

Newsletter

Business Unit Wealth Management
New standards for maintenance divorce payments 19 - 2018

Introduction

With decision no. 18287 of 11 July 2018, the plenary session of the Italian Supreme Court ("Corte di Cassazione") has set new standards for the determination of maintenance divorce payments, clarifying that these have a compensatory, and not only a welfare, function, and that it is necessary to take the contribution of each spouse to family life into account.

Following the judicial trend of other European countries, the Supreme Court found that family dynamics and choices that are taken during the marriage cannot be neglected when it comes to settling the financial issues arising from divorce. For this reason, it is necessary to address any imbalance potentially caused by the divorce.

This does not mean that divorce payments have to guarantee spouses their previous standard of living, but that, for the purpose of determining the divorce allowance, it is necessary to take into account the contribution - in any form - of each spouse to family life, the age of the applicant and the duration of the marriage.

The conclusion of the Supreme Court settles the debate provoked by decision no. 11504 of 2017, which - in direct conflict with the previously prevailing case law founded on the "same standard of living" principle - found that maintenance divorce payments had to be determined in the light of the economic "independence or self-sufficiency" of the former spouse.

With this decision, the Supreme Court shifts from the former case law towards a - perhaps more equal - principle according to which the financial outcome on divorce must consider the contribution of each spouse to family life, for the purpose of avoiding any imbalance or disadvantages in favor of either of them.

The decision no. 11504/2017

In decision no. 11504 of 2017, the Supreme Court, in direct conflict with the “standard of living” principle expressed by previously prevailing case law, found that maintenance divorce payments had to be determined in light of the economic “independence or self-sufficiency” of the former spouse. According to this statement, all the criteria provided for in art. 5, paragraph 6, of the Italian Divorce Law (law n. 898 of 1970) are relevant only for the purpose of determining the divorce allowance.

Under this ruling, the legal proceeding concerning the evaluation of the divorce allowance is split in two phases: (i) in the first phase, the judge must ascertain if the spouse is not economically self-sufficient and if he/she is not able to guarantee his/her economic maintenance due to objective reasons; (ii) during the second phase, the judge shall concretely determine the amount of the allowance.

Consequently should – on the basis of precise evidence such as income, assets, capacity and actual job opportunities, stable availability of a dwelling – the judge ascertain that the applicant is economically independent or is actually able to be such, he/she will not have any right to the divorce allowance, regardless of the standard of living enjoyed during the marriage, which is no longer to be considered.

This decision overturned the approach adopted over the past three decades introduced by a decision of 1990 of the plenary session of the Supreme Court, whereby a married couple's standard of living was the guiding principle in determining the amount of maintenance payable to a spouse upon divorce.

According to the position expressed in 2017, it is necessary to overcome the wealth-based conception of marriage understood as a “definitive economic arrangement”, that is also in direct conflict with the nature of the divorce itself.

Some critics have argued that, even if the supporting arguments expressed by the Supreme Court in decision no. 11504 are substantial, the decision makes it very difficult for courts not to discriminate against the financially weaker party and unfairly disadvantage those without the means to gain financial independence.

Thanks to this decision, in any case, the debate on this topic has been reopened and revised compared to the previous prevailing position expressed by the Supreme Court in 1990.

The recent decision of the Supreme Court

Following this debate, the recent decision of the Supreme Court gives a refreshing perspective of the contrasting issues relating to divorce payments, while offering an overview of the different case law that has evolved over time.

According to the new interpretation guidelines, the Supreme Court has clarified that:

- a maintenance divorce payments do not just have a welfare function, but also a compensatory and equalizing function;

- b this function is based on certain constitutional principles, according to which the judge should always compare the economic and patrimonial conditions of the spouses;
- c when determining the divorce allowance and ascertaining any potential imbalance raised by the divorce, the judge must take into account certain features, such as *(i)* the contribution of each spouse to family life, in agreement with the other spouse, even potentially sacrificing their own economic and professional possibilities, *(ii)* the age of the applicant and *(iii)* the duration of the marriage.

The Supreme Court finds that this position is largely consistent with the current state of play and the approach to spousal maintenance of other European countries (in particular, France and Germany). Even if in these countries the compensatory and equalizing function of the divorce allowance is strictly connected with the temporariness of the obligation, a comparative analysis shows some common principles within the European framework, such as the empowerment of a self-responsibility principle and the equalizing criterion to compensate any imbalance caused by the divorce.

For any question, please do not hesitate to call your contact lawyer at Chiomenti or our Wealth Management Business Unit.