

The divorce in national and european practice

Lecturer Dragos Lucian RĂDULESCU, PhD.

Petroleum and Gas University of Ploiesti, Romania

dragosradulescu@hotmail.com

Abstract

According to international and national law, divorce or separation of parents should not have a negative effect on the relationship between parents and children, unless the parent would endanger the minor. Civil Code regulations must conjunction with Law 272/2004, with the Charter of Fundamental Rights of the European Union and the provisions of the 2006 Strasbourg Convention on personal relationships concerning children.

The article presents legal proceedings regarding divorce, and how to handle accessories applications in accordance with national law and international law.

Keywords: *divorce, custody, housing, application*

Introduction

Dissolution of marriage by divorce is a legal procedure [1] that takes effect for the future be instrumented by the court or by the notary or officer of civil status. On the basis of dissolution through divorce but are specific reasons but limiting and distinct from those that determine the invalidity of which are expressly and exhaustively required by law. In addition, divorce produced legal effects for the future, unlike the nullity where they relate to both past and future.

Conceptual [2] divorce became a consent of the spouses divorce which is given in reverse to that of marriage and in the same time a family law specifies penalti, considered as true remedy for the parties.

Legal issues

Regarding fault divorce parties, the application is submitted by the applicant to the competent court or the court in whose jurisdiction the latter family residence is located or as an exception to the residence of one of them. Please note that the common residence includes both the spouses actually live and that of the residence of her husband where the children are in that moment, if the spouses live separately. According to legal regulations spouses during the marriage may have separate houses with their consent, for good reasons and have the right to decide which of them will live to their children. Once the home in which the minors reside was established, it can not be changed except by a new agreement of the spouses or if it

can not get through a court ruling. Thus, if the spouses did not had a common household will be competent[1] to judge of the court having jurisdiction over the defendant husband's house, or if the defendant does not live in the country house husband applicant.

Regarding the competence of the court, if it was legally referred, it will be competent to rule on applications and accessories divorce in accordance with art.918 of the Code of Civil Procedure, respectively the exercise of parental authority, the child home, personal connections between parents and children and the costs of raising and educating. Because of these issues, the application for summons for divorce must include [3] besides the general elements the names of minor children or the name of the adopted or otherwise mention that from the marriage did not result children. Of course, if the spouses have agreed on these accessories requests they will be accepted by the court only when they were made in accordance with the law.

Previous Constitutional Court's decision on compulsory procedure for informing the possibility of a divorce settlement through mediation prior to filing for divorce was compulsory for spouses to undergo this procedure. The provisions on mediation can be found in Law no. 192/2006 and were intended to give spouses the possibility to agree on divorce and on accessories applications and relieving the courts by this procedure of the taking of evidence in this regard. Mediation offers the opportunity for the parties to achieve a partial understanding of aspects of divorce, following that the court will hear evidence only related with issues that could not be resolved by spouses consensus. Previous legal provisions specify that the lack of informing of the spouses about the advantages of mediation will determined the rejection the application for divorce by the court as inadmissible. Thus spouses were forced to annex to the application for divorce a minutes that included their understanding of the issues of divorce and accessories, procedure that currently is not required.

On the other hand, before the divorce court decided on divorce applications and accessories, the law provided including the legal possibility for the parties to understand in particular on the maintenance obligation of parents towards minors, collecting government benefits, setting minors or use family dwelling house. Of course, all these measures could be taken by the court only provisionally, even during the divorce judgment.

Legal practice

In the present case, the applicant requested the court to pronounce judgment on:

- 1) exercise of parental authority by the applicant solely on the basis of the provisions of article 398 NCC for minor result of marriage or alternatively if you will not admit this request jointly exercise parental authority by both parents
- 2) determination of residence of the minor to the applicant

If the court will not allow these applications, alternatively applicant request to this institution to allow him personal connections with minor through a schedule of visitation at his home, under Article 401 paragraph 1 C prev pr civ.

In proof [4] of his claims the applicant said that in fact the parties were married and from this marriage resulted a minor, matrimonial relations between spouses after becoming irreparable. It states that the defendant left the shared residence of marriage for months, and now having a relationship with another man who lives with rent, undocumented, in a building small comfort. In his view this property the defendant lives for a while, can not provide minor corresponding growth conditions, which generates instability directly, and not covering its needs according to his age of 6 years.

