

## PROTECTION OF CREDITORS' INTERESTS IN AN EXTRAJUDICIAL DISSOLUTION

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**Abstract.** Modern society increasingly adopts the products of companies, institutions, and organizations that provide credit services in order to meet its needs and improve general quality of life, as a result of which, when terminating a marriage, questions of a mandatory nature often arise, related to the determination of the nature of the obligations of the spouses and their division between the spouses, hence in divorce cases it is not uncommon for a third party to appear – a creditor whose interests must also be protected. In family relations cases, the protection of the public interest dominates, because the protection of the legal interests of the spouses as well as the creditors must be guaranteed, also the proportionality of the protection of the legal interests protected by the law between the parties has to be achieved, because everyone has the right to defend their violated rights, and the state must ensure the protection of these legal interests. The article discusses the protection of creditors in the divorce process in the countries of the European Union, Estonia, Latvia, Slovenia, Luxembourg, in which legal systems the possibility of ending a marriage out of court exists, also the assumptions made in the national legal acts and their application practice, ensuring the protection of creditors and distinguishing its implementation problematic aspects in the civil process, are assessed, as well as the analysis of the Republic of Lithuania's 2023 January 1 amendments to the Civil Code related to divorce outside of court entered into force is performed

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**JEL Classification:** K15, K23, K40.

### Introduction

The statistical data of Lithuania and the summary of justice of the European Union published by the European Commission in recent years show that the courts of Lithuania remain one of the courts with the highest workload in the entire European Union, because the national legal system of Lithuania regulates the obligation to go to court even in cases where there is no dispute between the parties (Tvaronavičienė, 2022). According to the 2020 data of the National Judicial Administration, more than half of the civil cases examined by district courts consisted of cases in which the courts did not decide the legal dispute and examined the cases in the simplified procedure. The list of such civil cases also includes divorce cases when there is no dispute between the spouses and the marriage is terminated by mutual consent of both spouses. Although

there has been a general decrease in the number of civil cases in Lithuania in recent years, the number of divorces by common agreement in recent years exceeds 7,500 cases per year (Tvaronavičienė, 2022). It is obvious that the examination of such civil cases in which there is no dispute to resolve inevitably increases the busyness of the courts, burdens the courts with a function that is not characteristic of them, and increases both financial and time costs, putting the burden of administration both on the shoulders of the state and the spouses. United States have also experienced similar problem where the judicial system was severely overburdened and the primary factor for this were divorce cases which in total comprised over a half of all cases filed in courts (Rigby, 1984; Gerber, 1990). In United states it is estimated that around forty-five percent of all current marriages will end in divorce (Saccuzzo, 2003; Preston, 1975).

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Since 2020, the mandatory use of mediation in family disputes in Lithuania shows that more and more couples are trying to do it peacefully, but mediation does not eliminate going to court, and although the request for divorce is considered according to the simplified procedure, the process takes time and the entire case apparatus remains burdened, more complex cases are allocated less time and people must wait longer for decisions (Trinkūnienė et al., 2022a, 2022b). Although the legal system of the Lithuanian state is relatively young, the aim is always to strengthen and improve its foundation, optimize, and make it more accessible to the majority of society and on January 1, 2023 a big step was taken in the direction of the family law institute, changes to the civil code were legalized in Lithuania, simplifying the process of divorce, changes to the marriage contract, transfer of family property and disposal of property of minor children. From now on, it will be possible to dissolve the marriage at a notary, if the spouses meet all the conditions stipulated by the law. The norms of the legal divorce system at the notary have been in force for almost a decade in Latvia, Estonia, Spain, Italy, France and other European Union countries. In this article we will look over all countries in the European Union which already have adopted this alternative marriage dissolution procedure. Based on their practice, divorce at a notary is less public, avoiding formalism, a more confidential and faster organized process. Such states have found that the administrative procedure of marriage dissolution, when its conditions are met, introduces the advantages of an uncomplicated, short and less expensive for the parties' procedure (Guga, 2015; Cetean-Voiculescu, 2016; Nicu, 2018). Some authors also claim that the possibility to reach an uncontested divorce without the involvement of the court, helps with relieving the courts and increasing the spouses' autonomy (Kraljić, 2020). Seeing such prevalent advantages of allowing to divorce extrajudicially at the notary Tanja Mitrović S. proposes that Serbia should also adopt such legislation by giving successful example of Great Britain (Mitrović, 2019).

It is clear that the amendments to Lithuanian civil code aim to improve the quality of justice, facilitate legal procedures for applicants, reduce the workload of the courts, in order to best respond to the interests of the persons involved in the cases, increase the efficiency of the court system, reduce the costs of the state and society, facilitate and simplify the divorce process by making it as operative and confidential as possible. Simplifying the divorce process does not in any way mean a reduction in the protection of creditors' interests or a simplification of their protection measures.

The article analyses the legal norms regulating the protection of creditors' interests in the divorce process, their advantages and disadvantages, and presents arguments on the influence of the simplification of the divorce process on the Lithuanian legal system.

## 1. Divorce by agreement of the parties

Marriage, one of the basic human rights, a free-will decision of two people to start a family, is a fundamental institution of family law, which can be considered as the basis for starting a family. After entering a marriage, a man and a woman acquire a new legal status – they become spouses, create a family relationship, on the basis of which they acquire the rights and duties characteristic of spouses. However, it is not uncommon for spouses to take different paths in life after a change in life circumstances and end the marital relationship on one or another basis. Unfortunately, divorce is a difficult experience for spouses, affecting not only adults but also children, often signalling the final end of a relationship. Depending on the cause of divorce, Article 3.49, Part 2 of the Civil Code (Civil Code, 2000) lists three cases of divorce: by mutual agreement of both spouses, at the request of one spouse, or due to one of the spouse's or both spouses' fault. Divorce by joint agreement of the spouses is considered one of the simplest and most painless ways, which is applied when there is no dispute between the spouses either regarding the divorce or the legal consequences of the divorce, that is, when the spouses peacefully resolve the issues of the divorce itself and the legal consequences. Until 2023 January 1 divorce was assigned only to the jurisdiction of the court and the valid Article 3.51 of the Civil Code provided for three necessary conditions for the termination of marriage by mutual agreement of both spouses, while the newly effective amendments added another condition to this article, under which the marriage is terminated not in court, but by notarial procedure. The addition of such a provision to the Civil Code is linked to the European Family Law Principle 1:2 (2), which stipulates that "Divorce must be delegated to a competent authority, which may be a judicial or administrative body", although based on the European Protection of Human Rights and Fundamental Freedoms according to Article 6, (European Court of Human Rights [ECHR], 1950) Part 1 of the Convention, the issue of a person's civil rights and obligations must be decided by an independent and impartial court, the notary was chosen as the competent authority for divorce, taking into account the fact that the notary is considered a preventive judge to whom the state entrusts to perform functions ensuring public interest, operating in the sphere of civil legal relations and carrying out the legal establishment of subjective rights and legal facts.

