has to relinquish the household effects can demand appropriate compensation for this.

The other spouse has no claim to household effects belonging to only one spouse.

3.2.2 Equalisation of accrued gains:

If the spouses live under the statutory matrimonial property regime and they do not reach agreement on the settlement of their assets on divorce, the accrued gains can be equalised on the application of one of the spouses in a separate judicial procedure (Sections 1372 et seq. of the Civil Code). This takes place as follows:

The starting point for the calculation is the value of the assets of each spouse on marriage (initial assets, Section 1374 of the Civil Code) and at the end of the property regime (final assets, Section 1375). Assets inherited or donated to one spouse during the marriage are to be added to that spouse's initial assets. The relevant reference date for the calculation of the final assets is the day on which the divorce petition was served on the other spouse. Accrued gains are the amount by which the final assets of a spouse exceed the initial assets (Section 1373). The person with the lower accrued gains is entitled to half the difference in value compared to the accrued gains of the other person (equalisation claim) (Section 1378(1)). The claim to equalisation of the accrued gains involves payment of a sum of money. The person entitled to equalisation as a rule cannot demand the transfer in their favour of specific assets belonging to the person required to pay the equalisation claim. However, in exceptional cases, the family court (Familiengericht) may also transfer individual assets (Section 1383). However this is possible only if

this is reasonable for the person required to pay the equalisation claim and

this enables gross inequity to be avoided for the person entitled to equalisation, which would other arise through the equalisation of accrued gains in cash.

The value of these transferred assets is offset against the equalisation claim.

Instead of the statutory property regime, the spouses may, under German law, also opt for the property regime of the separation of property in notarial form (Section 1414), the community of property (Sections 1415 to 1518) or the optional regime of the community of accrued gains (Section 1519).

3.2.3 Implications for the spouses' pensions

Pension rights accrued by the spouses during the marriage (e.g. entitlement to benefits from the statutory pension scheme, the civil service pension scheme, the occupational pension scheme or from private retirement and disability pension schemes) are in each case divided in half on divorce by means of the equalisation of pension rights. This ensures that both spouses share equally the rights acquired by them during their marriage and that each spouse receives independent pension rights.

3.3 the minor children of the spouses

3.3.1 Parental responsibility

If parents have joint parental responsibility, it continues after the divorce. Except in cases where the child is at risk, the question of parental responsibility will not be examined or decided on by the court unless one of the parents applies to the family court for transfer of parental responsibility or part of parental responsibility to that parent alone. Such an application must be granted if the other parent agrees and the child of at least 14 years of age does not object or if cancellation of joint parental responsibility and transfer to the applicant is likely to be in the child's best interest (Section 1671(1) of the Civil Code). German law generally assumes that it is in child's best interest to have contact with both parents, and therefore grants the child a right to contact with both parents and provides that both parents have a right and a duty of contact (Section 1684(1)). This applies irrespective of the allocation of parental responsibility.

3.3.2 Maintenance claims

Parents have a duty to maintain their children (Section 1601 of the Civil Code). Children are entitled to be maintained if they are incapable of maintaining themselves (Section 1602). The parents' duty of maintenance is subject to their ability to pay (Section 1603). However, parents' duty of maintenance in respect of their children is understood broadly, i.e. as regards the ability to pay, it is the achievable income, not merely the available income that matters (Section 1603(2)). Fundamentally, parents must pay maintenance for their children in proportion to their earning power and financial circumstances. However, a parent looking after a child fulfils their maintenance obligation as a rule in the care and upbringing of the child (Section 1606(3)). After the divorce of the parents, it is therefore as a rule only the parent in whose household the child does not live who is liable to pay cash maintenance.

Maintenance of the child covers all the child's living requirements, including the cost of an appropriate education (Section 1610).

3.4 the obligation to pay maintenance to the other spouse?

The spouses must each provide for themselves after the divorce (Section 1569 of the Civil Code). They are accordingly required to engage in appropriate gainful employment (Section 1574(1)). Where this is necessary to obtain appropriate gainful employment, they must undergo education, further training or retraining if it is likely that that education will be successfully concluded (Section 1574(3) of the Code).

