ESTONIA

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January 2021

A. New Developments in the field of Divorce (since September 2002)

Divorce is regulated by the Estonian Family Law Act (FLA, entered into force 01.07.2010).[1]

Similarly to the Estonian Family Law Act of 1995, the initial version of the Family Law Act of 2010 provided for the termination of marriage by both the court and the vital statistics office (§ 64 and § 65 FLA). Concurrently with the FLA, amendments to the Estonian Notaries Act[2] entered into force, whereby a notary acting upon the request of the parties certifies entering into marriage as well as divorce, and makes the corresponding vital statistics entries concerning marriage and divorce pursuant to the Estonian Vital Statistics Registration Act. [3]

According to § 4(5) of the Estonian Vital Statistics Registration Act, notaries are required to pass an evaluation on their knowledge of family law, name law and the legal bases of and information technology systems used for the performance of vital statistics procedures, in order to acquire the competence to certify entering into marriage or divorce. Attestation of a notary shall be organised by the Chamber of Notaries pursuant to the procedure established by the Government of the Republic.

According to § 64 FLA, a vital statistics office, except for a notary, may grant divorce upon agreement of the spouses on the basis of a joint written petition of the spouses, if:

a) the spouses have agreed on the basis of Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ L 343, 29.12.2010, p. 10–16) to apply Estonian law to the divorce, or
b) both spouses reside in Estonia and Estonian law applies to the divorce.

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1 Perekonnaseadus (adopted on 18 November 2009). - RT I 2009, 60, 395; RT I, 27.10.2020, 15 (in Estonian), available in English at www.riigiteataja.ee/en/eli/ee/Riigikogu/act/507022018005/consolide.

2 Notariaadiseadus (adopted on 6 December 2000).- RT I 2000, 104, 684; RT I, 10.07.2020, 24 (in Estonian), available in English at www.riigiteataja.ee/en/eli/516072020004/consolide.

3 Perekonnaseisutoimingute seadus (adopted on 20 May 2009).- RT I 2009, 30, 177; RT I, 18.12.2019, 5 (in Estonian), available in English at www.riigiteataja.ee/en/eli/522122019007/consolide.

A notary may grant divorce upon agreement of the spouses on the basis of a joint written petition of the spouses (FLA § 64[1]). The spouses may enter into an agreement on the law applicable to the divorce corresponding to Council Regulation (EU) No 1259/2010 in person in a notarially authenticated form.

The entering into an agreement on the law applicable to the divorce in judicial proceedings shall be recorded. The recording shall substitute for the notarially authenticated form.

The spouses may enter into and amend those agreements at any time until a petition for divorce is accepted by a notary or in judicial proceedings until the time specified in § 2(2) of the Estonian Private International Law Act.

Thus, the powers of a notary have been expanded to the cases of divorce including a 'foreign element'. It follows that notaries are entitled to grant divorce inter alia in cases where foreign law applies to the divorce or where the spouses do not live in Estonia. Notaries may grant a divorce in all cases where the spouses agree about the divorce, regardless of whether the law of Estonia or of a foreign country is applied to the divorce.

A divorce may be granted by a court judgment on the basis of an action of one spouse against the other. The court grants divorce if the spouses disagree about the divorce or the circumstances relating to the divorce or if a vital statistics office or a notary is not competent to grant divorce.

A divorce may be granted by the court if conjugal relations have definitively terminated (§ 67 FLA). Conjugal relations have terminated if the spouses do not have matrimonial cohabitation anymore and there is reason to believe that that the spouses will not restore cohabitation. Termination of conjugal relations is presumed if the spouses have lived apart for at least two years.