It is also important to consider the conditions which must be upheld in order to apply for a divorce in a court or a notary's office. The requirements for both institutions vary slightly with notary having an additional specification which is not necessary for judicial marriage termination as seen in the Figure 1.

According to the current legal regulation of family relations, all cases of termination of marriage until January 1<sup>st</sup>, 2023, were resolved in the district court of general competence, regardless of the way of divorce and

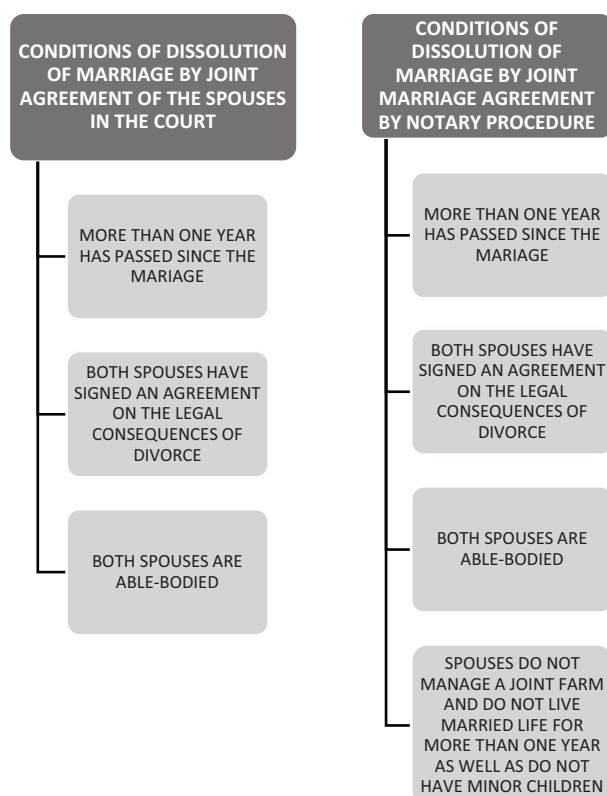


Figure 1. Conditions for dissolution of marriage by joint agreement of the spouses

establishing a rather flexible system of grounds for divorce and legal procedures corresponding to them, giving the spouses the opportunity to choose the grounds for divorce, depending on the specific life situation. Clause 2 of Article 3.51 of the Civil Code provides that divorce is possible only when the spouses agree not only on the divorce, but also on the legal consequences of its termination (Mikelénas et al., 2022), which must be discussed in the contract regarding the legal consequences of divorce. This agreement is an agreement between the spouses that determines the personal non-property of the spouses, as well as the property rights and obligations after the divorce. Prior to the entry into force of the amendments to the law, the legal norms provided for the possibility of only the court approving the divorce agreement due to legal consequences, after checking its content, the legality of the terms of the agreement, and transferring its content to a court decision. After the court approves the divorce agreement and satisfies the request of the spouses, a decision is made that has the force of *res judicata* (Civil Cases, No. 3K-3-350/2006; Civil Cases, No. 3K-3-474/2006; Civil Cases, No. 3K-3-243/2008) that marriage disintegrated and there is no way to save it. Such a final decision made by the court cannot be changed in the part regarding divorce and division of property, due to the possibility of violating the interests of creditors, but in exceptional cases, the terms of the contract related to the division of property can be changed if one of the spouses acted dishonestly and hid from the other spouse the common property, as a result

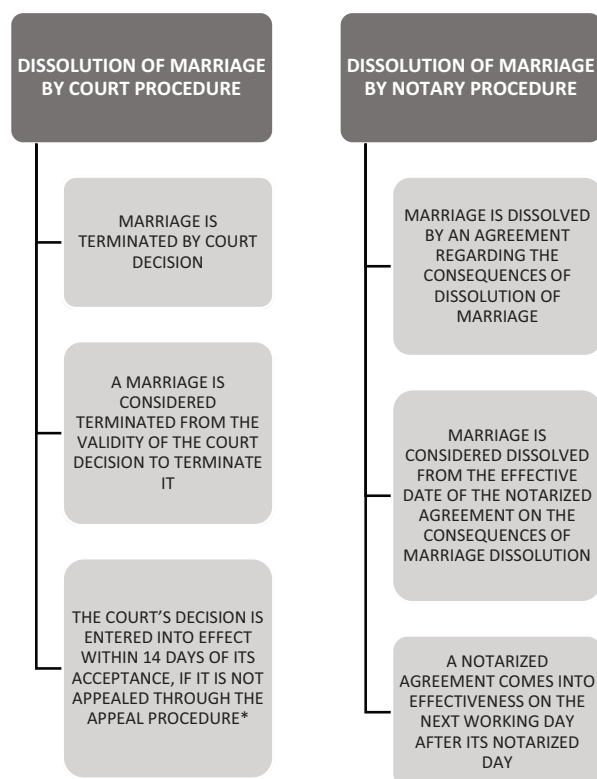
of which this property was excluded from the contract and remained undivided.

