GROUNDS FOR DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES

BELGIUM

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A. GENERAL

1. What is the current source of law for divorce?

Code of Civil Law (Belgian Civil Code), Articles 229 – 311 *quarter* and Judicial Code, Articles 1254 - 1318.

2. Give a brief history of the main developments of your divorce law.

From 1804 until 1974, no major changes occurred in Belgian divorce law. The Belgian Civil Code was the major source of law. It provided the possibility of divorce on the ground of fault as well as divorce by mutual consent, although the latter was restrictively applied. Until the 1970s, Belgium was one of the very few European countries that offered the possibility of a divorce by mutual consent.

The law of 1 July 1974 instituted an additional non-fault based divorce ground. From then onwards divorce could be obtained after ten years of separation, even against the will of an "innocent" spouse. The notion of fault, however, continued to rule the patrimonial consequences of

the divorce. The law of 1974 made it also possible for the spouse of a mentally ill person to obtain a divorce after ten years of separation, although without any referral to fault. The law of 2 December 1982 reduced both terms to five years. The law of 16 April 2000 further reduced them to two years.

The law of 30 June 1994 radically reformed the divorce procedure in three fields, but the grounds for divorce and the consequences remained unchanged. The divorce procedure on the ground of fault and separation was drastically simplified and made more humane. Before, the *ratio legis* had been to make the divorce procedure as long and as complicated as possible, to discourage divorce. This approach was abandoned for a more realisttic one. Secondly, the divorce procedure by consent was fundamentally reformed. The procedure was also simplified, with a reduction of the number of appearances before the court and of the probationary period. Also, the court was given the possibility to intervene in the agreement concerning the children. Finally, a general regulation was introduced concerning the rights of minors to be heard by the court when their interests are at stake. Finally, the law of 20 May 1997 introduced some minor changes in the divorce procedure and the preliminary measures.[1]

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[1] For more information on the answer to Question 2, see: S. Demars, *Les procédures en divorce. La réforme de la réforme. Loi du 20.05.1997*, Brussels: Larcier, 1997, p. 184; M. Gregoire and P. van den Eynde, *La réforme du divorce. Loi du 30.06.1994*, Brussels: Bruylant, 1994, p. 262; M. Heymans, 'Wet van 30.06.1994 houdende wijziging van Article 931 Ger.W. en van de bepalingen betreffende de procedures van echtscheiding', in: R. de Corte (ed.), *Nieuwe wetgeving, een eerste commentaar*, Ghent: Mys & Breesch, 1994, p. 36; J.P. Masson, *La loi du 30.06.1994 modifiant l'article 931 du Code Judiciaire et les dispositions relatives aux procédures du divorce*, Brussels: Bruylant, 1994, p. 162; J-L. Renchon, 'Les grandes lignes de la réforme opérée par la nouvelle loi du 30.06.1994 sur les procédures en divorce', *Rev. trim. dr. fam.*, 1994, p. 159-195; P. Senaeve, and W. Pintens, (eds.), *De hervorming van de echtscheidingsprocedure en het hoorrecht van minderjarigen*, Antwerp: Maklu, 1997; P. Senaeve, 'De aanpassing van de wet tot hervorming van de echtscheidingsprocedures. Commentaar op de Wet

3. Have there been proposals to reform your current divorce law?

Yes, most importantly, several proposals have been made in order to achieve one sole ground for divorce, namely that of the irretrievable breakdown of the marriage, without reference to fault.[2] There was also a proposal to shorten the necessary duration of the marriage before one can apply for a divorce by consent.[3] It has been suggested to make a divorce by consent possible, even when there is no agreement on all the necessary subjects. The court or a third party would be asked to settle the remaining disagreements.[4]

B. GROUNDS FOR DIVORCE

I. General

4. What are the grounds for divorce?

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van 20.05.1997', *E.J.*, 1997, p. 65-96; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 620-621.

2 Proposition de loi modifiant le régime du divorce par suite de l'instauration du divorce sans faute, *Doc. parl.* Sénat 2001-2002, nr. 2-1076; Proposition de loi réformant le droit du divorce et instaurant le divorce sans faute, *Doc. parl.* Chambre 1999-2000, nr. 50-684; Proposition de loi modifiant un certain nombre de dispositions relatives au divorce et instaurant le divorce pour cause de désunion irrémédiable entre époux, *Doc. parl.* Chambre 2000-2001, nr. 50-896; Proposition de loi modifiant le régime du divorce par suite de l'instauration du divorce sans faute, *Doc. parl.* Chambre 2000-2001, nr. 50-1109; Proposition de loi modifiant certaines dispositions relatives au divorce, *Doc. parl.* Chambre 2000-2001, nr. 50-1191; Proposition de loi modifiant la législation sur le divorce en vue d'instaurer le divorce sans faute, *Doc. parl*. Chambre 2001-2002, 50-1497.

3 Proposition de loi modifiant l'article 276 du Code Civil, *Doc. Parl.* Chambre 1999-2000, nr. 50-619.

4 Proposition de loi modifiant certaines dispositions relatives au divorce, *Doc. Parl.* Chambre 2000-2001, nr. 50-1191.

Divorce by consent (Article 233 Belgian Civil Code), divorce on the ground of fault (Articles 229 and 231 Belgian Civil Code), divorce on the ground of separation (Article 232(1) Belgian Civil Code) and divorce by transforming a decree of judicial separation into a divorce. A fifth ground, divorce on the ground of separation due to a mental illness of one spouse (Article 232(2) Belgian Civil Code), will be dealt with separately under "divorce on the ground of separation", when necessary.

