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What happens in a divorce?

What is important to consider in a divorce, what can I expect in the process? Must my spouse agree to the divorce? Below you will find answers to the most common questions about divorce and separation.

Divorce and separation ("Eheschutz"), what is the difference?

„Eheschutz“ can be translated as marriage protection, but corresponds to the legal institute of separation. It is intended for when the couple's relationship has failed and a couple wishes to dissolve the joint household. If one of the spouses objects to the separation or if the spouses cannot agree on how the separation should be organised and lived out, the court can authorise the separation in a marriage protection procedure and make the necessary arrangements for this provisionally (e.g. on the allocation of housing or for the assessment of alimony).

A marriage protection procedure is also useful if one spouse does not (yet) want to get a divorce - the two-year separation period required for the divorce suit can be proven this way.

However, 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.

(on marriage protection/separation, see also our separate publication „Separation („Eheschutz“)")

Can I ask for a divorce on my own?

If only one spouse wishes to divorce against the will of the other, he or she must enforce this by filing for divorce

pursuant to Art. 114 or Art. 115 ZGB. However, this is only possible if the couple has already been separated for two years (Art. 114 ZGB) or if the continuation of the marriage is no longer tolerable for serious reasons (Art. 115 ZGB). It has to be proven that the couple is separated - e.g. by determining the date of separation in a marriage protection procedure or by the documented moving out of the spouse's common apartment.

The situation is different if both spouses agree to the divorce: According to Art. 111 ZGB, a joint request for divorce can be filed at any time, signed by both spouses. An action for divorce is then no longer necessary and the prerequisites according to Art. 114/115 ZGB no longer have to be fulfilled.

What is the divorce procedure if a joint request has been filed?

The divorce proceedings begin with the filing of the joint request for divorce with the court. Some documents must also be sent along (e.g. the family certificate, tax returns, the rental contract of the shared apartment, documents on income and expenses, etc.).

In addition, a divorce agreement can be submitted to the court. In this agreement, the spouses regulate the consequences of the divorce (alimony, parental care for the children, distribution of the pension funds, distribution of the assets, etc.). The agreement may contain a full or partial settlement on the consequences.

The court then invites the spouses to a hearing. At this hearing, the court makes sure, on the one hand, that both spouses really want to divorce and, on the other hand, verifies whether the divorce agreement submitted (if any) is complete and fair and whether both spouses have understood and still agree to the points stipulated therein. For this purpose, the spouses are heard both separately and

together. If the spouses have not submitted an agreement, 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, the agreement can be approved and both spouses are willing to divorce, the court will pronounce the divorce and write it down in a judgment.

How does the divorce procedure work in case of a divorce suit?

The divorce proceedings begin with the filing of the divorce suit with the court. In principle, the same documents must be sent along as for a joint divorce request. In addition, proof should be submitted that the requirements for an action for divorce have been met (e.g. the rental agreement for the new apartment occupied alone as proof of separation).

At the divorce hearing, the court will first examine whether there are grounds for divorce under Art. 114/115 ZGB. If this is not the case, e.g. because it cannot be proven that the couple has been separated for two years, the divorce proceedings will be disputed in a normal civil proceeding.

But if the court is convinced that there is a reason for divorce, it will likewise attempt to reach an understanding on the consequences of the divorce and to draw up an agreement. The agreement will be examined and the court will issue the divorce decree. If no agreement can be reached, again, a disputed divorce proceeding will be necessary.

What about the children?

If the marriage has brought forth joint children, it must be settled in the event of divorce who will exercise parental responsibility and/or custody over the children.

Parental responsibility is the right and the duty to decide for the child where it is not yet able to do so itself (Art. 296 ZGB). This includes, for example, the decision on medical interventions or the whereabouts of the child. Parental responsibility is normally retained by the parents together even in the event of divorce (joint responsibility). Only in exceptional cases, e.g. if the welfare of the child is endangered, is one parent granted sole parental responsibility.

A distinction must be made between this and custody. Custody 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. 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. While parental responsibility is normally shared by both parents, custody can also be assigned to only one parent. The other parent is then granted visiting rights (Art. 273 ZGB).

The child also has the opportunity to make his or her views and wishes known to the court if desired. In principle, a child's hearing is possible from the age of six and serves the court to get an idea of the family situation and the needs of the child. The hearing remains confidential, only a summary of the interview is given.

Alimony - who pays how much?

Divorced parents are still responsible for their children - in the case of joint children who are still minors, it must be decided who provides for the child support. Child support can be provided through care, education or monetary payments. It consists on the one hand of the cash support,

i.e. the effective living costs (everyday needs such as food, clothing, costs for school materials, etc.) and on the other hand of the „Betreuungsunterhalt“, meaning the alimony for the actual care. The latter serves to financially meet the child's claim to personal care - if one parent is restricted in his or her gainful employment by the care and cannot fully cover his or her own living costs, the other parent must compensate for this disadvantage.

The former partner himself or herself may also be entitled to post-marital alimony for his or her own living costs and adequate provision for old age. In most cases, however, this alimony is only granted for a limited period of time, as both spouses are expected to be able to support themselves independently.

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.

How are the assets divided?

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 a divorce, the matrimonial property regime is dissolved and divided into "acquired property" and "individual property". Individual property is what was brought into the marriage or what one has received free of charge during the marriage (e.g. through inheritance or gift). Acquired property is everything that was acquired or saved during the marriage, especially the income from employment. Anyone who claims that an asset is his or her individual property must be able to prove this (Art. 200 ZGB).

While each spouse retains his or her individual property, the acquisition at the

time of divorce (the so-called surplus) is divided in half.

Does the divorce have an impact on the assets in the pension fund?

According to Art. 122 ZGB, the pension fund assets acquired during the marriage must be equalised in the event of a divorce in order to eliminate any disadvantages between the spouses (e.g. because due to child care, less funds could be acquired).

The amount paid in the funds by each spouse during the marriage is calculated - this corresponds to the difference between the leaving benefit on the date of marriage and the date on which the divorce proceedings were initiated. Each spouse is entitled to half of the other's assets thus calculated. A waiver of the division is only possible under strict conditions, e.g. if it can be proven that the pension plan is secured even without the settlement.

In order for the pension fund's assets to be calculated, a so-called "declaration of feasibility" by the pension fund must be submitted to the court. In this declaration, the pension fund records the amount of the assets saved during the marriage and confirms that the division is feasible. The declaration of feasibility should only be ordered from the pension fund once the divorce proceedings have been initiated, as the date of initiation is required for the calculation. In the divorce decree, the court instructs the pension fund concerned to make the calculated settlement. The assets are only moved between the pension funds and are not paid out.

Incidentally, the assets of the AHV compensation fund are also affected by a divorce: In the so-called "splitting" process, the income earned by the spouses during the marriage is divided and half of it is credited to each of them in order to be able to calculate the retirement or

disability pension of divorced persons correctly. The splitting must be applied for after the divorce.

After the divorce, can I use my maiden name again?

The name does not change automatically when you divorce - the spouse who has changed his or her name will keep it after the divorce.

However, Art. 119 ZGB provides for the possibility of simply declaring at any time at the civil registry office that you wish to use your maiden name again.

A divorce also has no effect on the name of the children - this would have to be changed with an official application for a change of name. However, if the child is older than 12 years, his or her consent is also required for the name change.

How much does a divorce cost?

In the case of a divorce, 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).

The procedure for a joint application for divorce is considerably shorter - and therefore also more favourable - than in an action for divorce, which is why it is worthwhile for both spouses to work towards an amicable solution.

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



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