### 1.1. Legal consequences must be discussed in a notarized divorce agreement

In the event of a notarized divorce, the notary also approves the agreement on the legal consequences of the divorce, if it does not conflict with public order or fundamentally violates the rights and/or legitimate interests of one of the spouses. The notary, like the court, checks the legality of the contract, but unlike the court, the notary has the right not only to check the content of the contract, but also to conclude such a contract, because one of the main functions of the notary is to legally consolidate the indisputable subjective rights and legal facts of individuals and to ensure that in civil law there would be no illegal transactions and documents in the relationship. Part 3 of Article 3.53 of the Civil Code does not provide an exhaustive list of consequences on which the spouses must reach a consensus in the contract but establishes that the contract must necessarily discuss the issue of maintenance of minor children and each other, the place of residence of minors, participation in their upbringing and the communication of minor children with the parent who lives separately (mother) order and other property rights and responsibilities of the spouses. In the notarized agreement on the consequences of divorce, the issues of mutual maintenance, other property rights and obligations of the spouses must be discussed (if these issues are not discussed in the marriage contract and/or if the property, which is the common joint property of the spouses, is not divided by their joint agreement, approved by a notary or court order), as well as indicate what the spouses' surnames will be after the divorce. As we can see, the new norm does not require the maintenance of minor children, because a marriage can be terminated by notarial procedure only with the agreement of both spouses and only if there are no minor children.

### 1.2. Entry into force of a marriage dissolved in a notarial procedure

Legislator from January 1<sup>st</sup>, 2023, after giving notaries the right to dissolve marriages by notarial procedure, also changed the existing provisions of Article 3.66 of the Civil Code, part 1 which determined that a marriage is considered dissolved from the date of entry into force of the court decision to dissolve it or from the date of entry into force of the notary-approved contract on the consequences of divorce (shown in the Figure 2). In Figure 2 it is further explained that the court decision enters into force within fourteen days from its adoption if it is not appealed. If appealed, the court's decision, if it has not been annulled, comes into force after hearing the case in the appeal procedure, and the decision of the court of appeal or a new decision comes into force from the date of their adoption Article 279, paragraph 1 of the Code of



Note: \* According to the appellate procedure, the court decision can be appealed within 30 days from the adoption of the appealed decision.

Figure 2. The moment when the divorce takes effect

Civil Procedure (CCP, 2002). Meanwhile, a notarial marriage is considered dissolved from the date of entry into force of the notarized agreement on the consequences of divorce, and it enters into force on the next working day after the date of its notarization (Figure 2). Despite the fact that the divorce by joint agreement of the spouses is considered by the court in a simplified procedure, and the court decision itself, based on Article 540, Part 2 of the Code of Civil Procedure, must be adopted no later than 30 days from the date of receipt of the request for divorce by mutual consent, divorce by notarial procedure gives the opportunity to spouses jointly expressed free will in the absence of a dispute to speed up and facilitate the divorce process, as a result of which, as shown in the Figure 2, its termination will take effect on the next working day, from the date of the notary's approval of the contract on the consequences of the divorce, so the divorce by notarial procedure ensures an incomparably faster end of married life for the spouses.

## 2. Divorce out of court. Comparison between the world and Lithuania

When it comes to divorce rates around the world, there is no single factor that affects the likelihood of citizens separating from their partners, as each country has its own unique mix of social, religious, and economic factors. With the increase in the movement of citizens

within the European Union, there has been an increase in the number of families whose members are citizens of different states, living in different EU member states or in a member state where none of them is a citizen. Although marriage is considered one of the basic human rights, the free will to create a family, modern family law is based on the freedom of both marriage and divorce. Family dissolution itself is a very complex process, and when an international couple breaks up, additional legal difficulties arise due to the peculiarities of the situation, which is why cross-border cooperation in the family institute is extremely important. At the European level, legal regulation in the process of divorce through legal instruments has been introduced since November 27<sup>th</sup>, 2003, by Council Regulation (EC) No. 2201/2003 on jurisdiction and recognition and enforcement of court decisions related to marriage and parental responsibilities. But the legal traditions of the member states of the European Union, their approach to marriage, family, and raising children are different, but with the rapid increase in the divorce rate in Europe and beyond, the huge number of marriages forces the improvement of national laws, implementing the freedom of marriage, adapting to the constantly changing European Court of Justice jurisprudence in order to ensure the equal and proper implementation of human rights and legitimate interests by harmonizing the applicable rules in the field of family law as much as possible. As the member states of the European Union have different national laws, it is appropriate to analyse and compare the legal regulation of the member states of the European Union as well as the applicable practice governing the protection of creditors in the case of divorce in a simplified out-of-court procedure. It should be noted that in some of the member states of the European Union, in Latvia, Estonia, Slovenia, Greece, Spain, Portugal, Italy, France, Romania, currently, in Lithuania from January 1<sup>st</sup>, 2003, the possibility of divorce outside the court procedure has been established.

In Latvia, the possibility of divorce outside of the court has been available since on February 1<sup>st</sup>, 2011, but as in Lithuania, there remains a possibility to dissolve marriage in the court. In Latvia, a marriage can be dissolved at a notary only by joint agreement of the spouses, that is, if the spouses have agreed on the divorce and do not have a common minor child or common joint property, or if the spouses who have a common minor child or common joint property have entered into a written agreement on joint custody and communication of a minor child rights, child support payments and division of common joint property (European Judicial Network, 2022a). The main difference between the legal systems of Latvia and Lithuania is that in Latvia there is a possibility to dissolve the marriage in a simplified procedure even when the couple has minor children, but it should be emphasized that it is only about the joint children of the spouses, and not about all the minor children of the spouses that the latter may have from previous