5. *Provide the most recent statistics on the different bases for which divorce was granted.*

The most recent statistics concerning divorce, for the years 2000 and 2001, are:

Divorce Statistics 2000[5]

Article	**231**	**232**	**233**	**Total**
Percentage	18	7	75	100
Granted	4807	1863	20190	26860
Refused	255	8	30	293
Disconitnued	45	13	395	453
Transformed			13	13

[5] The statistics for 2000 and 2001 originate from the Federal Government Service of Justice, Direction Statistics and Logistic Means.

Divorce Statistics 2001

Article	231	232	233	Total
Percentage	17	12	71	100
Granted	4860	3448	20684	28992
Refused	226	16	47	289
Disconitnued	59	7	323	389
Transformed			29	29

From this it may be concluded that the vast majority of divorces are granted on the ground of consent. The number of divorces on the ground of separation is increasing as the law of 16 April 2000 has reduced the term from five to two years.[6]

6. How frequently are divorce applications refused?

Divorce applications are seldom refused, as the tables under question 8 clearly demonstrate. The rather large number of refused divorce applications on the ground of fault may be explained by the fact that it includes the refused counterclaims, that are often instigated in an attempt to obtain the divorce against the claimant or against both parties, but are not always sufficiently grounded.

7. Is divorce obtained through a judicial process, or is there also an administrative procedure?

Divorce is always obtained through a judicial process.

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[6] For more information on the answer to Question 5, see: W. Pintens, 'Statistische gegevens betreffende de echtscheiding', in: P. Senaeve and W. Pintens, (eds.), *De hervorming van de echtscheidingsprocedure en het hoorrecht van minderjarigen*, Antwerp: Maklu, 1997, p. 39-51; P. Senaeve, 'Recente statistische gegevens omtrent huwelijk en echtscheiding', *E.J.*, 2000, p. 103-104; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 623-625.

8. Does a specific competent authority have jurisdiction over divorce proceedings?

The Court of First Instance has jurisdiction over divorce proceedings (Article 569(1) 1° Belgian Judicial Code). A Justice of the Peace has jurisdiction over maintenance claims (Article 591(7) Belgian Judicial Code). During the divorce procedure, however, the president of the Court of First Instance is competent with regard to provisional measures concerning the parties, their maintenance and assets (Article 1280 Belgian Judicial Code). When there is a case of urgency, maintenance claims will always fall under the general jurisdiction of the president of the Court of First Instance (Article 584(1) in conjunction with Article 1039(1) Belgian Judicial Code).[7]

9. How are divorce proceedings initiated? (e.g. Is a special form required? Do you need a lawyer? Can the individual go to the competent authority personally?)

The initiation of divorce proceedings depends on the ground for divorce:

(a) Divorce on the ground of fault

This procedure was radically simplified by the law of 30 June 1994 and slightly amended by the law of 20 May 1997. Apart from a few exceptions, the divorce procedure is initiated and continued like a general civil procedure (Article 1254(1) Belgian Judicial Code). The procedure is instigated by a summons issued by the claimant, which

[7] For more information on the answer to Question 8, see: K. Uytterhoeven, 'De bevoegdheid en de rechtspleging inzake onderhoudsgelden', in P. Senaeve (ed.), *Onderhoudsgelden*, Leuven: Acco, 2001, p. 190-227.

must extensively contain the grievances against the other spouse, or by the voluntary appearance of the parties. There is no need for the parties to appear in person before the court at any time; representation by a lawyer is always possible, unless the court has specifically ordered an appearance by the parties in person (Article 1263 Belgian Judicial Code). During the proceedings, even during the appeal proceedings, the claimant may instigate an additional claim with one or more new grievances; also, the respondent may issue a counterclaim in order to obtain a divorce against the claimant (Article 1268 Belgian Judicial Code). These additional and counterclaims are only allowed when the proceedings are contradictory (Article 1268(1) Judicial Code).

(b) Divorce by consent

First, the spouses have to draw up a written agreement on the consequences of the divorce. Then, the procedure is initiated by a petition that refers to this agreement (Article 1288 *bis* (3) Belgian Judicial Code). The petition is signed either by both spouses, who do not need a lawyer, or by at least one lawyer or notary who will represent both parties (Article 1288 *bis* (6) Belgian Judicial Code).

(c) Divorce on the ground of separation

A divorce on the ground of separation follows the same rules regarding the claim, the procedure, the proof and the effects of the judgment as in the case of divorce on the ground of fault.

(d) Divorce on the ground of separation due to mental illness

Principally, the same rules are applicable as in case of a "normal" divorce on the ground of separation. What differs, however, is that the mentally ill spouse must be represented, either by his guardian, his

provisional curator or an administrator ad hoc who is appointed by the court at the request of the claimant.[8] The mentally ill spouse can only appear in a divorce procedure as a respondent, never as a claimant, unless his / her mental illness is not sufficiently severe. The court rules autonomously on the severity of the mental illness. Some of the case law does not consider Article 232(1) Belgian Civil Code and Article 232(2) Belgian Civil Code to be complementary: thus it would be possible that a spouse's illness is not sufficiently severe for Article 232(2) Belgian Civil Code, but too severe for Article 232(1) Belgian Civil Code, since in the latter case he / she must be capable of judging the seriousness of the facts without representation or assistance, so that a divorce is not possible on either ground.

