THE MARRIAGE DISSOLUTION ON ADMINISTRATIVE WAY, ASPECTS OF COMPARATIVE LAW

Oana Voica NAGY
gugaoana@yahoo.com
“Dimitrie Cantemir” University, Târgu-Mureș, Romania

ABSTRACT

The study aims, on the one hand, to identify the utility of the marriage dissolution on administrative way and on the other hand to debate the procedure itself in order to compare it later with similar procedures from the comparative law. This procedure represents only one of the many ways that the legislator put on hand to spouses for the dissolution of their marriage, but in more restrictive conditions compared to the other ways of marriage dissolution.

The debate of these conditions, regarding the admissibility of the marriage dissolution on administrative way, the competence of the civil registrar as well as aspects regarding the necessity of the existence of the spouses consent will constitute a part of the main objectives of the study. From another prospective we will point out the extent to which the procedure of marriage dissolution on administrative way is used in other states of the European Union but also on international plan.

KEYWORDS: divorce, civil status officer, notary, spouses consent

1. The Dissolution of Marriage on Administrative Way in Comparative Law

The modifications brought by the new Civil Code as well as by the Law no. 202/2010 regarding some measures for speeding up the settlement of trials have strongly influenced the institution of the marriage dissolution.

For the first time by this law the marriage dissolution was also admitted on administrative way. So, spouses by mutual consent, have currently the option to file for divorce either at the civil registrar, either at the public notary or in court.

But the majority of the states do not permit the dissolution of marriage only if it is approved by the court of law. Not like the Romanian law, in the comparative law, in the Islamic countries for example, but not only, the dissolution of marriage on administrative way is not admitted.

On the contrary in these countries the dissolution of marriage represents a burdensome procedure, especially if the dissolution of the marriage is requested by the woman, an administrative procedure does not even represent a viable option especially from the religious point of view. Also, under the influence of religion, more
specific of Catholicism states like Ireland, Spain, Portugal and others did not admit the divorce in any of its forms. Only later, for example in Ireland starting with the year 1995, these countries have recognized the spouses possibility to request the dissolution of their marriage but only for grounded reasons [1].

England belongs in the same category, it is a state with a long tradition in what regards the marriage, and at the moment the dissolution of the marriage in this country is a relatively simple procedure. But the approval of the court for the admission of the divorce application is necessary.

Even in France, whose legislation represented one of the inspiration sources for the Romanian legislator for the elaboration of the new Civil Code does not recognize such an administrative procedure for the dissolution of the marriage by the mutual consent of spouses. The French law permits the spouses to divorce through a simple procedure with their mutual consent. Yet, the one that controls and supervises, during the whole divorce procedure, the accomplishment of the conditions provided by the law and the existence of the spouses consent, is the judge [2].

In the French doctrine the problem aroused if the dissolution of marriage on administrative way by the civil registrar, or on notary way, or even by the court clerk without the intervention of the judge does indeed satisfy the needs of both spouses, although the advantages of such procedure are recognized by the majority of the French doctrinaires. So, among the advantages are listed the economic one and then the fact that it would constitute a much simple, supple, faster and less traumatizing procedure than a divorce trial. But the issue that discouraged the French authorities to adopt an administrative procedure of marriage dissolution was and is the fact that, if the spouses rights are indeed defended in the absence of the defense that is usually formulated by a lawyer during a divorce trial in court [3].

With all these, the fact can be sustained that nothing stops the spouses to seek a lawyer’s support even if they request the dissolution of their marriage on administrative way, in order to have the certainty of an effective defense of their rights and personal interests. Beside this, the French doctrine pronouncing itself against the administrative dissolution of marriage has motivated its decision on the necessity to protect the person in general and the child in special but also the third parties, creditors of the spouses which having control over the partition of their common goods would have the tendency to defraud them [4].

The same, in Canada, state that also represented an inspiration source for the Romanian legislator, the divorce occurs in case of marital relation’s rupture. According to the Law called “Divorce Act” in the 8th article second alignment there are three distinct situations when one of the spouses can file for divorce namely: the spouses have been separated in fact for at least one year [5]; in case one of the spouses committed adultery as well in the situation when one of the spouses physically or psychically abused the other one. Just like the other states, Canada does not recognize the dissolution of marriage on administrative way.

In 2001 Portugal was the state that introduced the dissolution of marriage on administrative way. According to the 14th article of the Law no. 272 from 2001 that entered into force in 2002, the Portuguese legislation permitted the spouses to address themselves to the Civil Registrar Office in order to request, together the dissolution of their marriage. The Director of the Office receiving the divorce application checks the cumulative fulfillment of three conditions, namely: the existence of the spouse’s mutual consent regarding the children’s custody, the family’s home and when necessary regarding the obligation of maintenance of one of the spouses. Also, he
will establish a meeting where the reconciliation of the spouses is tried. If the spouses continue to sustain their request the divorce will be granted [6]. It can be observed in this case that the Romanian legislation and the Portuguese one are similar, with small exceptions. In our country the spouses also address themselves to the civil registrar requesting the dissolution of their marriage, the essential difference being the condition that exists in the Romanian law regarding the inadmissibility of such a request if from the marriage children were born or if the spouses have adopted children during the marriage and they are minors at the time of the request. But, also in what regards the fact that the civil registrar is obliged to give the spouses a 30 days period for an eventual reconciliation and only after that he can issue the certificate of divorce, if the spouses continue to solicit the dissolution of their marriage.