marriages. In Estonia, a marriage can be terminated with the mutual consent of the spouses at the registry office of civil status acts or by notarial procedure. A marriage can be terminated at the civil status register office no earlier than one month and no later than three months after the filing of the application. The legal consequences of divorce, such as the division of property, can be set out in an agreement between the respective spouses. If the spouses do not agree on the circumstances of the divorce, there are no extrajudicial means of finding a solution. In Slovenia, from April 2019 divorce by mutual consent of the spouses is possible at a notary. The new legislature replaced the old Marriage and Family Relations Act from 1976 which required material and procedural changes and adjustments. The new Family Code gave notaries jurisdiction in the area of divorce (Kraljić, 2020) and enabled spouses who do not have common children for whom they exercise parental responsibilities to divorce and reach an agreement on the division of their joint property and which of them remains or becomes a tenant of the apartment in which they live as well as an agreement on the maintenance of the spouse who does not have the means to live on and does not work through no fault of their own. From then on the spouses are able to ask a notary to draw up a notarial agreement on divorce. The marriage is terminated from the date of signing the notarial agreement. The agreement is the legal basis for entering the divorce in the civil registry. Within eight days of signing the agreement at the notary, the notary sends the agreement to the administrative unit, which enters the divorce in the civil register Article 97 of the Family Code. Divorce by mutual consent in Greece involves the spouses agreeing to divorce by means of a written agreement signed by the spouses themselves and their lawyers or only by lawyers if they are specifically authorized to act on behalf of the spouses. It is necessary that the spouses have been married for at least six months. If there are no minor children, the marriage is terminated outside the court, i.e., it is sufficient to enter said agreement. However, if there are minor children, it is necessary to add to that agreement another written agreement between the spouses, which determines the procedure for maintaining and communicating with the children. All these agreements are submitted to the competent court of first instance with one judge, which approves the agreements and, following the procedure of non-contentious cases, declares the marriage dissolved. In Portugal, it is possible to apply for a divorce by mutual consent to the institution that registers acts of civil status (with the exception of cases related to an agreement adopted during the divorce proceedings in the legal order of the dispute (European Judicial Network, 2022) Article 1779 of the Civil Code if such a request for a divorce by mutual consent is accompanied by a detailed statement of the spouses a list of the couple's joint assets, an agreement on the use of the family home, an agreement on the payment of maintenance to the spouse who needs maintenance, and a certificate certifying the order

of parental responsibility, or an agreement on parental responsibility for any minor children, if this issue has not yet been resolved in the courts Article 272(1) of the Portuguese Civil Registration Code (European Judicial Network, 2022). in Italy According to the 2014 September 12 Legislative Decree no. 132, which was amended and repealed by Legislative Decree no. 162/2014 European Judicial Network, 2022), the Italian government has provided two new alternative procedures that do not involve the courts: with the participation of a lawyer, the parties can prepare a negotiated agreement and, accordingly, have the opportunity to amicably settle the dispute out of court with the help of lawyers. This option is available to spouses seeking to separate by mutual agreement, end the civil consequences of their marriage or annul it, or change the terms of their separation or divorce, even if they have children who are minors or who are adults but have significant disabilities or are not financially independent. In this way, couples can ensure that legal proceedings are not initiated Legislative Decree 162/2014 Articles 2 and 6 (European Judicial Network, 2022), if the spouses do not have children who are minors or who are adults but have a significant disability or are not financially independent, the spouses have recently been given the opportunity at the civil registry office to reach an agreement confirming the separation or the dissolution of the marriage or the annulment of its civil consequences, or the conditions for approval of separation or divorce have been changed Legislative Decree 162/2014 Article 12 (European Judicial Network, 2022). In France, a marriage can be dissolved by mutual consent of the spouses through a notarial procedure, even if the spouses have minor children (if the child does not want to be heard by a judge). Each spouse must be represented by a lawyer in order to properly protect the interests of the spouses. The agreement is drawn up by lawyers and can be signed after 15 days. The signed agreement is submitted for approval to a notary, who verifies compliance with the conditions established by law. Thus, a marriage can be dissolved outside of court only in one way, by mutual consent, through a private document signed by lawyers and registered in the notary's official registers. In Romania, if the spouses agree to dissolve the marriage and do not have legitimate, illegitimate, or adopted minor children, the place where the marriage took place or where the last joint registered permanent residence of the spouses was, the official of the civil registration office or the notary can declare that the marriage is dissolved by the agreement of the spouses, and issue them a divorce certificate. A notary public can issue an agreement on a dissolved marriage after the spouses have concluded it, even if there are minor children who are married, illegitimate or adopted, if the spouses agree on all aspects related the marriage dissolution since it is an essential requirement for the validity of extrajudicial divorce (Cetean-Voiculescu, 2016). Spouses must reach an agreement on the surname, the exercise of parental authority, the determination of the children's permanent residence, the

maintenance of personal relationships and the contribution of the parents the procedure for paying the costs of child-rearing, education, school attendance and professional training (Ionaš, 2017).

Thus, taking into account the simplified practice of divorce by mutual consent of the spouses applied by foreign countries, it can be concluded that a very similar institute of divorce in a simplified procedure operates in each country, only in some countries leaving and not limiting the possibility of a divorce in a simplified procedure in the presence of minor children, after the agreement of the parties has been resolved between them and their maintenance of minor children, determining the place of residence of minor children, participation in their upbringing and communication of minor children with the father (mother) living separately, as well as discussing other rights and obligations of the spouses after the divorce, leaving it to the free agreement of the spouses and the content of this agreement without contradicting public order or without substantially violating the rights and legitimate interests of the spouses' minor children or one of the spouses, is considered a basis for terminating the marriage by common agreement of the parties outside of court.

It is beneficial to consider which countries in the European Union lead by the number of divorce rates. As seen in the Figure 3 below, Lithuania was among the highest-ranking countries in 2020 by this regard. This