Others consider the criterion by which to decide whether the mental illness is sufficiently severe to obtain a divorce on this ground, to be whether or not the mentally ill spouse is capable of defending him / herself during the divorce procedure. When he / she is able to realize what is taking place, the divorce ground of Article 232(1) Belgian Civil Code is applicable. This would make both grounds complementary.[9]

10. When does the divorce finally dissolve the marriage?

The divorce dissolves the marriage when the judgment is final and is not subject to a challenge or appeal concerning the personal consequences for the spouses (Article 1278(1) Belgian Judicial Code and Article 1304(3) Belgian Judicial Code). Concerning the assets of the

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8 Court of Appeal of Brussels 11.10.1978, *R.W.* 1978-79, 1283

9 For more information on the answer to Question 9, see: C. de Busschere, *De feitelijke scheiding der echtgenoten. De echtscheiding op grond van feitelijke scheiding*, Antwerp: Kluwer, 1985, p. 427-448; C. de Busschere, Art. 232 B.W., in *Comm. Pers.*, Antwerp: Kluwer, loose-leaf, 2002, p. 41; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 681-682.

spouses, the dissolution has a limited retroactive effect until the day of the first application for divorce on the ground of fault (Article 1278(2) Belgian Judicial Code) and until the day of the first appearance in the case of divorce by consent (Article 1304(2) Belgian Judicial Code). When the spouses have lived apart before the initiation of the divorce proceedings, an optional possibility exists to extend the retroactive force until the initiation of the separation at the request of one spouse, in the case of certain assets or debts that have arisen since the separation (Articles 1278(3) and (4) Belgian Judicial Code). In the case of a divorce by consent, a conventional derogation from this rule is possible, in order to extend the retroactivity to an earlier point in time, e.g. the date of the agreement a the petition. In order to make it public, the judgment needs to be entered in the marriage records . As Against third parties, the divorce has no consequences before this date (Article 1278(1) Belgian Judicial Code and 1304(1) Belgian Judicial Code).

If under your system the sole ground for divorce is the irretrievable breakdown of marriage answer part II only. If not, answer part III only.

III. Multiple grounds for divorce

1. Divorce by consent

22. Does divorce by consent exist as an autonomous ground for divorce, or is it based on the ground of irretrievable breakdown?

Divorce by consent is an autonomous ground for divorce. The mutual and continued agreement between the spouses, expressed in the manner and under the conditions that the law prescribes, sufficiently proves that life together has become unendurable for the spouses, and that an adequate ground for divorce exists (Article 233 Belgian Civil

Code). Thus, the mutual agreement leads to the presumption of an irretrievable breakdown.[10]

23. Do both spouses need to apply for a divorce together, and if not, how do the divorce proceedings vary according to whether one or both spouses apply for a divorce?

Both spouses need to apply for a divorce together, and the petition is signed either by both spouses or by at least one lawyer or notary who in this case will represent both spouses (Article 1288 *bis* (6) Belgian Judicial Code). Moreover, they need to draw up a personal and matrimonial agreement beforehand, so they will necessarily agree on the petition as well.[11]

24. Is a period of separation required before filing the divorce papers?

No.

25. Is it necessary that the marriage was of a certain duration?

The marriage should have lasted for at least two years (Article 276 Belgian Civil Code) before the deposition of the initiating petition. This means that the duration of the following divorce procedure may not be taken into account in calculating the two years.

26. Is a minimum age of the spouses required?

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[10] For more information on the answer to Question 22, see: W. Pintens, *Echtscheiding door onderlinge* toestemming, Antwerpen: Kluwer, 1982, pp. 36-42, 73 -103, 107-109.

[11] For more information on the answer to Question 23, see: W. Pintens, *Echtscheiding door onderlinge* toestemming, Antwerpen: Kluwer, 1982, p. 239 ff.

In order to initiate a divorce procedure by consent, both spouses need to be at least twenty years old (Article 275 Belgian Civil Code). This minimum age must be reached before the deposition of the initiating petition.

27. Are attempts at conciliation, information meetings or mediation attempts required?

If by "required" "an absolute condition for proceeding to a divorce" is understood, the answer is in the negative. There is no obligation whatsoever for the spouses to conciliate, to attend an information meeting, or to try to mediate. During the divorce procedure, however, the judge may formulate objections and requests concerning the agreement between the spouses (see Question 28), and this may in some ways be considered as a conciliation attempt.

In order to make the divorce procedure more humane, the law of 19 February 2001 [12] was introduced, concerning mediation in family matters. It inserted Articles 734 *bis* until 734 *sexies* within the Judicial Code. Mediation in family matters is a possibility, not an obligation. In a limited number of claims, the parties can opt for a mediation procedure before proceeding to an actual judicial procedure, e.g. claims concerning marital obligations, divorce claims, claims concerning cohabitation (Article 734 *bis* (1) Belgian Judicial Code). Mediation is also possible in the case of a divorce by consent; the *ratio legis* behind this is that a part of the agreement between the spouses may sometimes need to be changed (Articles 1290 and 1293 Belgian Judicial Code). In any case, the parties will always first initiate a divorce procedure, after which the court may refer them to mediation; it is not possible for the parties to proceed to mediation from the beginning, without first going to court . A mediator will be appointed by the court upon the joint

[12] *B.S.* 03.04.2001

request of the parties, or at the initiative of the judge but with the consent of the parties (Article 734 *bis* (2) Belgian Judicial Code). When an agreement has been reached, the court will duly take note (Article 734 *bis* (5) Belgian Judicial Code). When no solution has been reached by the mediator, the parties may ask to continue the divorce procedure (Article 734 *bis* (5)(2) Belgian Judicial Code). No information meetings are required in a divorce procedure on the ground of consent; they are optional in the preceding mediation procedure.[13]

28. What (formal) procedure is required? (e.g. How many times do the spouses need to appear before the competent authority?)