A court shall take measures for the conciliation of the parties unless this is impossible or unreasonable due to the circumstances. A court may give the parties a term of up to six months for reconciliation. According to § 357 of the Estonian Code of Civil Procedure[4] the court suspends divorce proceedings if there is reason to believe that the marriage can be preserved. The court does not suspend proceedings if the spouses have lived separately for a lengthy period of time and neither of them agrees to the suspension of proceedings. If proceedings are suspended on the grounds specified in

[4] Tsiviilkohtumenetluse seadustik (adopted on 20 April 2005). - RT I 2005, 26, 197; RT I, 20.06.2020, 5 (in Estonian), available in English at https://www.riigiteataja.ee/en/eli/522062020001/consolide

§ 357(1) of the Estonian Code of Civil Procedure, the court draws the parties' attention to the possibility of reconciliation and guidance from a family counsellor.

The Estonian Vital Statistics Registration Act specifies in its Division 4 on divorce that in order to divorce, the spouses are to personally submit a joint written application to a vital statistics office (§ 44). In the application the spouses shall express their wish to divorce and confirm that they have no disputes concerning the circumstances relating to the divorce.
If a spouse cannot, for objective reasons, turn up in person at a vital statistics office for submission of a joint application, he or she may submit a separate notarially authenticated application.

A divorce shall be granted no earlier than one month and no later than three months from the date of submission of an application.

Upon accepting an application, a vital statistics official shall determine the date of divorce which shall be communicated to both spouses.

Where a spouse cannot for objective reasons turn up at a vital statistics office for submission of a joint application for divorce and submits a separate notarially authenticated application, the date of the divorce shall be communicated to the spouse who submitted the application at the vital statistics office in person and the date of the divorce shall be thereby deemed to be communicated to both spouses. If the spouses cannot turn up at the vital statistics office on the determined date with good reason, they shall notify the vital statistics office thereof and the vital statistics office shall determine a new date for divorce.

A vital statistics official shall grant a divorce in the presence of both spouses under the conditions provided for in the Estonian Family Law Act.

According to § 47 of the Estonian Vital Statistics Registration Act, a divorce may be granted without the presence of one spouse if the spouse cannot turn up at a vital statistics office with good reason and the consent of this spouse to granting the divorce without his or her presence is submitted, authenticated by a notary or consular officer.

According to § 222(2) of the Estonian Code of Civil Procedure the representative of a spouse who has no active civil procedural legal capacity has the right to submit a petition for divorce or annulment of marriage only with the consent of the guardianship authority. As the current Estonian Family Law Act does not contain the

concept of guardianship authority, it has been suggested in legal literature[5] that this is to be taken as the consent of the court.

B. New Developments in the field of Maintenance between former spouses (since September 2002)

Rules governing maintenance between former spouses are provided in the Estonian Family Law Act (FLA, entered into force 01.07.2010).[6]

The grounds for a former spouse to request maintenance from the other spouse after divorce (FLA § 72 and § 73) remained largely the same as under the previous Family Law Act.

The prerequisite for a maintenance claim is that the former spouse requesting maintenance is unable to maintain himself or herself after the divorce and is hindered from finding a source of income on one of the following reasons:

a) taking care of a common child under the age of three,
b) the age of the requesting spouse, or
c) the state of health of the requesting spouse.

According to § 73(1) FLA, if, after divorce, a divorced spouse is unable to maintain himself or herself due to his or her age or state of health and the need for assistance arising from age or state of health existed at the time of the divorce, he or she may request provision of maintenance from the other divorced spouse. Provision of maintenance due to age or state of health may be requested from the other divorced spouse also in case the need for assistance arising from age or state of health existed at the time when the right to receive maintenance from the other divorced spouse on another basis provided by law terminated.

The Supreme Court held in the decision of 13 January 2015[7] that under applicable law, a divorced spouse may request maintenance from the other spouse on the condition that he or she is unable to provide income to himself or herself after the divorce due to his or her age or state of health and such need for assistance existed at the time of divorce (§ 73 FLA), but the law does not provide for the divorced spouse to claim

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5 Tsiviilkohtumenetluse seadustik I. Kommenteeritud väljaanne (Code of Civil Procedure I. Annotated edition. In Estonian). V. Kõve et al (eds.). Tallinn 2017, § 222, comment 3.2 (V. Kõve, J. Lints).

