

Matilde Project

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State of the Law and References

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European legislation

In the context of European legislation the major document which tackles and governs family mediation is Recommendation R. (98) I of the Committee of Ministers of the Member States on family mediation, adopted by the Committee of Ministers on January 21, 1998 at the 616th meeting of the Delegates of Ministers.

The Recommendation, inasmuch it is a recommendation, is not in the nature of an order and is not binding for the Member States, but it is a document, which contains general directives and presupposes a subsequent statutory intervention within the single Member States, which should issue a law on the subject taking in the suggestions contained in the directive.

After having placed on record the high number of family conflicts arising particularly from divorces and separations between spouses and their prejudicial effects on children, identifies in family mediation the tool to reduce family conflicts and thus to guarantee the protection of the child's prominent interests.

Among the potentials inherent in family mediation, the Recommendation particularly identifies the capacity of:

- improving communication among the members of the family,
- reduce the conflict between the disputing parties,
- bring about friendly agreements,
- give continuity to personal contacts between parents and children,
- decrease social and economic costs of separation and divorce for the parties and the States,
- reduce the time necessary for the solution of the conflict.

It is therefore based on the necessity to guarantee to the minor, also at the stage of the family crisis, the double parenthood that must be maintained in the child's interests over and above the breakdown of the marriage relationship.

This requirement has been incidentally confirmed recently at the European Council in Nice on 7/9 December 2000, in the context of the Chart of Fundamental Rights, which condenses in one text the civil, political, economic and social rights expressed in various sources, whether international, European and national.

Italian legislation

With regard to domestic legislation, as already reported in the previous meeting, there are numerous bills, which – in the context of an overall reform of the Civil Code - hopefully foresee family mediation within the procedure of separation or divorce, as an optional and not compulsory tool. There is therefore no actual law governing family mediation in the context of separation or divorce.

Recently, however, family mediation has been foreseen within Law 285/1997, which deals with “Provisions for the promotion of rights and opportunities for children and adolescents”.

In particular, family mediation is contemplated therein as a tool, a support to the relationship between parents and children, against the alternative of poverty and violence, as an alternative to consignment in public assistance institutions.

The thread identifying family mediation in a technical sense is to consider it a tool against family disruption, whatever its causes, in an attempt to support and maintain the relation between parent and child.

DIVORCE: “Dissolution” of the civil marriage and “cessation of civil effects” in the (religious) marriage under the Concordat.

In our system of law, up to 1970, the only cause of dissolution of marriage was death of one of the spouses: until the spouses were living, marriage could not be dissolved. There was in fact no divorce, which was introduced by Law 898 of December 1, 1970, modified by Law 74 of March 6, 1987.

Section 1 of Law 898/1970 provides that “the Judge pronounces dissolution of marriage.... when – after having carried out in vain an attempt of conciliation – he ascertains that the spiritual and material communion between the spouses cannot be maintained or reinstated because of the existence of the causes foreseen in Section 3”.

Divorce is admitted both in respect of the civil marriage and of the religious one (under the Concordat). In respect of the latter, however, the Judge does not pronounce dissolution but cessation of the civil effects, without prejudice to its religious effects.

Divorce is thus subject to two conditions:

- ascertainment of the end of the spiritual and material communion between the spouses, i.e. of an irreversible disruption (a criterion which is common to many European legislations);
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- ascertainment of one of the imperative causes of divorce, which make the lack of communion relevant, as expressly listed in Sect. 3. In short, these are:
 1. legal separation for at least three years, whether judicial or by consent (a final sentence is required, but the three years are computed from the first hearing of appearance before the President of the Tribunal);

2. life imprisonment sentence or other prison sentence for particularly serious crimes (incest, sexual assault, exploitation of prostitution, murder or attempted murder against spouse or issue, etc.);
3. annulment or dissolution of marriage obtained abroad by one of the spouses as a foreign citizen;
4. new marriage abroad by one of the spouses;
5. non-consummation of marriage;
6. final sentence confirming change of sex under Law 164/1982;
7. “de facto” separation started at least two years before the coming into force of Law 898/1970 and continued for further three years.

Divorce may be judicial or upon joint application. In both cases the parties must appear before the Judge, although in the latter case the procedure is simpler.

In the case of divorce upon joint application (a procedure similar to that of separation by mutual consent), the spouses must file an application of divorce to the magistrate, **setting out the terms relating to the children** and to financial matters. Without any public hearing, the **Tribunal hears the spouses, controls** the existence of the conditions foreseen by the law and the **proper protection of the children’s interests**. If the application is accepted, the Tribunal issues a sentence pronouncing the divorce.

If on the other hand there is no agreement between the spouses the procedure is very similar to that of the judicial separation. The procedure starts with submission of an application and consists of two stages, one before the President of the Tribunal, the other before the Investigating Judge.

In the first stage the parties must appear personally and the President of the Tribunal must go through the attempt of conciliation, hearing them first separately and then together. If conciliation succeeds, minutes of conciliation are drawn and the case is filed.

If conciliation does not succeed, the President – after having heard the minor children if he deems it necessary – can order such temporary and urgent steps as he considers opportune for the sake of spouses and issue and appoints an Investigating Judge setting the date of the hearing of appearance before the latter. The investigating procedure in divorce case is analogous to that of an ordinary civil case, except that the judge has power to order evidence not requested by the parties (e.g. an investigation on income and on the actual standard of living of the spouses).

At the end of the investigation a sentence is issued by a Court of three magistrates. The sentence has a main part relating to the dissolution of the matrimony and **an “accessory” part on the relation between the spouses and on the children**, dealing with the following points:

- 1 **custody of the minor children**,
- 2 **contribution for child support** by the spouse who has no custody obligation and details as to visiting rights,
- 3 destination of house.
- 4 Maintenance allowance in favour of the financially weaker spouse (after death the right to the allowance can be confirmed by the judge against the estate; the divorced spouse also has the right to a portion of pension and to a percentage of the leaving indemnity). The right to the allowance ceases if the beneficiary marries again.

The effects of the divorce sentence are as follows:

- a. the conjugal link ceases and each of the spouses is restored to an unattached status;
- b. the wife loses the husband's name, which she had added to her name after the marriage, unless the Tribunal authorizes her to keep it in case of an interest of hers or of the issue which deserves protection (e.g. professional fame);
- c. **the parents' obligation to support, educate and instruct the children remains, also in case of a new marriage of one of the spouses or of both.**