First, the spouses need to draw up a written agreement on the consequences of the divorce. Then, the procedure is initiated by a petition that refers to this agreement (Article 1288 *bis* (3) Belgian Judicial Code). The petition is signed either by both spouses or at least one lawyer or notary (Article 1288 *bis* (6) Belgian Judicial Code). The Public Prosecutor issues a written advice on the fulfilment of procedural demands, the admissibility of the divorce and the contents of the agreement regarding the personal consequences for the minor children (Article 1289 *ter* Belgian Judicial Code), but not on the contents of the other aspects of the agreement.

The spouses need to appear twice before the president of the Court of First Instance and on both occasions they need to express their desire to divorce. The first time they appear within one month after the petition (Article 1289 Belgian Judicial Code). The judge may propose to alter the agreement if it seems to be contrary to the interests of the minor children (Article 1290(2) Belgian Judicial Code). He may also hear the

[13] For more information on the answer to Question 27, see: E. Torfs, 'Proceduregebonden bemiddeling in familiezaken. Commentaar bij de wet van 19.02.2001', *E.J.*, 2001, p. 106-119.

children (Article 1290(3) Belgian Judicial Code). In both cases he will set a new date for an additional appearance, so in these cases three appearances will take place (Articles 1290(4) and (5) Belgian Judicial Code). During this additional appearance, the judge may ask the spouses to alter or strike out any settlements that are manifestly contrary to the interests of the children. In the latter case, the spouses need to draw up an additional agreement that has to be presented during the final appearance (Articles 1290(3) to (5) Belgian Judicial Code). This competence is not dependent upon whether the children have been heard. The judge himself may not adapt or change an agreement, but the spouses' refusal to comply with his request to do so, may lead to the divorce being refused.

The spouses will appear a second (or third) and last time within a month after three months have passed since the first appearance (Article 1294(1) Belgian Judicial Code). Thus a maximum of five months will have passed between the petition for divorce and the second appearance, except in the case of an additional appearance, in which case the three-month term is suspended (Article 1294(3) Belgian Judicial Code).

Each of the spouses may at any point in the procedure decide not to pursue the case any further. Directly after the second (or third) appearance, the Public Prosecutor advises the court in chambers, after which the court will decide on the petition for divorce (Articles 1296 to 1298 Belgian Judicial Code).[14]

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[14] For more information on the answer to Question 28, see: S. Demars, 'Les procédures en divorce. La réforme de la réforme. Loi du 20.05.1997', in: *Les dossiers du journal des tribunaux*, Brussels: Larcier, 1997, p. 184; W. Pintens, *Echtscheiding door onderlinge toestemming*, Antwerp: Kluwer, 1982, p. 239 ff.; W. Pintens, 'De weergave van de overeenkomsten in het verzoekschrift van echtscheiding door onderlinge toestemming', *E.J.*, 1995, p. 6-8; A-Ch. Van Gysel, 'Un an d'application de la réforme de la procédure du divorce par consentement mutuel: les pratiques et les failles

29. Do the spouses need to reach an agreement or to make a proposal, or may the competent authority determine the consequences of the divorce?

The spouses need to reach an agreement on the consequences of the divorce, both matrimonial and personal and concerning both themselves and their common children.[15]

30. If they need to reach an agreement, does it need to be exhaustive or is a partial agreement sufficient? On what subjects should it be, and when should this agreement be reached?

The agreement must be exhaustive and drawn up before the filing the petition for divorce. When the spouses wish to alter their agreement during the procedure, they will have to recommence the divorce procedure from the beginning, since they need to express the wish to divorce during the following appearances based on an unchanged agreement. There are three exceptions to this rule: firstly, when new and unforeseeable circumstances appear after the first appearance (Article 1293 Belgian Judicial Code); secondly, if they wish to alter their residences during the procedure; and, thirdly, when the judge asks or orders them to amend the agreement regarding the children. In such cases, the procedure will not need to be recommenced.

Concerning the matrimonial consequences, the spouses must agree on their respective patrimonial claims and on the *ab intestato* succession rights between each other, in case one of them should die during the divorce procedure (Article 1287 Belgian Judicial Code).

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subsistantes', in: *Actualité du droit du divorce*, Brussels: Bruylant, 1996, p. 139-165.

15 For more information on the answer to Question 29, see: W. Pintens, *Echtscheiding door* onderlinge *toestemming*, Antwerp: Kluwer, 1982, p. 170; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 686.

Concerning the personal consequences, the spouses must agree on their respective residences during the divorce procedure, the authority over the person and assets of the common minor children and the visiting rights, both during the probationary period and after the divorce, the division between them of the maintenance for the children, also both during the probationary period and after the divorce, and the maintenance for themselves, if any, also both during the probationary period and after the divorce (Article 1288(1) Belgian Judicial Code).[16]

31. To what extent must the competent authority scrutinize the reached agreement?

Generally, the court has to limit itself to controlling the agreement's legality; when the spouses have fulfilled all the material and procedural demands and have reached an agreement on all the necessary subjects (see Question 30), the court must grant the divorce. It must only check if there are no elements of the agreement which are contrary to public order and common decency, in which case these elements will be regarded as not having been agreed upon, and any further examination of the agreement's reasonableness and fairness is not allowed, nor may the spouses be ordered to alter their agreement.