6 Perekonnaseadus (adopted on 18 November 2009). - RT I 2009, 60, 395; RT I, 27.10.2020, 15 (in Estonian), available in English at www.riigiteataja.ee/en/eli/ee/Riigikogu/act/507022018005/consolide.

7 Decision of the Civil Chamber of the Supreme Court (hereinafter "SCCCd") 3-2-1-153-15 p. 11.

maintenance on the ground of taking care of a common disabled adult child. The chamber admits that taking care of a child with profound disability, including an adult child, is especially demanding and comparable to taking care of a child under three years of age, hindering the person from earning income. Thus it could be fair that a parent caring for a disabled child was entitled to claim maintenance from the divorced spouse, similarly to a parent in charge of a child under three years of age, entitled to claim maintenance under § 72 FLA. Nevertheless, the legal basis for providing maintenance to the divorced spouse has been set out restrictively. This is a decision of the legal policy of the legislator, which has to be taken into consideration in settling the case.

Maintenance shall be provided to the person entitled to receive maintenance until the person cannot be presumed to obtain income and to the extent the person cannot be presumed to obtain income. Regarding the amount of maintenance, this Act, unlike the Estonian Family Law Act of 1995, consistently relies on the usual needs of the spouse entitled to receive maintenance (§ 74 FLA; the same principle is foreseen for the maintenance obligation of relatives). It is the actual living standard of the involved party rather than statistical minimum subsistence, which is relevant for prescribing the provision of maintenance and its amount under § 73 and § 74 FLA.[8] Where possible, the current standard of living of the divorced spouse should be maintained in determining the amount of maintenance. A court may disregard the current financial situation of the spouses or take it into account only with regard to certain period of time if it would not be reasonable to determine the amount of maintenance on the basis of the previous financial situation during the whole period of obligation to provide maintenance taking into account how the household and obtaining of income was organised (§ 74(1) FLA). A spouse entitled to receive maintenance shall, for the purposes of his or her maintenance, dispose of his or her property to the extent which complies with the principles of fairness and rational management taking into account the financial situation of both spouses. The spouse obliged to provide maintenance shall, for the purposes of the performance of the obligation to provide maintenance, transfer his or her property to the extent which complies with the principles of fairness and rational management taking into account the financial situation of both former spouses (§ 74 (2) FLA).

§ 76 FLA provides the grounds upon which the court may restrict the claim for maintenance or relieve it entirely. This is a provision conferring a discretion on courts and should be applied bearing in mind the principles of fairness and reasonableness. According to § 76(1), a court may relieve a divorced spouse of the obligation to provide maintenance, limit the obligation in time or reduce the amount

[8] SCCCd 3-2-1-61-16, p. 19.

of support if payment of support would be extremely unfair considering, *inter alia*, the interests of the common child left to be cared for and raised by the entitled person, if:

a) the marriage has lasted for a short period of time;
b) the entitled person is convicted of a criminal offence against the person obliged to provide maintenance or a person connected with him or her;
c) the need for maintenance has been caused by unreasonable conduct of the entitled person;
d) the entitled person violated severely his or her obligation to contribute to the maintenance of the family for a longer period of time before the divorce; or
e) there is another good reason for that.

A court may relieve a former spouse from the obligation to provide maintenance in so far as the spouse is, considering his or her other obligations and financial situation, unable to provide maintenance to the entitled spouse without damage to his or her own usual maintenance. The Supreme Court held[9] that a divorced spouse's obligation to provide maintenance mainly stems from the reciprocal solidarity between the spouses, which continues after the divorce, and the aim of this provision is to refrain from ordering the payment of maintenance to a divorced spouse in cases where the spouse claiming maintenance has not been led by solidarity in his or her conduct or there has been no such solidarity.