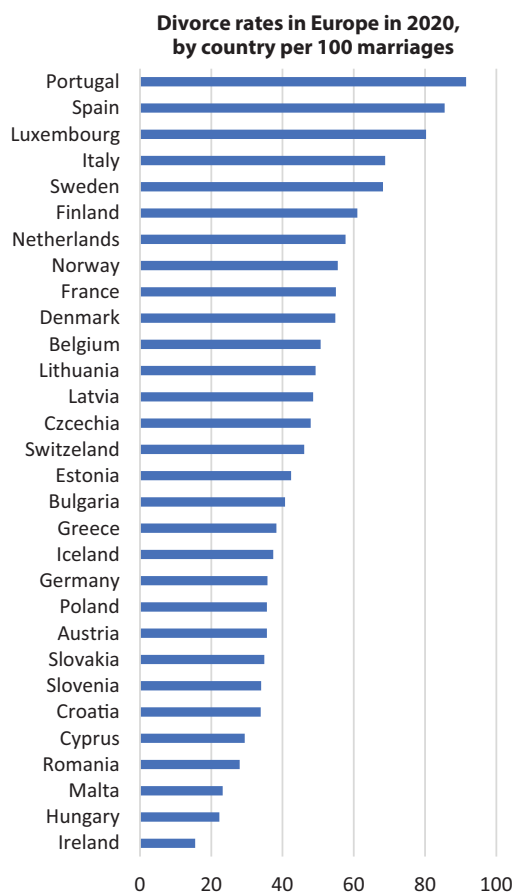


Figure 3. Ranking of European Union member states by the number of divorce cases (from high to low)

means that prior to the January legislature reform Lithuanian courts were overburdened by the number of divorce cases. This overburdening is determined by the need to go to court even in cases where there is a lack of dispute between the spouses. Such cases in which there is no need for the court to settle a disagreement make up almost half of all civil cases examined by district courts every year (Tvaronavičienė, 2022). In 2022 alone there were 7606 marriages dissolved by the mutual agreement of the spouses. Also, two agreements on the consequences of living apart have been approved. One when the spouses did not have divisible property and the other when the spouses had divisible property. One agreement to terminate the consequences of separation was also approved. As a contrast just in January alone, after the reform, there were 44 agreements on the consequences of living apart approved by the notary (21 of them when the spouses did not have divisible property and 23 when the spouses had divisible property) (Chamber of Notaries of Lithuania, 2023).

### 3. Determining the nature of creditors' claims and dividing them in divorce proceedings

Divorce cases are characterized by certain peculiarities, although in family relations cases, the primary aim is to protect the interests of minor children, to protect the legitimate interests of socially vulnerable family members (Civil Cases, No. 3K-3-145 /2008), but the interests protected by the law and the law of not only the spouses but also the creditors must also be guaranteed. The constantly improving economic situation of modern society enables individuals to increasingly use the services of institutions providing credit services to purchase housing and improve the quality of life, as a result of which the division of obligations under credit or loan agreements is often decided in divorce cases. In Lithuania around 50–80 percent of all considered divorce cases involve issues of division and determination of the nature of obligations and resolution of civil liability of spouses according to property obligations, and creditors are involved. The right of creditors to participate in the divorce case is one of the guarantees of the protection of the material rights of creditors, which provides procedural prerequisites for creditors to file their objections regarding the method of property division chosen by the spouses, the possibility of filing independent claims regarding the amount, type of obligation, etc. The civil liability of spouses to creditors in terms of property obligations depends on the moment and basis of the obligation's occurrence, therefore the identification of the obligation's content is of fundamental importance for the division of the obligations assumed by the spouses, and the qualification of the obligation is significant for the relationship of the spouses with creditors, due to the peculiarities of the performance of obligations and their scope.

It is not uncommon for spouses to become parties to various debt obligations, the obligations arising from

which may be related to both meeting the needs of the family and meeting the needs of each spouse, so it is important to know which property account one or another obligation of the spouse will be executed. In the event of a non-judicial divorce, the newly enacted Article 3.54<sup>1</sup>, Part 2 of the Civil Code stipulates that in the case of a notarized divorce, the agreement on the legal consequences of the divorce must discuss not only the issues of mutual maintenance of the spouses, but also other property rights and obligations, if these issues were not discussed in the marriage contract and (or) if the property, which is the common joint property of the spouses, is not divided by a common agreement of the spouses, approved by a notarial procedure or a court decision. Thus, before the termination of marriage and the division of all the property of the spouses, the joint property of the spouses and the personal property of one and the other spouse are first determined (Part 1 of Article 3.118 of the Civil Code), that is, the property balance is drawn up. The asset balance consists of the assets of the spouses' property, which include material values, movable and immovable objects, securities, money, claim rights, other tangible and intangible assets, property liabilities and debt obligations of the spouses to creditors. The plenary session notes that the proper qualification of the obligations assumed by the spouses (one or both of them) is significant both for the relationship of the spouses with the creditors and for the relationship between the spouses. In the relationship between the creditor and the spouses, depending on which obligation arises – personal or joint, the creditor acquires one or two debtors, even when the transaction with the creditor was concluded by one of the spouses. It is obvious that it is very important to qualify the legal regime of the property obligation because the obligations, even when they arise in marriage, are evaluated according to the basis of their occurrence, considering this as an evaluative criterion. The Supreme Court of Lithuania in 2013 November 13 in the ruling in (Civil Case, No. 3K-3-567/2013) stated: whether the transaction is necessary and meets the needs of the family is an evaluation criterion that depends on many circumstances. Taking into account the fact that in credit relations, the consent of the spouse is not required to enter into a loan agreement, it is necessary to determine whether the purpose of obtaining the loan, that is, whether the loan was taken to meet the needs of the family, because only in this case this obligation can be recognized as a joint obligation of the spouses Article 3.109 of the Civil Code 3 d. Obligations arising on the basis of the contract to meet the needs of the family will always be considered as joint obligations of spouses, regardless of whether one or both spouses assumed the obligations, since it is presumed that the spouse enters into transactions with the consent of the other spouse, except in cases where the conclusion of the transaction requires written consent of the other spouse (Chamber of Notaries of Lithuania, 2018). When concluding a contract, the parties are free to determine their mutual rights