Only concerning the minor children will the court scrutinize the contents of the agreement, and it may refuse the divorce if their

[16] For more information on the answer to Question 30, see: F. Buyssens, 'De onderhoudsbijdrage voor de kinderen en de onderhoudsuitkering tussen echtgenoten bij echtscheiding door onderlinge toestemming', in: P. Senaeve, (ed.), Onderhoudsgelden, Leuven: Acco, 2001, p. 82 ff.; Y-H. Leleu, 'Les conventions patrimoniales préalables au divorce par consentement mutuel', *T.B.B.R.*, 1999, p. 369-388; W. Pintens, *Echtscheiding door onderlinge toestemming*, Antwerp: Kluwer, 1982, p. 170-236; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 693.

interests are manifestly damaged. The part of the agreement that concerns the minor children will be ratified by the court (Article 1298 Belgian Judicial Code). Thus it achieves not only a conventional but also a jurisdictional character, it has the force of *res judicata* and it is enforceable. After the procedure has terminated and the marriage has been dissolved, the ex-spouses may change the agreement at any time. However, the part on the minor children that has been ratified by the court may not be altered without the permission of the Juvenile Court, in so far as it touches upon the parental authority and the visiting rights which were agreed upon.

Since a judgment by the Court of Cassation in 2000[17] it has been possible for the court to annul part of the agreement after the divorce on the ground of deceit, without compromising the validity of the divorce itself.[18]

32. Is it possible to convert divorce proceedings, initiated on another ground, to proceedings on the ground of mutual consent, or must new proceedings

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17 Cass. 16.06.2000, *R.W.* 2000-01, 238, note W. Pintens.

18 For more information on the answer to Question 31, see: F. Buyssens, 'De onderhoudsbijdrage voor de kinderen en de onderhoudsuitkering tussen echtgenoten bij echtscheiding door onderlinge toestemming', in: P. Senaeve, (ed.), *Onderhoudsgelden*, Leuven: Acco, 2001, p. 108-135; W. Pintens, *Echtscheiding door onderlinge toestemming*, Antwerp: Kluwer, 1982, pp. 254, 304-325; W. Pintens, 'De vernietiging van de overeenkomsten bij echtscheiding door onderlinge toestemming', note to Cass. 16.06.2000, *R.W.*, 2000-01, p. 239-242; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, pp. 692, 694, 696, 698; P. Senaeve, 'De nietigverklaring van een beding van de overeenkomst voorafgaand aan de echtscheiding door onderlinge toestemming na de ontbinding van het huwelijk', *E.J.*, 2001, p. 26-31; E. Vieujean, 'Divorce par consentement mutuel - Révision des conventions relatives aux enfants', note to the Court of Appeal of Brussels 07.05.1999, *T.B.B.R.* 2000, 290-296; *contra*: J.Gerlo, 'Kan een door de rechter gehomologeerde overeenkomst gewijzigd worden zonder tussenkomst van de rechter?', note to the Court of Appeal of Brussels 01.12.1998, *E.J.*, 1999, p. 68-72.

be commenced? Or, vice versa, is it possible to convert divorce proceedings on the ground of mutual consent, to proceedings based on other grounds?

As mentioned above (see Question 28), each spouse may at any time decide not to pursue the divorce procedure any further. In such a case, any spouse may apply for a divorce on another ground. An important innovation in the optional mediation procedure, introduced by the law of 19 February 2001, is that the parties can agree, through the intervention of the mediator, to convert the divorce procedure initiated on the ground of fault or separation, into a divorce procedure by consent (see Question 27).

There is also a possibility to convert a divorce procedure initiated on the ground of fault, to a divorce procedure on the ground of separation. The Court of Cassation[19] has recently determined that even though they both rely on different facts, and their consequences are not necessarily the same, their mutual object is to dissolve the marriage. Therefore, when during the divorce procedure on the ground of fault, the procedure is converted into a procedure on the ground of separation by one party's pleadings, it is sufficient that the conditions for a divorce on the ground of separation are fulfilled at the time of the deposition of those pleadings.[20]

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19 Cass. 18.04.2002, *E.J.* 2002, 72-73 (summary).

20 For more information on the answer to Question 32, see: S. Mosselmans, 'De omzetting van een echtscheiding op grond van fout naar een echtscheiding op grond van feitelijke scheiding: een welgekomen "vereenvoudiging" van de voorwaarden met het oog op "bespoediging" van de procedure', *E.J.*, 2002, p. 73-80; P. Senaeve, 'Het vorderen van de echtscheiding nadat men reeds op een andere grond de echtscheiding heeft verkregen', *E.J.*, 1995, p. 19; P. Senaeve, 'Nouvelle demande en divorce après avoir déjà obtenu ce dernier sur base d'une autre cause, note to Cass. 15.09.1994', *Div. Act.* 1996, p. 53; E. Torfs, 'Proceduregebonden bemiddeling in familiezaken. Commentaar bij de wet van 19.02.2001', *E.J.* 2001, 106-119.

