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Separation („Eheschutz“)

I want to separate - do I have to go to court for that? What is meant with the term „Eheschutz“? What happens if we get back together? Below you will find answers to the most common questions about separation.

What does „Eheschutz“ mean?

„Eheschutz“ can be translated as marriage protection, but corresponds to the legal institute of separation. It is regulated in Art. 171 ff. of the Swiss Civil Code (ZGB) and is intended for when the couple's relationship has failed and a married couple wishes to dissolve the joint household.

In most cases, both spouses agree to the separation - if they also agree on the consequences of the separation (e.g. who will move out of the joint home or how the household effects will be distributed), they can record these agreements in a separation agreement without going to court.

This does not apply if there are underage children involved: The separation agreement must then be approved by the court so that the arrangements concerning the child's interests (e.g. child support or custody) become legally enforceable if the obligated parent does not comply with the agreement.

However, if one of the spouses opposes the separation or if the spouses cannot agree on how the separation should be organised and lived out, the court must approve the separation in a marriage protection proceeding and make the necessary arrangements (e.g. on the allocation of the apartment and household effects or on the assessment of alimony).

What is the difference between separation and divorce?

Nowadays, the marriage protection procedure usually forms the preliminary stage of the divorce, but is by no means a prerequisite for it. In marriage protection proceedings, no final regulations are made (e.g. on the distribution of assets or the determination of alimony), only the temporary separation period until a possible divorce is organized.

After a marriage protection procedure has been carried out, one is only "separated" and not yet divorced - a divorce procedure, which is described in Art. 111 ff. ZGB, will be necessary.

In contrast to divorce, the legal effects of the marriage and, above all, the mutual right of inheritance of the spouses continue to exist even after a marriage protection procedure.

(on divorce, see also our separate publication "What happens in a divorce?")

When does it make sense to initiate a separation procedure?

A marriage protection or separation procedure is primarily useful if one of the spouses does not (yet) want to divorce - as long as the spouses live together, no one can ask for a divorce against the will of the other. Marriage protection can be used to prove the two-year separation period required for an action for divorce under Art. 114 ZGB.

Similarly, it is helpful if the regulation of the consequences of the separation is not successful. In the event of a dispute as to who should move out of the shared home or if the financial situation of the children and/or the parent looking after the children is suddenly no longer secured due to the separation, the precautionary arrangements in the separation proceedings offer security.

The separation proceedings also serve to simplify the later divorce - the regulations by the court often anticipate many things, since these orders on the one hand also apply during a divorce proceeding and on the other hand affect the regulation of the consequences of the divorce.

Can I request the separation alone?

Each spouse can apply to the court at any time for a marriage protection procedure and request that the separation be approved and regulated. The consent of the other spouse is not necessary.

What is the legal process like?

Marriage protection or separation proceedings begin with the filing of the request with the court. Some documents must also be sent along (e.g. family certificate, tax returns, the rental contract of the shared apartment, documents on income and expenses, etc.). If there is a separation agreement in which children's interests are regulated, it must be submitted to the court for approval.

The court then invites the spouses to a hearing. If the spouses have not been able to agree on the consequences of separation, the court will try to reach an understanding and work out an agreement together at the hearing. If the court comes to the conclusion that all the necessary documents are available, that the separation agreement (in the case of children) and the separation itself can be approved, it will record the separation and the regulation of the consequences of it in a judgment.

What is regulated in the separation proceeding?

On one hand, the court grants permission for separation, i.e. it states that the spouses are separated now or from a certain date on. On the other hand, it regulates

the consequences of the separation in accordance with Art. 176 ZGB.

However, the regulation of the consequences is not final; it is valid at most until the later judgment of the divorce.

Allocation of flat and household effects

It is regulated which spouse remains in the joint apartment for the time being and who has to move out; in principle, it is decided according to who is more reliant on the apartment.

Assets

If there is no marriage contract, the spouses are subject to the statutory property regime of participation in acquired property in accordance with Art. 197 ff. ZGB. In the event of divorce, this matrimonial property regime would be dissolved and divided between the spouses.

In marriage protection proceedings, there is no division of assets as in divorce proceedings - however, it can be requested that the participation in acquisitions be replaced by the matrimonial property regime of separation of property. In the case of a subsequent divorce, only the assets which existed before the time of the arrangement of the separation of property must be divided.

Alimony

Since the marriage continues to exist despite the separation, the spouses are still obliged to contribute to the upkeep of the family to the best of their ability. In marriage protection proceedings, therefore, it is regulated temporarily with regard to common children who contributes how much to the support or the costs of the children. A claim for support may also arise for the former partner.

The amount of the alimony contributions always depends on the concrete circumstances and must be calculated individually on the basis of the spouses' financial

capacity. There are no flat rates in that respect.

Children

If the marriage has brought forth joint children, it has to be regulated in the separation who provisionally exercises custody of the children - the allocation of parental responsibility (according to Art. 296 ZGB the right and duty to decide for the child where it is not yet able to do so) is not decided in the separation proceedings.

„Custody“ only concerns who is responsible for the care of the child, who lives together with the child and takes care of the child's everyday needs, e.g. cooking dinner, shopping for clothes, putting the child to bed or caring for the child when it has a cold. If a child is looked after by one parent and also lives with this parent, this is called sole custody. The other parent is granted visiting rights (Art. 273 ZGB). If the child is cared for by both parents in roughly equal measure and also lives with both parents alternately, this is called alternating custody.

What happens if we get back together?

In the event that the spouses resume living together, the law assumes that the spouses have reconciled. Art. 179 ZGB therefore provides that the measures ordered in marriage protection proceedings to regulate the consequences - with the exception of the separation of property and any child protection measures ordered - are void.

How much does a separation cost?

In the case of a separation in court, there are court fees and possibly attorney's fees. The amount depends on various factors, e.g. the effort and difficulty of the case.

If the financial means to finance the costs of the proceedings in addition to living costs are lacking, there is the possibility to apply for a free trial according to Art. 117 of the Code of Civil Procedure (ZPO). For the time being, one is freed from court costs - provided, however, that one is without financial means and that the proceedings do not appear to be futile. Free legal assistance is granted if one is dependent on expert advice (e.g. because the other party also has a lawyer).

Do you have any further questions about separation or do you wish legal support in the proceedings? I would be happy to advise and represent you!



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