

Review

The Uncontested Divorce in Albania and the Controlling Role of the Judge.

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Abstract.

The divorce institute in the Albanian family law is designed to avoid severity and to promote the preservation of family relations and the amicably settlement of the family disputes. Respecting the will of the partners to divorce by a mutual agreement, the Albanian legislation provides their right to divorce by a facilitating judicial procedure, while many European countries have recently adopted a more facilitating procedure, the administrative divorce. The paper aims at comparing the Albanian judicial procedure with the administrative procedure by identifying in any of them the guarantor elements of the best interest of the child and the rights of the partners.

Keywords: *Uncontested divorce; agreement; judicial procedure; administrative procedure.*

Introduction

Maintaining the "yes we do" formula even in the divorce is considered to be more convenient to

partners by keeping civil their relationship and avoiding the traumatic consequences of the divorce. Divorce is a disruptive event in the life of each of the partners and in the contests of family relations. Dealing with it is a complex issue as it involves the emotional status of the partners and also it has many legal consequences concerning the division of the property and the child support. The increasing number of divorces has led to substantive legal changes in the procedure of the divorce and also in its consequences. Legislations have adopted new unconventional forms of divorcing. The traditional divorce intended to minimize direct communication between partners and to maximize third party decision making. (Folberg et al., 2004) Having in mind that if there is a way to handle with divorce that should be the one where the partners try to communicate on how they want to proceed after the divorce, legislations are evolving new practical forms. The Albanian families in these two latest decades are experiencing the most dramatic change as the mass scale of divorce is increasing year after year. (Instat, 2018) According to the Albanian Institute of Statistics the average of divorce has grown

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from 1.3 per 1000 inhabitants in 2013 to 1.6 per 1000 inhabitants in 2017. (Instat, 2018) This is considered as a significant increase in the number of divorces with an average grown number of 0.075 per 1000 inhabitants per year. The increase number of divorces means more cases of divorces to solve by the judge, overloading so the judicial administration and increasing the costs for spouses and extending the time to have a definitive solution for the spouses pending the decision of the judge. The institute of marriage is based on the mutual consent of the former partners to consume the life together. The consent of the spouses is not just a necessary condition for the marriage as an act but at the same time it constitutes a necessity in regulating the consequences during and after the marriage. The consent of the spouses has a very important role in the Albanian Family Code (F.C) While solving the family disputes the judge is obligated to consider the consent of the spouses.

The Albanian Family Code provides only judicial forms of marriage dissolution; the uncontested marriage divorce, the dissolution of marriage because of factual separation and dissolution of marriage by the request of one of the spouses. (Law No 9695/2007, Article 125 – 144) Despite the fact that the three of them are judicial forms, the uncontested divorce differs from the others as the will of the spouses plays a determinant role in regulating the legal consequences of the divorce.

“Yes we do...want to divorce”

The Procedure of the Mutual Consent Divorce in Albania

The uncontested divorce is designated in four articles from article 125 to article 128, providing the meaning of the uncontested divorce, the procedure and the legal effects of the agreement between the spouses. A special attention is given to the role of the judge to check the validity of the agreement based on two main principles, the best interest of the child and the equality between

spouses. Even the main purpose of the uncontested divorce is to give more space to the will of the spouses in solving the consequences of the divorce, the judge still have a crucial role in this procedure. The procedure starts with a request, signed by both partners and not by a plaintiff. The request should be accompanied by a settlement agreement that stipulates the terms for the dissolution of the marriage and it can be submitted by the spouses or by their representatives. (Law No 9695/2007, Article 125) It is very important to highlight the fact that in the uncontested divorce, according to the Albanian family law the mutual consent of both partners is necessary to begin the divorce procedure. In this case the request filed at the court should be signed by both partners. Article 126 of the F.C requires the presence of both spouses. This is to clarify that according to article 127 of the F.C, each of the spouses expressed a serious and their fully consent in the agreement for the dissolution of the marriage. If there is any hesitation from the spouses or if the consent is not clearly manifested the court can refuse the request for the divorce by mutual consent. The court should refuse the request for a divorce by mutual consent even if one of the spouses withdraws his/her request and should orient the spouse to other ways of marriage dissolution. (Omari, 2008) If the court evaluates that the given consent was based on their free will and that the common purpose of the spouses during the trial is still the mutual dissolution of the marriage, the court should continue with the examination of the provisions of the agreement. In the procedure of the divorce by mutual consent, the court does not examine the reasons of the divorce and it does not administer any evidence to seek and prove the causes of the divorce.

