
JUDICIAL DIVORCE BASED ON FAULT

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Abstract: *The article presents the cases and general conditions of judicial divorce based on fault*

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1. Introduction

The dissolution of marriage represents the measure of definitive separation of the spouses, adopted under the conditions of the law. The legal means by which the dissolution of marriage is achieved is divorce¹.

In accordance with the provisions of Article 373 of the Civil Code, the marriage can be dissolved through divorce in the following cases:

- a) by agreement of the spouses, at the request of both spouses or of one spouse accepted by the other spouse;
- b) when, due to justified reasons, the relations between the spouses are seriously damaged and the continuation of the marriage is no longer possible;
- c) at the request of one of the spouses, after a de facto separation that has lasted at least two years;
- d) at the request of the spouse whose state of health makes the continuation of the marriage impossible.

¹ Dan Lupașcu, Cristiana Mihaela Crăciunescu, *Dreptul familiei*, 4th Edition, revised and added, Editura Universul Juridic, Bucharest, 2021, p. 286.



2. Cases and General Conditions of Fault-Based Divorce

The Civil Code regulates the judicial dissolution of marriage based on fault in two cases provided for by Article 373 letter b) of the Civil Code, namely when, due to justified reasons, the relations between the spouses are seriously damaged and the continuation of the marriage is no longer possible, as well as letter c) of the same legal text, specifically at the request of one of the spouses, after a de facto separation that has lasted at least 2 years.²

2.1. Divorce based on the provisions of Art. 373 Letter b) of the Civil Code (justified reasons)

The dissolution of marriage for justified reasons involves the fulfillment of the following conditions:

- the existence of justified reasons;
- these reasons must have seriously damaged the relations between the spouses;
- due to the serious damage to the relations between the spouses, the continuation of the marriage must no longer be possible.³

Unlike the Civil Code of 1864, which explicitly enumerated the grounds for divorce, the current Civil Code does not list the grounds for divorce, leaving the judge the possibility to assess, on a case-by-case basis, whether the reasons invoked by the spouses can constitute grounds for divorce, as well as the justification of those reasons.⁴

The dissolution of marriage presupposes not only the existence of grounds for divorce, but the law also requires them to be justified. Reasons are considered justified when they are real and of a nature to produce the consequences provided by law, namely to have led to the serious damage to the relations between the spouses, such that the continuation of the marriage is no longer possible.⁵

In judicial practice, the following reasons have been retained as justified, by way of example: infidelity of one spouse (the violation by one spouse of the obligation not to engage in sexual relations outside the family), failure to contribute to fulfilling family duties, refusal to contribute financially to family expenses, withholding or diminishing family financial resources, acts of physical and/or verbal violence by one of the spouses, and the existence of physiological incompatibilities affecting the conjugal relations.⁶

The court will grant divorce based on the fault of the defendant spouse when, due to justified reasons imputable to that spouse, the relations between the spouses are seriously damaged and the continuation of the marriage is no longer possible.⁷ In order to grant the divorce under these conditions, the evidence presented must not also show the guilt of the plaintiff in the breakdown of the marriage.⁸

² Dumitru Lupulescu, Ana-Maria Lupulescu, *Căsătoria și efectele sale*, Editura Universul Juridic, Bucharest, 2019, p. 251.

³ See Marieta Avram, *Drept civil. Familia*, 3rd Edition, revised and added, Editura Hamangiu, Bucharest, 2022, p. 199.

⁴ Dumitru Lupulescu, Ana-Maria Lupulescu, *op. cit.*, p. 251.

⁵ Idem, p. 252.

⁶ Aurelian Gherghe, *Noile modalități de desfacere a căsătoriei*, in *The New Civil Code. Commentaries*, coordinator Marilena Uliescu, 3rd Edition, revised and added, Editura Universul Juridic, Bucharest, 2011, p. 446.

⁷ Art. 934 para. (1) C. proc. civ.

⁸ Mihaela Tăbărcă, *Drept procesual civil, vol. II, Procedura contencioasă în fața primei instanțe. Procedura necontencioasă judiciară. Proceduri speciale conform noului Cod de procedură civilă*, Editura Universul Juridic, Bucharest, 2013, p. 677.