From 2007, a similar legislation to the Romanian one regarding the dissolution of marriage on administrative way was adopted in Brazil. The Law no. 11.401 from 2007 has introduced an extra judiciary procedure that allows spouses to divorce in front of the notary with the condition that they declare that, at the time of their request they do not have minor children or that their children are adults at the time when the dissolution of marriage is requested, condition that, as it was mentioned before, also exists in our country.

2. The Competence and the Procedure of the Marriage Dissolution on Administrative Way in Romania

In the situation when the spouses agree on the dissolution of their marriage and do not have minor children, in order to avoid the much longer and expensive procedure that a divorce trial in court supposes, they can address themselves to the civil registrar.

From the competence point of view, in our country, the civil registrar is competent from the place of the marriage conclusion, or the from the area where the spouses had their last common dwelling place, as it results from the content of the II article of the Law no. 202/2010 regarding some measures for speeding up the settlement of trials. With other words, the spouses can address themselves to the city hall that keeps the marriage certificate or to the one where they have their last common dwelling place.

Unlike the other two options that the spouses have to request the dissolution of marriage, namely on notary way and in court, the divorce on administrative way is governed by a relatively simple procedure if the mandatory conditions imposed by the law for its admission, are fulfilled.

Ab initio the legislator imposes a series of conditions, which if they are not accomplished, the administrative dissolution of the marriage is not possible. So, the divorce can be pronounced by the civil registrar only if the spouses do not have minor children [7]. When the legislator speaks about minor children he refers as well to the spouses children that were borne during the marriage or before its conclusion but also to the situation when the spouses have adopted children during their marriage.

As any other divorce procedure, judicial or notarial one the dissolution of marriage on administrative way starts with a divorce application. Unlike the application addressed to the court, the one addressed to the civil registrar has a standard form and will mandatory contain the following elements: the spouses consent to the marriage dissolution, that they do not have minor children, that neither of them is under court ban, that they did not file for divorce at another authority, the address of their last common dwelling place and, not at last, the name that they will have after the dissolution of the marriage.
Necessarily the dissolution of marriage application will be accompanied by the spouses’ birth certificate as well as by the marriage certificate, in original and in copy, documents that prove their identity, also in original and in copy, a statement given in front of a public notary when the last common dwelling place is other than that which appears in the ID’s of both spouses [8].

When the spouses request the dissolution of marriage by the civil registrar they have to personally file the application and sign it in front of him, unlike in the judicial procedure were the divorce application can also be filled by a trustee. According to the 165th article of the Government Decision no. 64/2011 for the approval of the Methodology regarding the unitary application of the dispositions in civil status matter “the registration of the divorce application on administrative way is made separately in the input-output Register of the divorce applications”.

From the filing of the divorce application, according to the 376th article of the new Civil Code, the civil registrar grants the spouses with a period of 30 days. This period actually represents a time for reflection for the spouses.

Practically within this period the spouses have at any time the possibility to abandon the dissolution of marriage by withdrawing their application. But if, after the expiry of the period, the spouses continue to sustain their application the civil registrar will proceed to the issue of the divorce certificate.

But, in one of the following situations the application will be rejected, according to the 172nd article of the same Government Decision no. 64/2011 for the approval of the Methodology regarding the unitary application of the dispositions in civil status matter, by the civil registrar: if the spouses are not present, together in front of the civil registrar, after the 30 days period’s expiry as it is provided by the new Civil Code, the divorce file will be classified, by drawing a report up.

Also, the divorce file created by the civil registrar at the submission of the application will be classified if one of the following conditions is met:

a) If both spouses or only one of them renounces at the submitted divorce application;

b) If, before the completion of the divorce procedure, one of the spouses is put under court ban;

c) If, before the completion of the divorce procedure, the birth of a child occurs;

d) If, before the completion of the divorce procedure, one of the spouses dies.

In this case the marriage will cease by death.

The Government Decision no. 64/2011 for the approval of the Methodology regarding the unitary application of the dispositions in civil status matter also provides a series of special administrative dispositions regarding the situation when the divorce application is admitted.

So, the civil registrar will mandatory go through the following stages in order to issue the divorce certificate. At the time of the marriage dissolution the civil registrar will cancel the ID of the ex-spouse that changes his or hers surname by divorce, by cutting the ID’s corner where the validity period registered.

