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italiană

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Divorce and legal separation

Italia

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1 What are the conditions for obtaining a divorce?

The law lays down the legal requirements for divorce (see section 2). The court must verify that the legal requirements for issue of the divorce order are met. These checks must be carried out even if the two spouses lodge a joint application for divorce; the agreement of the spouses is not in itself a ground for divorce – in reality, therefore, there is no such thing in Italy as a divorce by mutual consent: the court must always establish the facts underlying the application before granting a divorce.

If the marriage was contracted under the Civil Code, the divorce dissolves it, and if the parties were married in church, with the marriage being duly recorded in the civil register of births, marriages and deaths, the divorce terminates its effects in civil law. The public prosecutor must take part in the proceedings.

Sources: Law No 898 of 1 December 1970, as amended by Law No 436 of 1 August 1978, by Law No 74 of 6 March 1987 and by Law No 55 of 6 May 2015.

2 What are the grounds for divorce?

Either spouse may apply for divorce on any of the following grounds:

1) where, after the wedding has taken place, the other spouse is sentenced by final judgment for a particularly serious crime, whether committed before or after the wedding, namely:

sentenced to life imprisonment or to a term of imprisonment of more than 15 years, which may be the sum of a number of sentences, for intentional offences, with the exception of political offences or offences committed for 'motives of special moral and social value' (*motivi di particolare valore morale e sociale*);

sentenced to a custodial sentence for incest (Section 564 of the Criminal Code) or sexual offences under Sections 609-*bis* (sexual abuse), 609-*quater*, 609-*quinquies*, or 609-*octies* (which were inserted by Law No 66 of 1996);

sentenced to a custodial sentence for murdering a son or daughter or for the attempted murder of the spouse or of a son or daughter;

sentenced to a custodial sentence, where the person has been found guilty on two or more counts of grievous bodily harm, failure to fulfil family support obligations, mistreatment in the family or of minors, or undue influence on persons not of sound mind at the expense of the spouse or children, except where the applicant for divorce has also been convicted as an accessory to the offence or where the couple have resumed cohabitation;

2) in cases where:

the other spouse has been acquitted of the offences of incest or sexual abuse mentioned in points 1b) and c), if the court establishes that the respondent is unfit to continue or return to living with the family;

the couple have been legally separated, either by mutual consent or on the application of one of the parties, for an uninterrupted period of

at least twelve months since the couple appeared before the court in legal separation proceedings

six months in the event of separation by mutual consent, including when a disputed judgment is mutually settled

or six months from the certified date given in the separation agreement reached following negotiations attended by a lawyer, or from the date of the deed setting out the separation agreement concluded before a civil registrar;

criminal proceedings regarding one of the offences listed under points 1b) and c) were discontinued because the offence was time-barred, but the divorce court establishes that the offence in itself would otherwise have given rise to criminal liability;

criminal proceedings regarding the offence of incest ended with a finding that there was no criminal liability because the act did not create 'a public scandal';

the other spouse, being a foreign national, has obtained the annulment or dissolution of the marriage abroad or has entered into a new marriage abroad;

the marriage has not been consummated;

one of the spouses has officially changed sex: in this case the divorce application may be submitted either by the person who has changed sex or by the other spouse.

In summary, apart from the 'criminal law' scenarios (which include, in addition to convictions for serious offences, cases where the person is acquitted on the grounds of diminished responsibility, cases where the offence is time-barred, and cases of incest where the objective requirement for criminal liability is missing), the possible grounds for divorce are: legal separation; annulment, dissolution or a new marriage entered into by the other spouse abroad; non-consummation of the marriage; and change of sex.

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

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

The granting of a divorce entails the following.

Firstly, the marriage relationship is dissolved: each party reverts to single status and is free to remarry.

The woman loses the husband's surname, if she has added it to her own; however, on application, the court may allow the woman to retain her husband's surname in addition to her own, where this is shown to be in her interest or in the children's interest for reasons that merit protection.

Divorce does not break the ties of affinity, and in particular it does not set aside the impediment to marriage constituted by affinity in the direct line (Section 87 (4) of the Civil Code).

Foreign spouses do not lose the citizenship they acquired through marriage.

3.2 the division of property of the spouses

The divorce dissolves the joint estate established by law (*comunione legale*, which includes all purchases made by the spouses jointly or separately during the marriage, apart from the personal items listed in Section 179 of the Civil Code) and also any fund set aside for the needs of the family (*fondo patrimoniale*). However, such a fund continues to exist until any children have reached the age of majority. Divorce has no effect on joint property governed by other arrangements (*comunione ordinaria*, for example goods acquired prior to the marriage *pro rata*, or during the marriage where at the time of the marriage it was provided that the spouses' property would be held separately (*separazione dei beni*)): the link in respect of joint property of this kind may be dissolved on application by one of the spouses.

