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“Out-of-court” divorce by mutual consent

Since January 1, 2017, spouses who agree on the breakdown of their marriage and on the effects of such breakdown may divorce, without a judge, by signing a private agreement that must be countersigned by their respective lawyer and then recorded and kept by a notary. What are the practical implications of this reform?

Article authored in collaboration with Kheidi Bentamra, trainee-lawyer.

The procedure laid down by Article 229-1 of the French Civil Code

Pursuant to Decree n°2016-1907 dated December 28, 2016 related to divorce proceedings provided for under Article 229-1 of the French Civil Code, the spouses who agree on the breakdown of their marriage and on the effects of such breakdown may now divorce by mutual consent without a judge.

In practice, the lawyer must send to his/her client spouse a draft divorce agreement by registered letter, return receipt requested.

This draft agreement cannot be signed by the spouse until the end of a 15-day cooling-off period, otherwise it will be declared null and void.

Once the divorce agreement has been signed by both spouses, it is recorded by a notary, which makes it legally enforceable.

Exceptions

This “out-of-court” divorce by mutual consent is not available for incapacitated adults or wherever a minor

child of the spouses asks to be heard by the judge.

This last exception is quite objectionable as it is likely to put pressure on the child. Indeed, it cannot be excluded that some parents will induce their child not to ask to be heard by the judge to avoid having to seek a divorce through court proceedings.

The role of the notary

The notary is simply responsible for ensuring that the 15-day cooling-off period has been duly observed and that the divorce agreement contains the mandatory information imposed by Article 229-3 of the French Civil Code, i.e.:

“1° the last name, first names, occupation, place of residence, nationality, date and place of birth of each spouse, the date and place of marriage, as well as, where applicable, the same information for each of their children;

2° the name, place of business and firm of the lawyers representing the spouses and the bar association of which they are a member;

3° the reference to the fact that the spouses agree on the breakdown of the marriage and on the effects of such breakdown, as per the terms set forth in the divorce agreement;

4° the terms and conditions governing the complete settlement of the divorce, as per Chapter III of this Title, in particular whether a compensatory allowance should be paid;

5° the statement of liquidation of the matrimonial property regime, in an authentic form [i.e. recorded with and authenticated by a public officer such as a notary] wherever the marital estate includes properties subject to land registration formalities, or the declaration that there is no need to proceed with a liquidation;

6° the reference to the fact that the minor child(ren) has/have been informed by his/her/their parents of the right to be heard by the judge in the conditions set forth in Article 388-1 [of the French Civil Code] and that he/she/they do(es) not want to use this option.”

As such, the role of the notary is in no event to check the equilibrium of the contract.

The cost of the divorce

In an “out-of-court” divorce by mutual consent, each spouse must be assisted by a lawyer. Under this new procedure, it is no longer possible to have one lawyer for both spouses, as was the case previously for a divorce by mutual consent through court proceedings.

Each spouse must thus pay his/her own lawyer. The spouses may no longer share the cost. The cost of the “out-of-court” divorce by mutual consent could thus turn out to be much higher than that of a divorce by mutual consent through court proceedings.

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In addition to the lawyers' fees, the spouses must pay a registration duty in the amount of 50 euros.

Gaps

The fact that the judge no longer plays any role is open to criticism since (i) there is no more control over the equilibrium or validity of divorce agreements, and (ii) the absence of a divorce judgment does not enable to cure any potential irregularities or defects that may exist in the divorce agreement.

Consequently, and as per Circular n°CIV/02/17 dated January 26, 2017, the divorce agreement can be challenged *a posteriori* for lack of consent, lack of capacity or violation of public policy rules.

As such, the reform - which originally aims at unclogging Family Courts - is in fact likely to result in an increase of post-divorce disputes and litigation.

Lastly, another shortcoming that ought to be outlined concerns couples with an international element (spouse with dual citizenship, expatriate or marriage ceremony held in a foreign country). Indeed, many international conventions on conflict of laws and jurisdictions only refer to divorce judgments or authentic instruments (i.e. documents recorded with and authenticated by a public officer such as a notary). They do not mention private divorce agreements. This raises the question of the recognition and enforceability of such divorce agreements by foreign courts.

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