However, divorced spouses are entitled to maintenance in the following circumstances:

as long as, and to the extent that, they cannot be expected to engage in gainful employment because they are looking after a child for whom they have joint responsibility (Section 1570 of the Civil Code) or by reason of illness or other infirmities or weakness of their physical or mental capacity (Section 1572),

as long as, and to the extent that, they can no longer be expected to engage in gainful employment because of their age at a certain point in time, in particular at the time of the divorce or the end of the care or upbringing of a child of the spouses (Section 1571),

as long as, and to the extent that, the divorced spouse is undergoing education, further training or retraining in order to make up for gaps in his or her education or disadvantages caused by marriage; they must commence the education, further training or retraining as soon as possible in order to achieve appropriate gainful employment which will provide a long-term living, and the education must be expected to be successfully concluded (Section 1575 BGB),

as long as, and to the extent that, they are unable to find appropriate gainful employment after the divorce (Section 1573(1)),

as long as, and to the extent that, they cannot be expected to engage in gainful employment for other serious reasons and it would be grossly unreasonable to refuse maintenance, taking account of the interests of both spouses (Section 1576),

to the extent that the income from appropriate gainful employment is insufficient to cover the full cost of maintenance (Section 1573(2)).

The level of the maintenance is determined by the matrimonial living conditions and also covers the costs of appropriate insurance against sickness and the need for care as well as, under certain circumstances, old age and reduced earning capacity too (Section 1578). If the spouse who is obliged to provide maintenance is incapable, on the basis of their earnings and financial circumstances and having regard to their other obligations, of providing maintenance to the party entitled to it without endangering their own proper maintenance, they need provide maintenance only to the extent that this is reasonable, having regard to the needs and to the earning power and financial circumstances of the divorced spouses (Section 1581, first sentence).

The maintenance may be reduced and/or limited in time where continued payment of a maintenance claim without restriction would be inequitable (Section 1578b). The possibility for a reduction/time limit under Section 1578b of the Civil Code extends in particular to Sections 1570-1573, whereby, according to Section 1570, the considerations of equity necessary for the prolongation of the maintenance for care after the child's 3rd birthday, for reasons relating to the child or parents, represent a special time limit arrangement.

The interests of a child of the spouses entrusted to the spouse entitled to maintenance for care or upbringing must be taken into account in the evaluation under Section 1578b of the Civil Code. In addition, consideration must be given to the extent to which disadvantages caused by marriage have arisen with regard to the possibility for the spouse to take care of their own maintenance. Disadvantages exist if the income earned by the spouse entitled to maintenance is lower than it would have been without the marriage. According to Section 1578b(1), third sentence, of the Civil Code, such a disadvantage may arise from childcare and from the organisation of household management and gainful employment. When assessing the disadvantages caused by marriage, all circumstances of the specific individual case must be taken into account in the comprehensive assessment, including the duration of a marriage.

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

Either spouse may live separately, if they so wish, without any particular formalities. Sections 1361 to 1361b of the Civil Code contain regulations concerning the duration of living apart (see question 6).

5 What are the conditions for legal separation?

The spouses must live apart. The spouses are living apart if they do not have a joint household and one of them recognisably does not intend to establish one as they refuse marital cohabitation (Section 1567(1) of the Civil Code).

6 What are the legal consequences of legal separation?

If the spouses are living apart or if one of them intends to do so, one spouse may demand that the other spouse leaves them the matrimonial home, or a part of it, for their sole use (allocation of the home), provided this is necessary in order to prevent unreasonable hardship (Section 1361b of the Civil Code). If one spouse has physically abused or threatened the other, the injured or threatened spouse will usually be allocated the whole home. The allocation of the home does not serve to prepare for or facilitate the divorce.

Use of the household effects may also be regulated for the period of the separation (Section 1361a). Either spouse may require the other to give them the household effects which belong to them. However, this does not apply if the person required to relinquish these effects needs them to maintain their new separate household and this is equitable in the particular circumstances (e.g. transfer of the washing machine to the spouse with whom the children are living).