A parent who lives with a minor child may be granted the right to continue to live in the former couple's home where it is in the child's interest to remain in that home.

3.3 the minor children of the spouses

The court granting the divorce will award joint custody of minor children; only in exceptional cases are the children placed in one parent's exclusive custody. The court also establishes the rules on the time to be spent by the minor children with the non-cohabiting parent. It gives instructions regarding the administration of the children's property and sets the monthly contribution towards the minor children's maintenance to be paid to the cohabiting parent.

3.4 the obligation to pay maintenance to the other spouse?

When granting the divorce, the court, on application by a party, orders regular payment of maintenance to a party who lacks sufficient means or who is unable to procure them for objective reasons. The obligation to pay maintenance ceases if the recipient remarries. Where both parties are in agreement, support may also be paid in a single transaction by transferring ownership rights on a property to the benefiting spouse (for more details see 'Maintenance claims – Italy').

Spouses who fail to pay maintenance in the event of separation or after divorce commit the offence of failing to assist their family (Section 570 of the Criminal Code).

There are other effects. A spouse who is divorced but has not remarried and who is entitled to maintenance is also entitled to a share of any severance payment made to the other spouse. In the event of the death of a former spouse, the surviving former spouse is entitled to receive any survivor's pension, or to share such a pension with any subsequent surviving spouse, and to receive a payment from the deceased's estate, if he or she is in financial hardship.

The law also allows a spouse entitled to maintenance to register a judgment mortgage or apply for seizure of the assets of the spouse required to pay support.

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

Legal separation means that the law no longer requires the spouses to live together. Mere *de facto* separation is without effect (except in situations arising prior to Reform Law No 151 of 1975).

Legal separation does not cancel the marriage relationship but weakens it.

Legal separation may be by order of the court or by mutual consent.

Sources: the substantive rules are set out in the Civil Code (Sections 150 *et seq*.; on questions regarding inheritance see Sections 548 and 585).

5 What are the conditions for legal separation?

Judicial separation – i.e. separation by order of the court – requires a finding that the spouses are no longer able to live together.

Where this condition is met, the court will issue a separation order on the request of one of the two spouses, even against the other's wishes.

In exceptional cases, the court may also place responsibility for the separation on one of the spouses: this has implications for the award of maintenance during separation and after divorce, and for inheritance rights. The public prosecutor must take part in the proceedings.

Legal separation by mutual consent is based on an agreement between the spouses, but becomes effective only after approval by the court, which is responsible for ensuring that the agreements reached by the spouses meet the family's overriding interests. In particular, where an agreement regarding child custody and support is not in the interest of the children, the court will reconvene the parties and request the necessary changes. If the parties fail to comply, the court may refuse to approve the separation.

6 What are the legal consequences of legal separation?

Personal relationships: legal separation (by order of the court or by mutual consent) removes the requirement for all forms of assistance associated with living together. It also removes the presumption of paternity. The wife does not lose the husband's surname if she has added it to her own, but at the husband's request the court may forbid her to use it where such use may cause him serious harm. Likewise, the court may allow the wife to refrain from using the husband's surname where such use may be to her detriment.

Ownership of joint property: the joint estate is dissolved upon a declaration of the absence or presumed death of one of the spouses, the annulment, dissolution or cessation of the civil effects of the marriage, legal separation, judicial separation of assets, the mutually agreed change to the matrimonial relationship, or one of the spouses being declared bankrupt.

In the event of legal separation, the property owned jointly by the spouses is dissolved when the court authorises the spouses to live separately, or from the date on which the minutes of the mutually agreed separation between the spouses are signed before the presiding judge, provided they are approved. The order authorising the spouses to live separately is sent to the civil registrar so that the dissolution of the joint estate can be recorded.

Parental responsibility: the court granting the separation rules on the custody of any minor children and establishes the amount of child support payable by the non-cohabiting parent (or, in the exceptional case of sole custody, the parent to whom custody is not granted). In the award of the right to live in the family home, the parent living with the child is given priority (for more details see 'Parental responsibility').

Awarding of maintenance: if requested, the court grants the spouse not responsible for the separation the right to maintenance from the other spouse, if he or she does not have sufficient independent means. A spouse in need is still entitled to receive maintenance, i.e. a regular sum needed for subsistence, even if he or she is responsible for the separation (for more details see 'Maintenance claims – Italy').

Automatic adjustment of maintenance payments for inflation is expressly provided for in the case of divorced couples; case-law has extended this to separated couples.

The measures set out in the court order concerning custody of the children and calculation of maintenance payments for children and for a spouse are open to subsequent amendment. Failure to make the maintenance payments is an offence under Section 570 of the Criminal Code.

Separation with and without responsibility: separated spouses who are not held responsible for the separation continue to enjoy the same inheritance rights as spouses who are not separated.