If the evidence presented shows that both spouses are guilty of the breakdown of the marriage, the court may grant the divorce based on the fault of both spouses, even when a counterclaim was not filed.⁹

The counterclaim filed by the defendant spouse is mandatory in the situation where the defendant requests the dissolution of the marriage based on the exclusive fault of the plaintiff spouse.¹⁰

If the defendant has not filed a counterclaim, and the evidence presented shows that only the plaintiff is culpable for the breakdown of the marriage, their claim will be rejected as unfounded, unless the conditions provided for in Art. 935 of the Code of Civil Procedure regarding the granting of divorce based on the exclusive fault of the plaintiff are met.¹¹

In the matter of divorce due to fault, the legislator has provided an exception to the rule according to which if during the divorce process one of the spouses dies, the court will take note of the termination of the marriage and will order, by the final decision, the closure of the file, respectively when the divorce application is based on the fault of the defendant and the plaintiff dies during the process, the plaintiff's heirs will be able to continue the action which the court will admit only if it finds the defendant's spouse to be exclusively at fault. If the action is continued by the heirs of the plaintiff spouse, the marriage is deemed dissolved on the date of filing the divorce petition.¹²

If, following the administration of the evidence and the introduction of the plaintiff's heir into the case, the defendant's spouse is not found to be exclusively at fault, the court will not pronounce the divorce, but will take note of the termination of the marriage and order the closure of the file.¹³

2.2. Divorce based on the provisions of art. 373 letter c) Civil Code (de facto separation)

According to art. 379 paragraph (2) of the Civil Code, in the case provided for in art. 373 letter c) of the Civil Code, the divorce is pronounced due to the exclusive fault of the plaintiff spouse, except in the case where the defendant declares his agreement with the divorce, when the latter pronounces it without mentioning the fault of the spouses.

In order to pronounce this divorce provided for in art. 373 letter c) Civil Code, the following conditions must be met:

- there must be a request from one of the spouses;¹⁴
- there must be a de facto separation of the spouses, which has lasted at least 2 years.¹⁵

The de facto separation of spouses must imply the cessation of the marital relations between them, as well as the intention to end their marriage. It is not enough that one of the spouses has gone abroad to work, for example, to consider that the condition of their de facto separation is met, as long as he has not manifested his intention to leave the other and even sends him money and other goods for the common household.¹⁶

In contrast, in the situation where the two spouses expressly manifest their intention to separate, and the one who left the family home returns for short periods of time to have personal relationships

⁹ Gabriel Boroi, Mirela Stancu, *Drept procesual civil*, 5th Edition, revised and added, Editura Hamangiu, Bucharest, 2020, p. 955.

¹⁰ Ciprian Raul Romițan, *Dreptul familiei. Partea I. Căsătoria*, Editura Hamangiu, Bucharest, 2023, p. 233.

¹¹ Art. 934 para. (3) C. proc. civ.

¹² Ciprian Raul Romițan, *op. cit.*, p. 235.

¹³ Ibidem.

¹⁴ In accordance with art. 935 paragraph (1) of the Code of Civil Procedure, the request may be made by the spouse who assumes responsibility for the failure of the marriage.

¹⁵ Ciprian Raul Romițan, *op. cit.*, p. 236.

¹⁶ Dan Lupașcu, Cristiana Mihaela Crăciunescu, *op. cit.*, p. 320.



with the common children, without attempting to resume conjugal relations with the other spouse, the de facto separation can be taken into consideration for granting this form of divorce.¹⁷

In specialized literature, it has been considered¹⁸ it was considered that it is not necessary for there to be an appreciable distance between the homes of the two spouses, but rather that the separation can take place right inside the family home, if it occurs through the express will of the spouses, in which case there are only difficulties in proving the de facto situation.

If, after a de facto separation, the spouses reconcile and resume their family life, it has been correctly assessed in the specialized literature that reconciliation has an interruptive effect, so that, in the event of a new subsequent separation, a new term begins to run, the duration of the previous separation not being taken into account.¹⁹

What the court has to verify in this divorce case, of course, based on the evidence administered, and not only on the basis of the plaintiff's claims, is only the existence and duration of the de facto separation of the spouses.²⁰ If, after administering the evidence, the court finds that the de facto separation has lasted for at least two years, it will pronounce the divorce due to the exclusive fault of the plaintiff, that is, of the spouse who assumed, at least at the level of appearance, the responsibility for the failure of the marriage, also bearing all the consequences of retaining such fault.²¹

The law also regulates the hypothesis in which the defendant spouse agrees to the divorce. In this case, the court will no longer hold the plaintiff spouse solely at fault, but will pronounce the divorce according to the procedure regulated by art. 931 of the Civil Procedure Code, relating to divorce by agreement of the parties, i.e. without making any mention of the fault of either spouse.²²

¹⁷ Ibidem.

¹⁸ Ibidem.

¹⁹ E. Florian, *Desfacerea căsătoriei în reglementarea noului Cod civil*, in the magazine Dreptul nr. 10/2011, p. 81 apud Gabriela Cristina Frențiu, *Comentariile Codului civil. Familia (art. 258-534)*, Editura Hamangiu, Bucharest, 2012, p. 305.

²⁰ Mihaela Tăbărcă, *op. cit.* p. 678.

²¹ Ciprian Raul Romițan, *op. cit.*, p. 236.

²² Ibidem.



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