After considering the mutual consent of the spouses for the dissolution of the marriage, that each of the spouses is freely deciding for the divorce and that each of them has freely given his/her consent, the court examines the provisions of the agreement. There is a noticeable difference between the role of the court in examining the free will of the partners and its role in ex-

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aming and evaluating the legality of the agreement and the validity of its provisions. In this phase the court has a judicial role as it evaluates if the agreement “does properly respects” the interest of the child or of one of the spouses. (Omari, 2008) Even in this phase the court does not fully exercise a judicial role as it can only orient the partners towards solutions to regulate the consequences but the court can't decide for them, as the divorce by mutual consent is fully based in the free will of the partners and so are its consequences.

The content of the agreement is mostly determined by the law. The agreement must contain the provisions for the care and education of the minor children, the financial support for the child care and education and the provisions for alimony. Provisions on the division of their property are not required to be part of the agreement, but spouses can include them freely and if included those should be part of the judicial examination by the judge.

The judicial examination of the agreement is based in two main principles; the protection of the higher interest of the child and the equality between the spouses. (Law No 9695/2007, Article 128) Each of the dispositions of the agreement should be in respect to both of these principles. If the court in its examination finds that the agreement does not properly provide for the needs of the child or one of the spouses, it may suspend the judgment for three months and request the spouses to make the necessary changes. If after this time period, the agreement still doesn't fulfill the legal requirements, the court may refuse to approve the agreement and dismiss the request for uncontested divorce. (Law No 9695/2007, Article 128 (2) If the agreement has met the legal requirements and the spouses have given their freely consent the court approve the agreement and decides on the dissolution of the marriage.

The refusal from the court to dissolve the marriage by the mutual consent of the spouses doesn't prevent the spouses to file a new request for the uncontested divorce as it doesn't prevent

each of them to file a plaintiff for the dissolution of the marriage under article 132.

This requirement to reach an agreement to the partners is in contradiction with principle 1; 7 (3) of the European Family Law which does not require an agreement as a precondition of the uncontested divorce. Even if the partners haven't reached an agreement at all or even when the agreement is partly reached, the divorce nevertheless remains a consensual divorce but the competent authority will decide on the consequences. Although the contradiction it looks like the Albanian Family Code provides for a wider margin of respect for the will of the spouses. As it is mentioned above the procedure is entirely dependent on the will of the spouses form the investment of the court to the resolution of the consequences.

New Procedures of Divorce by Mutual Consent.

The area of family law and its harmonization is part of a controversial debate in the European Union. The EU efforts on this field led to the establishment of the Commission on European Family Law (CEFL) in 2001. In order to give way to the harmonization of the family law, in 2004 the CEFL drafted in 2004 the first principles regarding Divorce and Maintenance between Former Spouses. (CEFL, 2004) The principles regarding divorce aims at facilitating the divorce procedure without jeopardizing the interest of the children and the interests of both spouses. The mutual consented divorce is clearly favored than the unilateral divorce, as the principles aim to encourage the former spouses to determine themselves the consequences of the divorce. (Boele - Woekli, 2005) Although the principles give a particular importance to the consent of the spouses the divorce, due to the involvement of the public interest, should be granted by a judicial or an administrative authority determined by law. (Principle 1;2, CEFL) Recently there is a tendency of many countries to switch from the judicial procedure to an administrative one in granting the unconventional divorce or the consensual divorce. In 2017 Greece simplified the divorce