and obligations and assume the obligations arising from the basis of the transaction, as a result of which a legally concluded contract has the force of law for its parties and it is obvious that it can only be changed by the joint agreement of all parties Article 6.223 of the Civil Code, ensuring the fair execution of the principles of the contract Article 6.200 of the Civil Code. A divorce agreement is no exception. Due to the personal nature of the content of the divorce agreement, it often seems that the parties to this agreement are only the spouses, but since the spouses have creditors, they also indirectly become a shadow party to the divorce agreement. The question what influence the creditor has on the content of this contract arises. Unfortunately, one should not forget that when signing a loan, credit or other agreement, the spouses, together with the creditors, enter into an agreement with their individually discussed and agreed terms and assume debt obligations based on it, precisely because of this, any subsequent amendment of the agreement is possible only by agreement of the parties. It is indisputable that, in order to ensure repayment of the loan as much as possible, it is beneficial for creditors to have several co-debtors, both spouses, responsible for the obligations, because two borrowers are always more reliable than one (Šekštelo, 2018). According to the articles 11.1.2 of the UNIDROIT principles (UNIDROIT, 2016), which also provides that when several debtors answer to the creditor under the same obligation, it is also presumed that the obligation acquired in marriage is joint and several, unless the circumstances indicate otherwise. As for the agreement on the legal consequences of the divorce, it seems to be assumed that this is only a personal matter of the spouses themselves, because only they themselves assess what property and to what extent each of them wants to have after the divorce, how they will fulfil the obligations assumed in relation to that property, if they decide that this the property would remain with one of the spouses, but unfortunately not everything is only in the hands of the spouses. When signing a loan, credit or other agreement, the spouses acquire joint obligations and are jointly and severally liable for them, as a result of which, in the divorce agreement, the spouses divide not only the property but also the property obligations, if any, deviating from the principle of equal shares not only in terms of property but also in terms of obligations, should be considered as a modification of the joint and several obligation, and changing the joint and several obligation into a personal one in fact means changing the contract regarding the subject of the contract, since the creditor in such cases loses the right to demand that the obligation be fulfilled by the second spouse. The agreement of the spouses in the event of divorce to change the joint and several obligation to a partial or personal one means changing the contract between the creditor and the debtors, and when there is no clearly expressed consent of the creditor due to such a change, it is considered a violation of the rights of the creditor and cannot be considered as a basis for the termination of the

joint and several obligation. It should be emphasized that the practice of the Supreme Court of Lithuania consistently explains that even in cases where the marriage is terminated, unfulfilled joint and several obligations, whose term has not expired, are not modified and the ex-spouses remain co-debtors, regardless of the fact that the property that created a property obligation for the spouses has passed to one of the spouses, except in cases where the creditors agree to the change of the obligation.

To further emphasise the different types of obligations which must be taken into account in divorce procedures the Figure 4 was devised.

#### 4. Provisions of legal regulation of creditor protection, positive and negative aspects

During married life, spouses become parties to various debt obligations, the obligations arising from which may be related to meeting the needs of the family, as well as meeting the needs of each spouse. Disputes that often arise in divorce cases are not only related to the spouses,

they often involve a third party, the creditor, whose interests must also be defended.

Disputes regarding the division of property (liabilities) arising in divorce, when at the time of divorce the spouses have joint creditors or one of the spouses has creditor obligations, and the deadline for the fulfillment of obligations has not expired, makes the process dependent on the moment of resolving the issue of obligations with creditors, since the creditor and the debtor are under obligations equal parties with rights and obligations to each other. The protection of the violated rights of creditors manifests itself as the protection of the interest of certainty when a person expects to remain in the situation in which he is and that his situation will not deteriorate. However, according to O. Williamson, it is not uncommon for many subjects to pursue their own interests, therefore, in order to realize their financial and economic interests, they may behave dishonestly. O. Williamson claims that people will do anything to maximize their interests – they will lie, cheat, steal, etc. Deception and misleading information are common tactics (Williamson, 1985), therefore the issue of protection and defense of creditor's rights remains extremely important. relevant and obvious that divorce cases are no exception. When terminating a marriage, the primary aim is to protect the interests of minor children and to protect the legitimate interests of socially vulnerable family members (Civil Cases, No. 3K-3-145/2008) but it must also be so that the interests protected by law as well as the rights of creditors are also guaranteed (Civil Cases, No. 3K-P-186/2010). The legislator, emphasizing the problems of the creditor's position during the divorce, has provided for the possibility to implement the protection of creditors' rights through legal instruments and to protect the creditors of the spouses, so that they have the opportunity to actually implement the protection of their interests. From 2023 January 1 The Civil Code of the Republic of Lithuania was supplemented by Article 3.54<sup>3</sup> which in part 1 stipulates the duty of the spouses to inform all creditors to whom both of them or one have obligations about the provisions of the consequences of the divorce, by sending the draft of the contract on the consequences of the divorce and the contact details of the notary, to whom it is intended to apply for contract approval. Protection of creditors' rights is an opportunity to ensure fair relations between the creditor and the debtor when fairness in law is assessed according to a person's informativeness about certain facts. Defining the extent to which a person must be informed and when it can be said that they knew certain circumstances, or should have known them, but acted dishonestly, is difficult, as a result of which unjustified inaction is considered dishonest behavior" (Supreme Court of Lithuania, 2008). In implementing the protection of creditors' rights, the legislator added Article 3.54 to the Civil Code, stipulating that before applying to a notary for the approval of the agreement on the legal consequences of divorce, when the agreement on the legal consequences of divorce approved by the notary discusses the division of the property of the