In addition, while the spouses are living apart, one spouse may demand from the other the maintenance appropriate with regard to the standard of living and the earnings and property situation of the spouses, in accordance with Section 1361 of the Civil Code. Maintenance during separation is the result of marital

solidarity and is intended to ensure that spouses are not in need as the result of a separation. In addition, this also opens up the opportunity for the spouses to return to married life, irrespective of the economic constraints. The spouses are therefore still responsible for one another to a comparatively large extent, so only limited requirements exist for economic autonomy and the obligation to earn a living. A spouse living separately is entitled to maintenance if this person is not in a position to meet their needs from their income and assets.

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

There is no such thing as a 'declaration of invalidity'. A marriage can be annulled by court decision following an application (Sections 1313 et seq. of the Civil Code). Marriage annulment proceedings are rare in practice.

8 What are the conditions for marriage annulment?

The grounds for marriage annulment are violations of the law or vitiated consent on marriage. They are listed exhaustively in Section 1314 of the Civil Code.

9 What are the legal consequences of marriage annulment?

The consequences of marriage annulment correspond to those in the case of a divorce (Section 1318 of the Civil Code). See the comments under question 3 in this respect.

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

In the event of divorce, parents are entitled to advice in the context of children's and youth services from the youth welfare office (Jugendamt). The advice is intended to assist parents who are separated or divorced in creating the conditions for carrying out their parental responsibilities in a way oriented towards the best interests of the child or young person. The parents are supported, with appropriate involvement of the child or young person concerned, in developing a plan for consensus-based provision of parental care. There is a database of all advice centres at https://www.dajeb.de/. It is also possible to resolve conflict and come to an amicable agreement with the aid of mediation. More information about family mediation is available at https://www.bafm-mediation.de/.

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?

Only dissolution of marriage (divorce), marriage annulment or the establishment of the existence or non-existence of a marriage between the participants exist under German law (Section 121 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, FamFG).

The application in matters of marriage must generally be lodged at the local court (Amtsgericht)/family court (Familiengericht) (Sections 111 and 121 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction, Section 23b of the Judicature Act (Gerichtsverfassungsgesetz)). Geographical jurisdiction is based on Section 122 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction. Representation by a lawyer is mandatory.

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

A person whose personal and financial circumstances are such that they are unable to afford the costs of conducting proceedings, or who can afford to pay only part of the costs or can pay them only in instalments, can apply for legal aid for proceedings before the family courts. Approval is conditional upon the intended legal action or defence having sufficient prospects of success and not appearing malicious. This ensures that those who are financially less well-off also have access to the courts. Depending on the available income, legal aid pays the party's own contribution to the court costs, in whole or in part. The costs of legal representation are assumed if the court assigns a lawyer. You can find further information in the brochure on legal aid and advice 'Beratungshilfe und Prozesskostenhilfe' on the webpage of the Federal Ministry of Justice and Consumer Protection under https://www.bmjv.de.

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

An appeal may be lodged against the decision pronouncing the divorce or the annulment of marriage under Section 58 et seq. of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction. The Higher Regional Court (Oberlandesgericht) rules on the 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?

Such a decision (unless issued in Denmark) is automatically recognised in Germany under Council Regulation (EC) No 2201/2003 of 27 November 2003 (the 'Brussels IIa' Regulation), i.e. without separate recognition proceedings. Brussels IIa generally requires the divorce, annulment or nullity proceedings to have been instituted after 1 March 2001 (see Article 64, Brussels IIa for the exceptions to this). It is primarily the predecessor to Brussels IIa, i.e. Brussels II, which applies to old cases. Decisions from Denmark still usually 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?

Where Council Regulation (EC) No 2201/2003 of 27 November 2003 applies, the court with jurisdiction to hear an application for non-recognition of such a decision is generally the local court (family court) of the place of the higher regional court in the district of which:

the respondent or the child concerned by the decision is normally resident, or

where no such jurisdiction applies, there is a manifest interest in the determination or there is a need for care,

or otherwise the Pankow/Weißensee Family Court.

An exception applies in Lower Saxony, where jurisdiction for all higher regional court districts according to these criteria is concentrated centrally in the Local Court of Celle.

The procedural requirements of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction apply.

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?

In Germany and now 16 other Member States of the European Union, the law applicable to divorce in situations involving a conflict of laws is governed by the provisions of the 'Rome III Regulation' (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). The law designated under the Rome III Regulation is then to be applied whether or not it is the law of a participating Member State.

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