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procedures by giving the possibility to former spouses, who have mutual consent for a divorce, to bring it before the notary except the cases of religious marriages before the Greek Orthodox Church. (Law No 4509/2017) From January 2017 even in France the family court has no longer jurisdiction on mutual consent divorce cases, unless a minor child requested to be heard or one of the spouses is under a guardianship measure. (French Civil Code, 1804) In all other cases, the divorce agreement is countersigned by both the lawyers of the parties and registered by the notary. In 2015 Italy also introduced the so called "fast track divorce law" which gives the possibility to spouses to divorce before a municipality officer, but in these cases the spouses cannot introduce provisions on the child support or division of the assets. The spouses cannot ask for a "fast divorce" if they have minor children or if the children have reach the age of maturity but they are still economically depending on their parents. (Law No 55/2015) Romanian legislation has the same approach as the Italian one, considering both judicial and administrative procedures and by giving the possibility to spouses who do not have minor children to apply for divorce in mutual consent at the civil register. (Law No 287/2009) The basic principle of a consensual divorce is the mutual consent of the spouses and their free will to determine the consequences of their marriage dissolution. Under the European Divorce Principles mutual consent is not considered as an irretrievable breakdown so no investigation for the reasons of a breakdown is necessary. (Boele - Woekli et.al, 2005) This is another reason why different legislations have adopted the administrative procedure of a consensual divorce as no investigation is necessary to make and there is no contestation from the parties. In the view of facilitating the uncontested divorce procedure the general principles does not necessary require a period of factual separation, but this is led to the national authorities to decide if it is necessary to have a prior factual separation between the spouses and how long its duration will be. (CEFL, Principle 1;4 (1) The lack of a fac-

tual separation period is an expression of the respect to the free will of the spouses to decide how they want to organize their relationship which stands at the heart of the consensual divorce. The other interest that may be at stake such as the interests of the child and that of the other spouse are foreseen in the principle 1;5 of the reflection period. The principle of the reflection period helps the spouses to take the necessary time to evaluate the divorce situation and its consequences. The reflection period and its duration depend on the interest they seek to protect. The presence of children under the age of sixteen years and whether an agreement is reached or not, are both the elements used to define the reflection period. If the spouses have children under the age of sixteen years and an agreement on the consequences of the divorce is reached, the reflection period should be of three months. If there is no agreement the reflection period should be extended to six months. If the spouses have no children, under the age of sixteen years, and they have not reached an agreement the reflection period should be three months. If the spouses have no children, under the required age and they have reached an agreement no reflection period should be applied. (Scherpe, 2016) The factual separation period conquer over the reflection period, as in the cases where the spouses have been factually separated for more than six months, no reflection period should be required. Different legislations have different approaches on this point. Some legislations still envisages the necessity of a factual separation period. In Italy for instance before entering in force of the new law of 2015, the factual separation time was of three years. (Law No 898/1970) Article 3 of the Italian Divorce Law was amended and according to the amendments the factual separation period is of six months in cases of consensual divorce and no reflection period is applied. In France there are no requirements on the separation or reflection period. The interest of the child and that of the other spouse are protected by making compulsory the judicial procedure in cases when a spouse is under guardianship or minor children are involved. In Spain

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there are no provisions on a factual separation requirement or on reflection period. The so called “fast track” divorce in Spain, by mutual consent, is given by a court procedure if the spouses are married for at least three months. (Andrev, Hummelsheim, 2009)

The agreement reached by the spouses is not always a sine qua non requirement for the consensual divorce. In many states the mutual consent of the spouses is just necessary for the dissolution of the marriage and not necessarily for its consequences. In others like the Albanian case, the mutual consent does not imply only the will of both spouses to divorce but also to regulate the consequences. If there an agreement is not reached than there is no divorce with mutual consent. According to the European principles the form of the agreement should be respected for its validity. The agreement should be in writing and signed by both spouses. The validity of the agreement is of a crucial importance as it defines the process in itself. The judge can not affect the will of the partners on how they will deal with the consequences of the divorce; neither can he make any adjustment to the agreement.