According to § 78(1) FLA, spouses may, by a notarially authenticated agreement, specify the obligation to provide maintenance after divorce different from the provisions of the law. An agreement by which the obligation to provide maintenance to a divorced spouse is excluded or restricted unreasonably is void. In particular, agreeing upon a level of maintenance which is merely symbolic or remarkably lower than that provided by law should be considered unreasonable restriction. Other acts performed by the party under maintenance obligation should also be considered as possible forms of providing maintenance. Additionally, the circumstances under which the entitled party concluded such agreement should be considered, such as whether his or her relationship of dependence or need for assistance was exploited by the obligated person.[10] The obligation to provide maintenance terminates upon remarriage of the entitled person and also upon the death of the entitled or obligated person (§ 79 FLA).

C. New Developments in the field of Parental Responsibilities (since December 2004)

[9] SCCCd 3-2-1-10-13 p. 15.
[10] SCCCd 3-2-1-61-16, p. 28.

Rules concerning the parent-child relationship underwent significant changes with the adoption of the new Estonian Family Law Act in 2010.

§ 116 FLA defines the parent's right of custody, which is an entirely new concept in comparison to the Estonian Family Law Act of 1995.[11] To develop the rules concerning the right of custody, the law of the Federal Republic of Germany was used as a model to a considerable extent. According to § 116 FLA parents have equal rights and obligations with respect to their children unless otherwise provided by law. Parents have the obligation and right to care for their minor child (*parent's right of custody*). The parent's right of custody includes the right to care for the person of the child (*custody over person*) and for the property of the child (*custody over property*) and to decide on matters related to the child.

The parents who are married to each other have joint custody over their child. If the parents of a child are not married to each other at the time of birth of the child, they shall have joint right of custody unless they have expressed their wish to leave the right of custody only to one of the parents upon submitting the declarations of intention concerning the acknowledgement of paternity (§ 117 FLA).

A parent who has the right of custody is the legal representative of the child (§ 120 FLA). Parents who have joint custody have a joint right of representation. Parents who have the right of custody may agree on the arrangement of exercising the joint right of representation. A parent represents his or her child alone if:

a) he or she has sole custody over the child, or
b) the powers of decision have been transferred to him or her pursuant to § 119 FLA.

It is important for the parents to exercise their joint custody as provided in § 118(1) FLA jointly and in solidarity, so that both parents have the opportunity to have a say in decisions regarding the child. This does not mean, however, that parents having joint custody are required to make their decisions while both being personally present. The mere fact that one parent lives part of the time abroad due to work arrangements does not lead to termination of the joint custody. The third sentence of § 120(1) FLA refers to the parents' possibility of agreeing on the arrangement of exercising the joint right of representation. By analogy, the parents can agree on making decisions about other issues related to the joint custody. At the same time sharing the right of custody by both parents should not hinder making custodial decisions concerning the child.

[11] Explanatory memorandum to the Family Law Act (Perekonnaseaduse seletuskiri), www.riigikogu.ee/tegevus/eelnoud/eelnou/982033c7-c2e1-2ce6-0479-ef2bf925488b/Perekonnaseadus (in Estonian).

Joint custody over matters of the children's place of stay may be terminated where the parents fail to make decisions in matters concerning custody of the child without tension and disagreement, and attempts to direct them towards cooperation and mediation procedure or other possibilities for reaching agreement have been unsuccessful.[12] Measures restricting parental custody may be implemented by the court.

If parents who have joint right of custody live permanently apart or do not wish to exercise the right of joint custody any further for any other reason, each parent has the right to request from a court in proceedings on petition that the right of custody of the child be partially or fully transferred to him or her. A court may resolve a dispute concerning the right of custody also in the proceedings concerning the divorce (§ 137(1) FLA). The joint right of custody may be terminated only where this is in the interests of the child (§ 123 and § 137 FLA). A court may deprive a parent of the right of custody in full only if other measures have not yielded any results or if there is reason to presume that the application of the other measures is not sufficient to prevent danger (§ 135 FLA). The procedural aspects of restricting the right of custody are set out in the Estonian Code of Civil Procedure.[13] Under § 550(1)(2), determination of a parent's rights to a child, including deprivation of parental rights from a parent, and modalities of contacts with the child are dealt with by non-contentious procedure which rests on the principle of investigation obliging the court to investigate the facts of its own motion.