Practically the same procedure is applied as at the conclusion of the marriage when one of the spouses takes over the other one’s surname, with the specification that in this case he or she will take back the maiden name.

Before issuing the divorce certificate due to the dissolution of marriage by the mutual consent of the spouses, the civil registrar will request, the allocation, of the number of the divorce certificate from the unique Register of the divorce certificate, number that will be registered on the certificate.

The divorce certificate is drawn by the civil registrar in 3 originals, from which
two are given to the parties based after they signed the divorce application and the register of divorce certificates evidence and an original will remain in the divorce file. When, the marriage is dissolved by mutual consent of the spouses the divorce certificate will not have mentions about the reasons of the divorce or about the fault of any of the spouses.

If instead the civil registrar finds out that conditions provided by the new Civil Code for the marriage dissolution by the mutual consent of the spouses, namely the spouses have minor children, they do not agree on the name they will have after the divorce or they consent is not freely expressed and is vitiated, he will draw up a report through which he will propose the reject of the divorce application. In this case, when the civil registrar rejects the divorce application the spouses can address themselves to the competent court for the dissolution of their marriage. And in case they consider that the rejection of their application is considered to be abusive, the spouses can address themselves to the court for the repair of the caused damages [9].

According to the legislation in force the marriage will be considered dissolved at the date the divorce certificate is issued by the civil registrar.

3. The Spouses Consent for the Dissolution of Their Marriage and Its Length

The spouses consent represents the essential condition for the admissibility of the divorce application by the civil registrar or by the public notary. In the lack of the consent of both spouses, the divorce application will be rejected. The spouses may in this case file for the divorce only in court.

Even more, the spouses consent must exist even if the marriage dissolution by mutual consent on judicial or extrajudicial way and has to persist all along the divorce procedure or trial.

What characterizes the spouses consent to the marriage dissolution is the fact that, as in the case of the marriage conclusion it has to be freely expressed and it must not be vitiated. In case these conditions are not met the divorce is void, either relative or absolute.

Also, beside the freely expressed and not vitiated consent it is necessary that both spouses have full exercise capacity, so that neither is under court ban [10]. On the other hand, according to the 917th article of the new Civil Code the spouse that is under court ban can file for divorce, in court, either personally if he or she can prove to have discernment or through its legal representative.

4. Conclusions

We can conclude by saying that, a very small number of states have adopted a legislation that allows spouses to choose the dissolution of their marriage by amicable settlement, the divorce being pronounced by the civil registrar or by the public notary, although many international doctrines recognize the advantages of this procedure.

With all these, a large number of the states, not only that do not have a simple, supple, fast, less traumatizing and less expensive procedure but they recognize the divorce only in very restrictive conditions. Such procedures especially met in the Islamic states or India for example, state which is strongly influenced by religion, being until recently one of the states with the lowest divorce rate in the world. It also has to be underlined that some states like Chile or Malta recognized the divorce as a modality for the marriage dissolution only in 2004 respectively in 2011.

The question arises if, in this states the right to divorce of spouses is not limited or, on the contrary if the Romanian legislator did not liberalized this right to much, facilitating on this way the family’s breakup. The family constituted and still constitutes in the majority of the states the
foundation of the society and establishing some procedures that are too simple might cause the spouses to give up easily the attempt of reconciliation.

But, the Romanian doctrine in its majority [11] recognizes the advantages of the administrative procedure of marriage dissolution, introduced by the Romanian legislator since 2010 with the adoption of the Law no. 202 regarding some measures for speeding up the settlement of trials.

At the moment, even if it is constantly changing, the Romanian legislation offers the spouses the possibility to choose the modality of marriage dissolution, as it is applicable to their situation.

So, spouses have the option to choose between the dissolution of their marriage on administrative way, by the public notary or in court, even if their marriage dissolution is governed by their mutual consent.

Considering that the divorce, in the past was mainly influenced by the religious factor and practically it was on this way discouraged and even incriminated. Today there has been a strong liberalization, and the marriage, is considered by the doctrine to be assimilated to a simple contract that can be dissolved by the simple consent of the spouses. Also it can be observed that religion does not influence any more in this sense the dissolution of marriage, recognizing it, and allowing the ex-spouses to remarry.

REFERENCES


5. Very similar disposition with the one existing in the Romanian Civil Code in the 373rd article according to which the spouses can request the dissolution of the marriage after a separation in fact of at least 2 years.

6. For details see the Portuguese Civil Code article 1775 and Law no. 272 from the 1st of October 2001.

7. For details see the 375th article (1) alignment Civil Code.

8. For details see the 166th article and following from the Government Decision no. 64/2011 for the approval of the Methodology regarding the unitary application of the dispositions in civil status matter.


BIBLIOGRAPHY

Government Decision no. 64/2011 for the approval of the methodology on the levelled application of the decisions regarding the civil status.
Law no. 287/2009 regarding the Civil Code.
Law no. 202/2010 regarding some measures for speeding up the settlement of trials.