The applicant informs the court that it had in his exclusive property adequate housing conditions and the location of this home is several minutes difference to minor school. This home offers the minor the possibility to attend school safely, because the minor in this case will not cross any street traffic. In this flat, said the applicant, the minor increased from birth and until when his mother left to shared residence with another man in a rented apartment.

In addition, it is noted that is very best known the minors attachment to the house where they lived from an early age, given the habits acquired by them. Keeping former minor home in which he has grown, does not mean the impossibility for the mother to have permanent access to it.

However, permanent change of home produce imbalance in development and daily life of the child, but it is necessary that the minor personal program should not be affected. Availability and attention of the applicant to the needs and requests of minor, are emphasized and prompt compared to those of his mother, who has no patience to achieve the child's needs.

Change of residence of the minor, on the one hand, it makes it no longer benefit from the presence and support of the complainant and because of that will be violate both parental rights in terms of duties of care, upbringing and education.

In this regard, the applicant may change at any residence without knowing where they will be able to move, resulting in lack of access to a minor. Moreover, the minor shall be separated irreparable to the opportunity to benefit from the help and support of the complainant, support with which it is used. It is noted that the applicant, due to its flexible working program, can offer to the minor permanent material and emotional assistance, supplying his mother's absence who did not want to get involved in his care. The complainant show that the situation created by the defendant who choose to left the minor in the care of the applicant, was created because his mother has a limited time to spent with him, due to its program of work. On the other hand the presence of another man in the minor life is not beneficial for him, because it does not develop the ability to discern this tipe of events and in the end he will be affected emotionally.

The notion of the child's best interest. CEDO practice

The origin of the concept of the child's best interest stems from the realization that this is an individual who has different needs and rights distinct of those of the parents. Hence his interest might be different from the parents or guardians. Therefore it is normal that the child's interests prevail over other interests when taking action on child. Recommendation 874/1979 of the Council of Europe Parliamentary Assembly as a first principle states: "The children should not be considered the property of the parents but must be recognized as individuals with their own rights and needs". The same recommendation states that children need to have their own legal representation in the event of conflict between parents. Therefore divorce and separation procedures should be improved, and based on the principle that the child's interests are paramount.

The concept of contact with the minor was introduced by the 2006 Strasbourg Convention on contact concerning children is a broader concept which replaced the notion of "right to visit the children" commonly used in the past with a more complete phrasing that focuses on child rights law separated from one or both parents to maintain personal relations and direct contacts with both parents. The Convention also expanded the number of people with whom the child has the right to maintain

personal relations, including in this list not only parents but also others grandparents, brothers etc. In the literature, older necustodian parent's right to maintain personal relations with the child and the child's right to maintain personal relations with a parent or other significant person in his life is called the right of access but which, in the modern view brought by law [5] is only a component of the right to personal relationships. There are several embodiments of personal ties such as the right to access, access rights, the right to housing, the right to correspondence, the right to receive personal information about the child and the child's right to receive information about significant people in his life. All this is covered by art. 15 of Law 272/2004.

Conclusions

Measures applied to the court thus considered only minor interest to be protected in terms of physical and mental integrity. The interests of the child falls within the child's right to physical and moral development normal to socio-emotional balance, family life, as asserted by art. 8 of the European Convention on Human Rights. The exercise of parental authority by both parents prescribed by the New Civil Code, is a right of the child, but there are exceptions.

Thus, according to art. 401 of the Civil Code, parents separated from their children have the right to have personal contact with them. This law is the expression of the constitutional principle of the right to family life and special protection of children's rights. As a result, according to art. 14 para. 1 of Law no. 272/2004, "the child has the right to maintain personal relations and direct contact with parents, relatives, and other persons to whom the child has become attached".

In this regard, in the Official Gazette of Romania, Part I, no. 607 of 30 September 2013 was published Law no. 257/2013 amending and supplementing Law no. 272/2004 on the protection and promotion of child rights, planning to consider all legislation.

Exercise of parental authority exclusively by a single parent can be motivated through its capacity to provide greater stability, both physical and emotional, as well as the existence of possibilities much larger than the other parent resulting from better professional training, which would provide the optimum environment for the harmonious development of minor.

Determination of domicile of the minor to a different address than the one to which the minor resides and joint custody can create the opportunity for the defendant to close the relationships between the other parent and the child. On the other side, establish exclusive custody of the minor can create opportunities for better coverage of the need for growth and education.

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