§ 143 FLA provides for the mutual right of a child and the parent to maintain personal contact. Unlike the right of custody, the right of access between a child and his or her parent is not a new legal concept in Estonian family law. Rules on the right of access between a child and a parent were also provided in the Estonian Family Law Act of 1995. The FLA also imposes a basic duty on a parent to maintain contact with the child, as well as to refrain from obstructing the other parent's access to the child. The court can rule on the issues of the right of access considering the best interests of the child (which can in essence mean restrictions to exercising the right of access for one parent or both) and such decisions are binding to third parties.

Right of access does not presume the parent's right of custody over person, and thus a parent who does not have custody over the child generally does have the right of access. Recently, problems with the enforcement of court decisions concerning namely the right of access have come to public attention in Estonia, as there have been cases

[12] SCCCd 2-16-5794 p. 16.

[13] Tsiviilkohtumenetluse seadustik (adopted on 20 April 2005). - RT I 2005, 26, 197; RT I 20.06.2020, 5, (in Estonian), available in English at www.riigiteataja.ee/en/eli/522062020001/consolide.

where the liable party refuses to comply with the judgement or where having access to the child has become complicated for the parent living separately due to legal separation.

Likewise, the power of decision is a new legal institution, designed for the cases where parents who are legally separated have maintained joint custody. If parents who have joint right of custody are permanently separated they shall jointly decide on essential matters relating to the child. The parent who has the right of custody and with whom a child resides with the consent of the other parent or on the basis of a court decision has the right to decide alone on everyday matters (usual care) of the child. As a rule, deciding on everyday matters means making usual decisions which occur often and which do not have a permanent effect on the development of the child (§ 145 FLA).

D. New Developments in the field of Property relations between spouses (since August 2008)

Among the provisions of Estonian Family Law Act (FLA, entered into force 01.07.2010)[14] those concerning the property relations between spouses introduced the largest share of material changes compared to the previous version of the FLA.

The most substantial rearrangements of the matrimonial property law include changes of the statutory matrimonial property regime: changes and improvements in the rules of matrimonial property regime and joint property regime and the introduction of an exhaustive list of allowed comprehensive matrimonial property regimes, allowing derogations only within the limits of a particular proprietary relationship in cases provided by law.[15] In addition to the statutory matrimonial property regime, two alternative comprehensive systems are provided in the FLA: first, community of acquisitions (joint ownership of the increase in capital value of assets), and second, separateness of property, in which case the joint proprietary rights of the spouses vis-à-vis the property belonging to either of them are minimal.

Prospective spouses may, by agreement, select a proprietary relationship from among the types of proprietary relations before entering into marriage by an application for marriage pursuant to the procedure prescribed in the Estonian Vital Statistics Registration Act. The abovementioned declaration of intention takes effect upon

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[14] Perekonnaseadus (adopted on 18 November 2009). - RT I 2009, 60, 395; RT I, 27.10.2020, 15 (in Estonian), available in English at www.riigiteataja.ee/en/eli/ee/Riigikogu/act/507022018005/consolide.

[15] Explanatory memorandum to the Family Law Act (Perekonnaseaduse seletuskiri), www.riigikogu.ee/tegevus/eelnoud/eelnou/982033c7-c2e1-2ce6-0479-ef2bf925488b/Perekonnaseadus (in Estonian).

entering into marriage. If the prospective spouses do not select a proprietary relationship by an application for marriage and do not enter into a matrimonial property contract, the provisions regarding jointness of property shall apply to their proprietary relations as of the entering into marriage. The provisions regarding jointness of property shall also apply if the spouses have not selected the type of proprietary relations by an agreement to apply Estonian law to the proprietary rights (§ 24 FLA).