Figure 4. Grounds for the emergence of obligations



spouses, which is the common joint property of the spouses issues, and the spouses have enforceable obligations, all known joint creditors of the spouses and each of the spouses' personal creditors must be informed about it, regardless of whether the deadline for the fulfillment of these obligations has expired or not. Establishing such a duty of spouses provides an opportunity for creditors to implement the protection of their interests, since the division of common property may negatively affect their interests. As noted in the practice of the Court of Cassation, the purpose of informing creditors is related to the possibility for creditors of the spouse(s) to exercise their rights and assess whether the agreement on the legal consequences of divorce does not violate their rights and legitimate interests (Civil Case, No. e3K-3-5-916/2022). As a result, the notary, upon receiving the request of the spouses to approve the agreement on the legal consequences of divorce, which aims to modify the nature of the existing contractual obligation of the spouses to the creditor, has the duty to find out not only whether the conditions of Article 3.126, paragraph 2 of the Civil Code are met, but also must determine whether there is a creditor consent to such modification. Consent to the amendment of the contract must be expressed clearly and unambiguously and the expression of will by silence in this case cannot be considered as consent of the party. Dividing the property obligations of the spouses due to the legal consequences of the divorce in the contract, without the consent of the creditor, means nothing more than interference between the parties, i.e., relations established between creditors and spouses in a loan, credit or other contract. As a result, in the absence of clearly expressed consent of the creditor, regardless of the fact that the creditor was informed about the divorce and received a draft of the contract on the legal consequences of the divorce, there is no reason to recognize that consent to change the terms of the contract and modify the obligation was received and is a basis for recognizing the contract infringing the interests of the creditor and contrary to public order (Civil Case, No. e3K-3-145-969/2022). The requirements for the form of the notification are not regulated by the law maker, but it is clear that the notification to creditors should be in written form, because only then the notary could be sure that the spouses' duty to inform creditors has been properly implemented and there would be no question about the content of the statement and the requirements of its annexes. Having foreseen an important place in the process of divorce, the legislator gave them the right to adjust the content of the agreement on the legal consequences of the divorce, presenting their reasoned objections and arguments regarding the general method of dividing the joint property of the spouses, modifying obligations or changing other provisions of the agreement on the legal consequences of the divorce, which may harm the interests of creditors with the right to make specific proposals as to how these objections should be taken into account. In such a case, the notary has the right to decide the issue of the legal consequences of the divorce not earlier than

after the expiry of the thirty-day period, from the date of receipt of the notification of the creditor's information on the legal consequences of the divorce. The notary, upon receiving the creditor's reasoned objections to the draft contract of the legal consequences of the divorce concluded by the spouses, and in the event that the spouses do not agree to take them into account, does not approve the legal consequences of the divorce agreement and the spouses are offered to use the right granted to them by the state in Article 6, Paragraph 1 of the Convention (European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950) ensuring an effective right to apply to the court for divorce. If the spouses violate the obligation to inform the creditors about the divorce and in order to protect the creditors from dishonest spouses, the legislator in Article 3.54 (Williamson, 1985), paragraph 3, provides for the protection of the interests of the creditors, if these rights were violated. Accordingly, creditors of one or both spouses who were not informed in accordance with the law about the conclusion of the divorce agreement or the amendment of this agreement and whose rights were violated due to the consequences of the terms of the divorce agreement, have the right within one year from the date on which found out about the conclusion of the divorce agreement or its amendment, to challenge these conditions in the manner established by the court and to demand the restoration of their violated rights, because the defense of legitimate interests is also the defense of the public interest, therefore the state's duty is to ensure everyone the opportunity to defend their rights in court, both from other individuals, as well as from illegal actions of state institutions or officials.

The scheme below depicts the relationship between the notary, spouses, and the creditor:

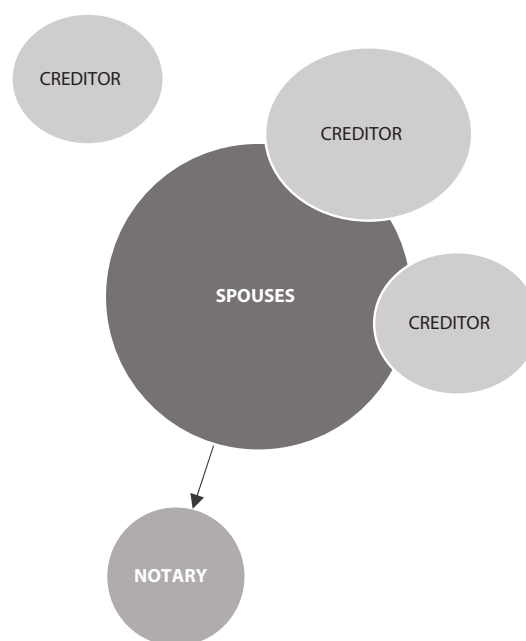


Figure 5. Portrayal of creditors traceable and non-traceable by the notary

Figure 5 shows the problem that the notary does not see all the creditors to whom the spouses are obligated which arises due to the legislator not providing for a reliably functioning mechanism to protect the interests of creditors, leaving the notaries themselves to create a properly functioning mechanism that must protect the interests of creditors since otherwise the contract approved by a notary will be considered violating the interests of creditors and will be challenged by the court procedure, and thus will once again add to the loads of cases pending in court. And this can happen through no fault of the notary, but because the notary using all the public registers available to them and after checking the property seizure register, the mortgage register and receiving information that the property of the spouses has not been seized or mortgaged, does not see all the creditors that the spouses have. This means that if the spouses have not pledged property or there is no enforcement case in court, the notary does not see any creditor obligations if no property owned by the spouse is pledged to ensure the performance of these contracts. Such a situation can occur when the spouses sign a promissory note or a loan agreement, the term of which has not yet expired. In such cases, there remains a question how the notary can ensure adequate protection of creditors' interests when there is no way to verify their existence.

## 5. The international element in the divorce process

Living in a global society, the number of marriages between people of different nationalities is also increasing, which is why divorce issues with a foreign element are becoming more and more relevant. Such divorce cases are subject to international legal norms, which determine which country's legal acts apply to divorce and which country's court has jurisdiction over divorce cases

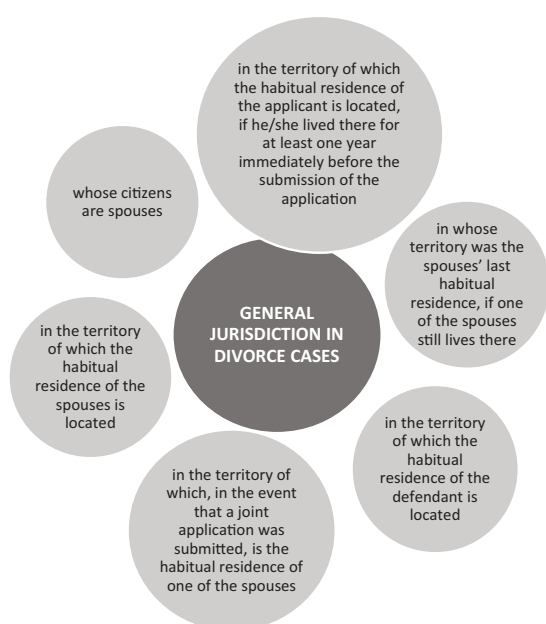


Figure 6. General Jurisdiction

with an international element. In all member states of the European Union if the spouses are citizens of different European Union states and/or live in different European Union member states, the legal regulation of the European Union is applied, or if the parties are from the Republic of Lithuania and another European Union state related to the dispute (bilateral and tripartite legal assistance agreements), international legal assistance agreements can be applied too. Finally national law could be applied in cases where the spouse is a citizen of a third country and/or lives in a third country. As we can see, determining the state in whose court a divorce case is pending is not an easy and rather complicated process.