2. Divorce on the ground of fault/ matrimonial offence

33. What are the fault grounds for divorce?

There are four fault grounds: adultery (Article 229 Belgian Civil Code), acts of violence against the other spouse, abuse of the other spouse and grave offences towards the other spouse (Article 231 Belgian Civil Code).

34. If adultery is a ground what behaviour does it constitute?

Adultery exists when one spouse engages in sexual intercourse with a person who is not his/her spouse. Traditionally, homosexual intercourse was not considered to be adulterous. However, on 17 December 1998 the Court of Cassation ruled that homosexual intercourse could also be considered to be adultery.[21] Sexual activities that do not involve actual intercourse, are not considered to be adulterous. They can, however, constitute a "grave offence". [22]

35. In what circumstances can injury or false accusation provide a ground for divorce?

Injury and false accusation may be considered to be "grave offences".

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21 Cass. 17.12.1998, *R.W.* 1998-99, 1075, note F. APS; *E.J.* 1999, 25

22 For more information on the answer to Question 34, see: J.E. Beernaert, 'Des us et coutumes en matière de constat d'adultère', *Div. Act.*, 2001, p. 175; A. De Wolf, 'Overzicht van rechtspraak (1994-2000) - Overspel als grond tot echtscheiding (Article 229 B.W.)', *E.J.*, 2001, p. 2-24; B. Putzeys, 'L'adultère - cause de divorce', *Div. Act.*, 1997, p. 50-59; P. Senaeve, 'Over lesbisch spel: al dan niet overspel?', *E.J.*, 1999, p. 18-22; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven/Amersfoort: Acco, 2000, p. 626.

36. Is an intentional fault required?

Grave offences used to be defined as actions that offend the sense of honour or esteem of his / her partner. Generally, however, the courts follow a more liberal interpretation and call any behaviour by a spouse by which he / she severely falls short of the marital duties, other than the behaviour specifically mentioned under the law (adultery, acts of violence and abuse), a "grave offence". In this way, a fairly non-limited scale of acts falls under this definition. The law does not provide any further guidance in this respect and the case law[23] must thereby be looked at.

An intentional fault is not required. It is not necessary that one spouse acted with the intention of offending the other spouse. The fact that he / she knew or reasonably should have known that the consequences of his / her actions would be offensive to the other spouse, is sufficient.[24]

37. Should the fault be offensive to the other spouse? Does the prior fault of one spouse deprive the guilty / fault-based nature of the shortcomings of the other?

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[23] E.g. Cass. 06.10.1988, *Arr. Cass.* 1988-89, 151; Court of Appeal of Brussels 04.10.1969, *Rev. dr. fam.* 1970, 39; Court of Appeal of Brussels 19.01.1982, *Rev. not. b.* 1982, 25; Court of Appeal of Brussels 28.06.1988, *R.W.* 1988-89, 340; Court of Appeal of Mons 04.10.1990, *Journ. proc.* 1991, 195, 28; Court of Appeal of Brussels 27.01.1998, *A.J.T.* 1998-99, 57. For more information on the answer to Question 35, see: M. Hustinx, 'La notion de faute dans le divorce, aperçu de la jurisprudence de la Cour d'Appèl de Mons, note to Court of Appeal of Mons, 12.06.2001', *Div. Act.*, 2001, p. 137; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, pp. 626-627 and 636-639; J. Tremmery, 'Grove beledigingen in echtscheiding', *T.W.V.R.*, 2000, p. 28-30.

[24] Cass. 18.09.1981, *R.W.* 1981-82, 1743; Cass. 26.02.1990, *R.W.* 1989-90, 1223. For more information on the answer to Question 36, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 631.

An action or omission can only be relied upon as a ground for divorce when it is offensive to the injured spouse, i.e. when his / her honour, dignity, feelings... have been harmed by it. Individual circumstances should be taken into account.[25] Concerning adultery, some of the case law maintains that the mere fact of adultery is sufficient to grant a divorce on the ground of fault, without having to additionally prove its offensive nature. The majority of the case law, however, agrees that adultery in itself is a grave shortcoming, but that its offensive nature nevertheless has to be prove [26] The offensive character must be evaluated at the time of the action / omission or at the time when the other spouse discovers its existence, and not at the time of initiating the divorce procedure nor of the judgment.[27]

Nothing can compensate for such a fault ; the prior fault of one spouse does not dectract from the guilty nature of the shortcomings of the other. [28] Nevertheless, the court will always take into account the individual circumstances of every case, which means that, indirectly, the behaviour of the other spouse may play a role.[29] For example, in the case of adultery, the offensive character has been considered not to have been established when the other spouse had lost all affection and respect towards the adulterous spouse, and had effectively and / or financially seperated from him / her.[30] In any case, only prior faults by the other spouse may be of importance in determining that the

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25 Cass. 24.06.1982, *J.T*. 1982, 815.

26 Cass. 03.06.1936, *Pas*. 1936, I, 137; Cass. 29.03.1973, *Arr. Cass*. 1973, 763; Cass. 08.03.1984, *Arr. Cass*. 1983-84, 872; Cass. 17.01.1985, *Arr. Cass*. 1984-85, 648; Cass. 04.09.1986, *Arr. Cass*. 1986-87, 23; Court of Appeal of Mons 06.03.1999, *Rev. trim. dr. fam*. 2000, 272

27 Court of Appeal of Antwerp 30.01.1980, *Rev. trim. dr. fam*. 1981, 24.

28 Cass. 05.11.1965, *Pas*. 1966, I, 302.

29 Cass. 09.11.2001, *Rev. trim. dr. fam.* 2002, I, 81.

30 Court of Appeal of Liege 17.02.1997, *J.T*. 1997, 521; Court of Appeal of Liege 26.01.2000, *J.L.M.B*. 2000; Court of Appeal of Brussels 29.02.2000; *Rev. trim. dr. fam*. 2001, 102; 1158; Court of Appeal of Antwerp 04.04.2001, *A.J.T*. 2001-02, 767

subsequent faults of the other spouse are not grave enough to grant a divorce, never later faults.[31]

38. To obtain a divorce, is it necessary that the marriage was of a certain duration?

No.