In the case of jointness of property, the objects and other proprietary rights of the spouses acquired during the jointness of property shall transfer into the joint ownership of the spouses. Thus, any proprietary rights, including rights of acquisition and rights of claim acquired during the marriage are presumed to be part of the joint property. Separate property as specified in § 27 FLA is the most notable exception. The separate property of a spouse includes: personal effects of the spouse; objects which were in the ownership of the spouse before the marriage or objects acquired by the spouse during the marriage by disposal without charge, including as a gift or by succession; objects which the spouse acquires on the basis of a right belonging to his or her separate property or as compensation for the destruction of, damage to or seizure of objects included in his or her separate property or on the basis of a transaction entered into with regard to his or her separate property; units of a mandatory pension fund, money in the pension investment account and financial assets acquired for the money, including the proprietary rights arising from the contract entered into upon acquisition of such financial assets, and the proprietary rights arising from the insurance contract for a mandatory funded pension.

A spouse cannot dispose of his or her share in joint property or in a single object included in joint property. A spouse does not have the right to request the division of joint property during the jointness of property (§ 26 (1) FLA).

Where the spouses have not concluded a matrimonial property agreement reserving the right to manage their joint property to only one of them, or any other agreement whereby the rights to manage joint property could be exercised by only one of them, § 28(1) FLA should be applied which provides that spouses jointly exercise the rights and perform the obligations relating to joint property. Each spouse can independently enter into contracts under the law of obligations with third parties. According to the first sentence of § 29(1) FLA if spouses manage their joint property jointly, they may enter into transactions with respect to the property only jointly or with the consent of the other spouse. The Supreme Court has held that commitment transactions fall under

this provision only to the extent that it creates obligations for both the spouses or in respect of the joint property in its entirety.[16]

If, upon entering into marriage, community of acquisitions is selected pursuant to the procedure prescribed by the Estonian Vital Statistics Registration Act or established by a matrimonial property contract, the share added to the property of each spouse during a proprietary relationship (acquired assets) shall be set off between the spouses. The proprietary relationship of community of acquisitions does not affect the ownership of the proprietary rights acquired by a spouse before entry into force of or during the proprietary relationship (§ 40 FLA).

In case of separateness of property, the spouses are deemed to be persons not married to each other as regards proprietary relations. Separateness of property arises either on the basis of a matrimonial property contract whereby separateness of property is chosen as the new form of matrimonial property regime or the existing proprietary relationship is terminated without expressly determining the new regime, or on the basis of a court decision given at the request of a spouse. Owing to the nature of marriage, the provisions of the FLA also apply in the case of separateness of property, establishing a reciprocal obligation to provide for the everyday needs of each other and the entire family, and to act in good faith and considering the interests of marital cohabitation.

E. New Developments in the field of De Facto Partnerships (since February 2015)

There have been no substantial changes in this domain.

The Estonian Registered Partnership Act (RPA) was adopted on 9 October 2014 and entered into force on 1 January 2016. This does not, however, cover de facto partnership but only the legal relationship between the parties to a partnership agreement. Until now, the legislator has failed to adopt implementing acts of the RPA. The Supreme Court has held that failure to adopt implementing acts does not affect the time of entry into force of the RPA itself. Nevertheless, it should be kept in mind that from 1 January 2016 the RPA governing the procedure of entry into registered partnership contracts by same-sex or opposite-sex couples, as well as the general legal consequences and termination of these contracts, forms an integral part of the legal order of Estonia and is to be applied in conjunction with other applicable laws. In the event of any inconsistency between the RPA and other legal acts, the appropriate

[16] SCCCd 2-16-9519, p. 29.2

forms and principles of interpretation such as *lex posteriori derogat priori* must be followed to overcome these contradictions.[17]

[17] Order 5-17-42 of the Constitutional Chamber of the Supreme Court, p. 38.