Spouses held responsible for a separation are entitled only to maintenance from the deceased's estate, and only if at the time of the inheritance proceedings they were entitled to maintenance payments from the deceased spouse (Sections 548 and 585 of the Civil Code).

Other effects: in the event of non-compliance, the separation order gives an entitlement to the registration of a judgment mortgage; and, on the entitled person's application, the court may order the seizure of the assets of the liable spouse or issue an order for attachment of earnings.

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

Under Sections 117 *et seq*. of the Civil Code, a marriage may be declared null and void in any of a number of disparate cases. The subject is best considered in terms of invalidity, looking at the grounds for invalidity and the law applicable in each case.
A marriage is invalid if it is vitiated by one of the defects set out in law, but the defect must be invoked by bringing an action in court.
An action for annulment of a marriage is not transferred to heirs unless the judgment is already pending. The public prosecutor must take part in the proceedings.
Sources: the substantive rules are contained in Sections 117 to 129-*bis* of the Civil Code.

8 What are the conditions for marriage annulment?

A marriage may be invalid for any of the following reasons (Sections 117 *et seq.* of the Civil Code):
1. one of the spouses was still in a previous marriage; the invalidity is absolute and imprescriptible; an application may be brought by either spouse, by a direct relative in the ascending line, by the public prosecutor, or by anyone with a legitimate interest.
2. *impedimentum criminis*: a marriage is entered into by two people one of whom has been convicted of the murder or attempted murder of the spouse of the other; the invalidity is absolute and irremediable, and may be invoked by either spouse, by the public prosecutor or by anyone with a legitimate interest.
3. the marriage cannot be contracted owing to the mental infirmity of one of the spouses; the order declaring such infirmity may be issued even after the wedding, where the infirmity is shown to have existed at the time of the wedding; the marriage may be contested by a guardian, by the public prosecutor or by anyone with a legitimate interest.
4. one of the spouses was not of sound mind (*incapacità naturale*); the marriage can be challenged by a spouse who, though not certified as incompetent, proves that he or she contracted the marriage while of unsound mind; the application may not be lodged if the couple has lived together for more than a year since the applicant regained his or her mental faculties.
5. one of the spouses was under age; an application may be brought by either spouse, by the public prosecutor, or by the parents; the minor's right to lodge the application lapses one year after coming of age.
6. there were ties of kinship, affinity, adoption or affiliation; this ground of invalidity may be invoked by either spouse, by the public prosecutor or by anyone with a legitimate interest, except where a year or more has passed since the wedding and the case is one in which authorisation for the marriage could have been sought despite the ties.
7. duress, fear and error: consent was extorted under duress, or was due to exceptionally serious fear of events outside the spouse's control; or there was mistaken identity, or an error regarding an essential personal prerequisite of the other spouse, pursuant to Section 122 of the Civil Code; applications may be brought by the spouse whose consent was defective on one of these grounds, unless the spouses have lived together for one year after the threat of violence or the source of the fear has come to an end, or after the error was discovered.
8. simulation: the marriage may be contested by either of the spouses where they contracted marriage having agreed not to meet the obligations or exercise the rights deriving from it; the application for annulment must be brought within one year of the wedding; it cannot be brought if the spouses have lived together as husband and wife after the wedding, even for only a short time.

9 What are the legal consequences of marriage annulment?

If the spouses acted in good faith (i.e. they were unaware of the impediment when they married), the marriage is deemed valid until it is annulled, and the annulment is effective only from the time it is ordered (the 'putative marriage' principle (*matrimonio putativo*)). A marriage declared null and void has the effects of a valid marriage with respect to any children, even if both spouses acted in bad faith.
The court may also require one of the spouses to make periodic payments to the other, for no more than three years, where the other spouse does not have adequate means and has not remarried.
Where only one of the spouses acted in good faith, the marriage has effects for the benefit of that spouse and any children. The spouse who acted in bad faith is required to pay fair compensation corresponding to maintenance for three years and to pay further maintenance if no other persons have an obligation to provide support.

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

By way of Decree-Law No 132 of 12 September 2014, which was converted into Law No 162/2014, the Italian government made provision for two new alternative procedures that do not involve the courts:
1) the parties may draw up a *negotiation agreement* in the presence of a lawyer, and thus have the possibility of amicably resolving their dispute out of court, with the assistance of lawyers. This possibility is available to spouses seeking to arrive at a mutually agreed separation, to cease the civil effects of their marriage or dissolve it, or to amend the conditions governing their separation or divorce, even if they have children who are not yet of age or who are of age but have serious disabilities or are not financially independent. By going down this route, couples are able to prevent court proceedings from being initiated (Sections 2 and 6);
2) if they do not have any children who are not yet of age or who are of age but have serious disabilities or are not financially independent, spouses have recently been given the possibility of reaching, before a civil registrar, an agreement confirming their legal separation or the dissolution or cessation of the civil effects of their marriage, or amending the conditions governing their separation or divorce (Section 12).