39. Does the parties' reconciliation prevent the innocent spouse from relying upon earlier facts as a ground for divorce?

The request for a divorce will expire with the reconciliation of the parties after the facts that led to the request or after the request itself. However, when the guilty spouse again indulges in the offensive behaviourafter the reconciliation, the contract of reconciliation is retroactively terminated and the other spouse may again rely upon the earlier facts to support his / her request for a divorce (Articles 1284 and 1285 Belgian Judicial Code).[32]

40. How is the fault proved?

The fault is proved by means of the general rules which apply to evidence (Article 1254(1) Belgian Judicial Code). Principally, it may be proved by all means (written evidence, testimony, a confession,

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31 Court of Appeal of Mons 11.10.1990, *Pas.* 1991, II, 41; Court of Appeal of Mons 22.09.1998, *Rev. trim. dr. fam.* 1999, 510. For more information on the answer to Question 37, see: C. Jonckers, 'Over de pot en de ketel: het beledigend karakter van wederzijds overspel', *A.J.T.*, 2000-01, p. 440-444; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, pp. 631-634, 635.

32 For more information on the answer to Question 39, see: P. Senaeve, 'Over de verzoening als grond van ontoelaatbaarheid van de echtscheidingsvordering', note to Court of Appeal of Antwerp 10.02.1998, *E.J.*, 1998, p. 130; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 643.

suspicions, expert reports, hearing of the parties, photographs, audio-recordings ...) except by a decisive oath.[33] The case law has imposed some limitations on this means of proof, e.g. a confession is often only allowed as permissive evidence.[34]

The *actori incumbit probation* principle (Article 870 Belgian Judicial Code) obliges the claimant to prove the faults wich he/she is relying upon in order to obtain a divorce. The facts which gave rise to the fault and their grave and offensive character must be proved. The respondent may try to object that he/she was not responsible for his/her actions due to a limited understanding at the time of committing the actions in question.

When the fault is adultery, there is a refutable presumption of offensiveness, so it is up to the respondent to prove the individual circumstances that remove the offensive nature of the adultery.[35] In practice, adultery is proved by a bailiff's conclusion, the other faults will usually be proved by witnesses.[36]

41. Are attempts at conciliation, information meetings or mediation attempts required?

No such attempts are required. Before the law of 30 June 1994 a preliminary conciliation procedure was obligatory. It was an essential

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33 Cass. 27.04.1939, *Pas.* 1939, I, 214.

34 Cass. 07.03.1975, *Arr. Cass.* 1975, 767; Court of Appeal of Liege 18.11.1997, *J.L.M.B.* 1998, 374; Court of Appeal of Brussels 12.02.1998, *Rev. trim. dr. fam.* 1999, 487; Court of First Instance of Charleroi 23.11.1987, *J.T.* 1988, 587; Court of First Instance of Arlon 24.01.1992, *T.B.B.R.* 1993, 390.

35 Cass. 04.09.1986, *Arr. Cass.* 1986-87, 23.

36 For more information on the answer to Question 40, see: P. Senaeve, *Compendium van het Personen- en* Familierecht, Leuven/Amersfoort: Acco, 2000, pp. 634-635 and 644-646; K. Tobback, 'De bekentenis als bewijsmiddel in een echtscheiding op grond van overspel', *E.J.*, 1997, p. 30-32.

part of the divorce procedure on the ground of fault and separation, and led to the annulment of the conciliation procedure itself and any following procedure if no attempt at conciliation was made. Since the law of 30 June 1994 an optional conciliation attempt is possible at the introductory session. The judge will attempt conciliation when both spouses appear before him in person at the introductory session and at least one of them requests him to do so (Article 1258(1) Belgian Judicial Code).

Concerning mediation attempts and information meetings, the same rules are applicable as in the case of a divorce on the ground of consent (see Question 27). An important innovation in this mediation procedure is that parties can agree, through the intervention of the mediator, to convert the divorce procedure initiated on the ground of fault or separation, into a divorce procedure by consent (Article 1259 Belgian Judicial Code).[37]

42. Can the divorce application be rejected or postponed due to the fact that the dissolution of the marriage would result in grave financial or moral hardship to one spouse or the children? If so, may the competent authority invoke this on its own motion?

No.

43. Is it possible to pronounce a judgment against both parties, even if there was no counterclaim by the respondent?

[37] For more information on the answer to Question 41, see: G. Bateman and C. Bamps, *De nieuwe echtscheidingsprocedure*, Deurne: Kluwer, 1994, XII.