The content of the agreement is of a particular importance as it guarantees the respect of children rights and the rights of the partners. There is a common approach of different countries in determining the terms and provisions of the agreement despite the fact if the procedure is a judicial or an administrative one. This is because of the sensitivity of the issues that need to be determined in it. According to the Albanian family legislation the agreement must conclude provisions for the care and education of any minor children, financial support for their care and education, provisions for alimony if needed and if possible the division of their assets. (Law No 9695/2007, Article 127) The agreement' provisions are mandatory when they related to the minor children and their relation with their partners. Between partners no provisions are mandatory except the case when the alimony is needed

and one of the partners ask for it. The factual relation between partners and the division of their assets is not mandatory to be stipulated in the agreement. The ex spouses, after the divorce can file a request to the court to settle the division of their property. The difference between the uncontested divorce procedure and that of other forms lies in the value of the will of the partners to define the consequences of their divorce, while in other divorce procedures the court decides and settles the relationship between partners and between them and their children. But the agreement between the partners is not entirely autonomous since its validity depends totally on the court approval. Another common approach, in judicial procedure, is noticed also in the imperative requirement that the partners should be personally present before the court.¹ This is a necessary requirement as the court needs to determine that the partners have expressed a fully, serious and complete consent. In cases of the administrative procedure the given consent will be subject of the assessment of the administrative authority.

Conclusions

The Albanian family law provides a facilitating procedure in cases of divorce by mutual consent of both spouses, but still it remains a judicial procedure where the spouses shall file a request to divorce accompanied by an agreement signed by them. As a judicial procedure is expected by the judge to give a decision and solve the consequences of divorce. But in the divorce by mutual consent the “role of the judge” lies in controlling the validity of the agreement and in conserving the interests that are at stake. The judge is the guarantor of the procedure and not the decision maker in the process. The divorce by mutual consent is a special form of divorce which is based in the principle of the consent of the spouses to disrupt their marriage. In this view it is a faster divorce procedure as no conciliation sessions are needed and the resolution of the consequences

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has to be settled by the spouses in the agreement and is not part of the judicial debate. Though it seems more facilitating than other divorce procedures, the divorce by mutual consent still requires time and costs to afford the judicial and notary expenses.

The administrative procedure, which provides all the necessary guarantees for interests that are at stake, is seen as a possibility to avoid the legal trap of a long judiciary procedure, reduces the costs and helps the former spouses to freely determine their property and personal relations after the marriage. The administrative procedure should be adopted as a possibility to resolve the mutual consented divorce only in limited cases, such as provided in other European countries' legislations. In the discussion of which administrative body should have the competence to deal with the divorce by mutual consent, the experience of other European countries shows that this competence is left to the civil register or to the public notary. In Albania according to the judicial reform and as a need to facilitate the courts some of the issues that were under the judicial jurisdiction have been transferred to other legal services. One of them is definitely the notary service which due to the professional legal service that it offers has helped the courts in some legal, administrative and technical issues. So it seems logical that as an administrative body, to dissolve the marriage by mutual consent should be appointed the public notary having regard of the fact that he is a legal professional and he can orientate the spouses to conclude a valid legal agreement.

References

1. Folberg J., Milne A., Salem P. (2004), "Divorce and Family Mediation. Models, Techniques and Application", New York, Guilford.
2. Yearly statistics 2018, Albanian Institution of Statistics. Available from <http://www.instat.gov.al/media/4936/vjetari-statistikor-2018.pdf>
3. Albanian Family Code Law No 9695/2007.
4. Omari S. (2008), "E Drejta Familjare", [Family Law], Tirane.
5. *Divorce and Maintenance between Former Spouses Principles*, drafted in 2004 by the Commission on European Family Law. Available at; <http://ceflonline.net/>
6. Boele- Woekli, K., (2005), "The principles of European family law; its aims and prospects", *Utrecht Law Review*, Volume 1, Issue 2, retrieved from <https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.13/>
7. Law 4509 / 2017 (GG. A 201/ 22. 12.2017) amended art 1438 and 1441 of the Greek Civil Code.
8. *French Civil Code*, 1804.
9. Law 55/2015, *GU Serie Generale n.107 del 11.05.2015*.
10. *Romanian Civil Code*, Law No 287/2009
11. Boele- Woekli K., Braat B., *Summer I.* (2005),
12. *European Family Law in Action Vol.III: Parental Responsibilities*, Oxford, Intersentia.
13. Scherpe J., M. (2016), "European Family Law Volume I: The Impact of Institutions and Organizations on European Family Law", Northampton. Elgar E.
14. Law No898/1970, *Gazzetta Ufficiale 3 dicembre 1970*
15. Andrev H. J., Hummelsheim D., (2009), "When Marriage Ends: Economic and Social Consequences of Partnership Dissolution", Northampton. Elgar E.