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?

The rules on divorce proceedings also apply to legal separation proceedings, *mutatis mutandis*. To a lesser extent, Sections 706 *et seq.* of the Code of Civil Procedure apply.
The proceedings take the form of a special fact-finding procedure governed by rules different from those applying to ordinary proceedings, particularly in the preliminary stage (this is basically a two-tier process: the conciliation phase and the examination-litigation phase).
The competent court is the general court (*tribunale*), sitting as a panel of judges, of the place of the spouses' last joint residence or of any other place indicated by law (Section 706 of the Code of Civil Procedure), or, where the respondent cannot be contacted or resides abroad, of the place of residence or domicile of the applicant; and where both parties live abroad, any court in the country may hear the case. Where divorce is by mutual consent, the spouses may choose the place of residence or domicile of either.
Proceedings: the petition for separation or divorce takes the form of an application to the court (*ricorso*) which is lodged with the office of the clerk of the court having jurisdiction. Any supporting documents should be enclosed with the application but may also be produced at the hearing. The applicant is responsible for ensuring that the other spouse is notified of the application and of the order of the presiding judge setting the date for the hearing of the spouses. If the attempt at conciliation during the first hearing is unsuccessful, the presiding judge will make interim orders in the interests of the spouses and their children, and set a date for a hearing before the trial court, which will examine the case in accordance with the ordinary rules of evidence.
Divorce by joint application: a joint application requires that the spouses agree both to the divorce and to the conditions regarding their children and financial relations. The proceedings are simplified.
Sources: Law No 898 of 1970 as amended; in the case of legal separation, Sections 706 to 711 of the Code of Civil Procedure also apply.

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

It is possible to obtain legal aid (*patrocinio a spese dello Stato*) and therefore to have legal representation without payment of the lawyer's fees and the other court costs. Legal aid is also available to foreign nationals lawfully residing in Italy. The eligibility conditions can be found in Law No 1990/217 and in the fact-sheet on legal aid. Applications for legal aid must be submitted to the relevant bar association (*consiglio dell'ordine degli avvocati*); see the bar association websites (e.g. for the bar association of Rome) and the Ministry of Justice's website.

Sources: Law No 217 of 1990, as amended by Law No 134 of 2001.

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

It is possible to appeal against legal separation, divorce or annulment orders. Non-final rulings in divorce proceedings (e.g. rulings on the spouses' status) or in separation proceedings (e.g. rulings on responsibility or on maintenance payments) cannot be challenged at a later stage, i.e. together with an appeal against the final judgment: they must be challenged within the ordinary legal time limits.

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?

Regulation (EC) No 2201/2003 of 27 November 2003 applies. It provides for a standard procedure in all EU Member States.

Recognition is automatic. There is therefore no need for any special procedure to update a Member State's registry of marriages, births and deaths following a final divorce, legal separation or annulment ruling.

However, any interested party may apply for a declaration to the effect that the foreign judgment must or must not be recognised. The specific grounds for non-recognition are set out in the Regulation. The action, in the form of an application to the court (*ricorso*), must be lodged with the court of appeal (*corte di appello*) with territorial jurisdiction in the place of implementation of the ruling as provided by the internal law of Italy. The court rules without delay, with or without hearing the other party, and the ruling is notified to the applicant.

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?

Either party may challenge a decision on recognition before the court of appeal which issued the decision, within one month of its notification (two months if the other party is resident in another country). At this second stage, both parties must be heard in accordance with the ordinary adversarial principle, and the ordinary rules of litigation apply.

The ruling delivered on this objection may in turn be appealed before the Court of Cassation (*Corte di Cassazione*, see the Annexes to the Regulation).

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?

Legal separation and divorce are governed by the national legislation common to both spouses at the time the application for separation or divorce is made; in the case of spouses of different nationalities, the court will seek to determine the law that applies according to the country in which the couple has spent most of its married life; the court is free to exercise a measure of discretion in this regard.

Where the applicable foreign law makes no provision for legal separation or divorce, Italian law applies (Section 31 of Law No 218 of 1995), that is to say that the *lex fori* prevails in such cases. It should be noted that Italian law applies irrespective of whether the applicant is an Italian national, and that Italian law may also be invoked by a non-national in a mixed marriage or a marriage of two non-nationals.

Italian spouses who have lodged applications for legal separation or divorce in Italy are subject to Italian law even if they are not resident in Italy. Spouses of a different nationality are subject to the law of the country in which most of their marital life takes place; however, where the law of the country in question does not provide for legal separation or divorce, the Italian court will apply Italian law.

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