The diagram (Figure 6) shows the rule of jurisdiction applicable to divorce when the spouses are citizens of different European Union countries and/or live in different European Union countries. Following the rules of general jurisdiction and when at least one of the specified conditions is met, divorce with a foreigner is possible in Lithuania. It should be emphasized that there is no hierarchy between the rules of jurisdiction and as a result any of the specified rules can be satisfied in order for the divorce case to be assigned to Lithuanian jurisdiction.

The choice of applicable law in the process of divorce is of great importance both for the possibilities of divorce and for the regulation of the legal consequences of divorce. Therefore, in all cases, it is important to consider and choose (when there is an option) not only the state where the divorce case will be heard, but also the most favorable law applicable to the divorce. National laws in European Union countries will determine the reasons you can file for divorce or legal separation, and the procedures involved. The rules vary greatly from one European Union country to another. However, a number of European Union rules help determine which courts have jurisdiction and which law applies in cases involving two or more European Union countries – for instance, because you and your spouse live in different countries or have different nationalities (European Judicial Network, 2022b).

Lithuanian legal acts provide that divorce with a foreign citizen is possible in Lithuania, if at least one of the spouses is a citizen of the Republic of Lithuania or a stateless person and the permanent residence of this stateless person is in the Republic of Lithuania. It should also be noted that the courts of the Republic of Lithuania are competent to hear family cases if both spouses are foreign citizens, but their permanent residence is in the Republic of Lithuania. The question arises, who should consider the issue of divorce if there is no dispute between the spouses and minor children? Can international couples apply to a notary if they want to end their marriage in Lithuania? Referring to European Family Law Principle 1:2 (2) which stipulates that the dissolution of marriage must be delegated to a competent authority, which may be a judicial or administrative body, and referencing Article 6(1) (European Convention for the Protection of Human Rights and Fundamental Freedoms,

1950) which states that the issue of a person's civil rights and obligations must be decided by an independent and impartial court, and finally taking into account the fact that in Lithuania a notary is considered a preventive judge to whom the state entrusts the performance of functions ensuring public interest, operating in the sphere of civil legal relations and carrying out the legal consolidation of subjective rights and legal facts, from January 1<sup>st</sup>, 2023, In Lithuania, a notary is considered the competent authority for divorce by agreement of both spouses.

## Conclusions

When it comes to divorce rates around the world, there is no single factor that affects how likely citizens are to separate from their partners, as each country has its own unique mix of social, religious, and economic factors, resulting in higher divorce rates in more developed countries with higher levels of education and financial status. Although divorce is currently legal in all but two of the 195 states, opinions on divorce remain diverse across countries and religions. It should be noted that a low divorce rate does not necessarily mean that a country's citizens have happy and prosperous marriages, it's just that it may be more difficult to legally end a marriage in some countries.

The right to divorce by notarial procedure appeared in Lithuania only on January 1, 2023. However, this simplified divorce procedure is unfortunately only available to those married couples without minor children. With this new legal regulation, the Family Law Institute is expected to reduce the workload of the courts. Moreover, contrary to critics' doubts the simplification of the divorce process did not lead to the mass divorce boom that had been expected. Meanwhile, no decrease in divorce cases was observed in the courts either.

The simplified divorce process envisaged by the legislator should cover all divorces by common agreement without differentiation. With the new law, notaries have been given the right to decide on the transfer of family property and the property of minor children and there is no longer any need to go to court, everything is solved by a notary. Regrettably, the legislator did not provide notaries with the opportunity to resolve the issues of child support and their place of residence in the event of an uncontested divorce as is the case with several other European Member states.

The participation of creditors in the divorce processes around the world is quite common, in Lithuania it reaches 50–80% of all matrimonial disputes. All considered, divorce cases consist of cases in which the issue of division of obligations is resolved and creditors are involved. As a result, the mechanism for the protection of creditors' interests must function reliably and smoothly, implementing the protection of creditors and their legitimate interests as efficiently as possible. The regulation of creditor protection provided for in Article 3.54<sup>3</sup>

of the CC provides for the procedure and conditions for the implementation of spouses' duties but does not take into account the possible dishonesty of the spouses and leaves the obligation to the notaries themselves to protect both the interests of the creditors and the public interest against the actions of the spouses. The transfer of new judicial functions to notaries may simplify the process of divorce, but without a real possibility to obtain all of the necessary information from all possible registers (in contrast, courts are able to do that), the performance of the transferred functions becomes an unreliable and insecurely functioning mechanism, unable to fully ensure the protection of legitimate creditors' interests with the help of a notary. This gives rise to the possibility of challenging the notarized contract regarding the legal consequences of the divorce which forces couples to go to the court. This means that the solution of the problem of freeing up the courts, saving court's and spouses' time and resources by diversifying the institutions which can dissolve the marriage is not fully successful.

In the non-judicial divorce process, the legislator should educate the public more, emphasizing the differences between judicial and non-judicial divorce, providing information on who prepares the divorce agreement, how to inform creditors, when the marriage can be terminated by a notary and when judicial procedure is needed. Chamber of notaries currently organizes trainings only for lawyers and notaries, but no information is provided to the public. Hence, if Lithuania wants to increase a number of successful divorce cases at the notary which are not challenged and sent to the court, all members of the society need to be better educated by the press on the subject of matrimonial disputes.

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