No, according to the procedural law in divorce cases, the court is not allowed to pronounce a judgment against both parties, if there was no counterclaim by the respondent. The court may not decide *ultra petita*, which means that it cannot decide autonomously, but is limited in its decisions by what is requested by the parties. The respondent is always allowed to introduce a counterclaim by which he/she attempts to obtain a divorce against the claimant, or against both spouses.[38]

3. Divorce on the ground of irretrievable breakdown of the marriage and/or separation

44. How is irretrievable breakdown established? Are there presumptions of irretrievable breakdown?

The breakdown is irretrievable when one of the spouses has definitely lost all affection for the other spouse and has renounced every form of marital life with that other spouse. A proved separation of more than two years and the initiation of the divorce procedure provide a refutable presumption of the irretrievable breakdown (see Question 48(a)).[39]

45. Can one truly speak of a non-fault-based divorce or is the idea of fault still of some relevance?

(a) Separation

[38] For more information on the answer to Question 43, see: A. Dulez, *Le droit du divorce*, Brussels: De Boeck & Larcier, 1996, p. 120.

[39] For more information on the answer to Question 44, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven/Amersfoort: Acco, 2000, p. 671.

In the case of separation for more than two years, a divorce can be obtained without reference to fault. As far as the ground for divorce is concerned, one can speak of a non-fault - based divorce. Nevertheless, the notion of fault does reappear in the consequences of the divorce. The difference with a divorce on the ground of fault, is that the fault is determined not by the ground for the divorce itself, but autonomously. In order to determine this, there is a legal presumption *juris tantum* that the spouse who obtains the divorce, is considered to be the guilty party (Article 306 Belgian Civil Code). This follows from the presumption that in most cases when a relationship has failed, there is a guilty spouse and in the majority of those cases, it will be the guilty spouse that petitions for a divorce on this ground (whereas the innocent spouse may prefer a divorce on the ground of fault). This presumption is only valid for certain material consequences of the divorce, e.g. maintenance (Articles 299, 300 and 301 Belgian Civil Code - see the reference in Article 306 Belgian Civil Code). Thus, the divorce will be obtained against the claimant, while it remains a non-fault - based form of divorce.

The claimant can refute this presumption against him / her by proving that the separation was caused by the fault(s) of the respondent (Article 306 *in fine* Belgian Civil Code). The court may also take into consideration faults which date back long before the beginning of the separation, [40] or faults from during the separation, when such behaviour is are responsible for its continuation.[41] The faults do not need to be grave as in a divorce on the ground of fault. Also less serious faults may be considered. [42] The claimant can either prove that the separation was based solely on the faults of the respondent, or he / she can prove that it was also based on his / her faults. In the former case,

40 Cass. 16.04.1993, *Fund. Rechtspr.* 1993, nr. 9, p. 5.
41 Cass. 04.01.1980, *R.W.* 1979-80, 2702; Cass. 13.12.1990, *R.W.* 1990-91, 1271.
42 Cass. 04.01.1980, *Pas.* 1980, I, 518; Cass. 23.04.1982, *R.W.* 1983-1984, 180.

the divorce may be obtained against the respondent, in the latter case, it may be obtained against both spouses.

(b) Separation due to mental illness

In this case, there is a true non-fault-based divorce. Considering both the ground for and the consequences of the divorce, there is no reference to fault whatsoever.[43]

46. To obtain the divorce, is it necessary that the marriage was of a certain duration?

No.

47. How long must the separation last before divorce is possible?

(a) Separation

The separation must last for two years before the initiation of the divorce procedure. The separation during the divorce procedure is not

[43] For more information on the answer to Question 45, see: A.M. Boudart, 'La trilogie de la présomption de faute', *Div. Act*. 2001, p. 44; N. Dandoy, 'Divorce pour séparation de fait: l'incidence des torts réciproques des époux', note to the Court of Appeal of Liege, 27.04.1998 and the Court of Appeal of Liege, 30.06.1998, *Rev. trim. dr. fam.*, 1999, p. 642-649; C. De Busschere, 'Art. 306 B.W. De weerlegging van het wettelijk schuldvermoeden lastens de echtgenoot die de echtscheiding op grond van feitelijke scheiding vordert, en de (on)bevoegdheid ratione materiae van de vrederechter ter zake', *T.B.B.R.*, 1994, pp. 347-357 and 377-382; N. Gallus, *Le divorce pour cause de séparation de fait*, Antwerp: Kluwer, 2000, p. 53; N. Maasger, 'Divorce pour cause de séparation, Actualité du droit du divorce', *Rev. Dr. ULB*, 1996, p. 112; G. Hiernaux, 'Divorce et séparation de corps - Chronique de jurisprudence 1989-1999', *Les dossiers du Journal des Tribunaux*, Brussels: Larcier, 2001, p. 81; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, pp. 669 and 674-677.

taken into account. It is not necessary, however, that the irretrievable breakdown existed at the start of the period of separation. In the case of a divorce initiated on the ground of fault, that has been transformed into a divorce on the ground of separation by means of the pleadings (see Question 32), the two–year period must have been completed at the time of the deposition of those pleadings, and not at the time of the instigation of the initial procedure.

The existence and length of the separation may be proved by all means, except by a decisive oath. A confession by the respondent may be used as proof when there has been no collusion between the spouses. Usually, the proof will consist of an excerpt from the population registers that states that both spouses have occupied different households for over two years.

(b) Separation due to mental illness

The mental illness in itself does not constitute a ground for divorce , but only as far as it has led to a separation of more than two years.[44]

48. Does this separation suffice as evidence of the irretrievable breakdown?

(a) Separation

The separation can only lead to a divorce as long as the irretrievable breakdown is established. The proved separation of more than two years and the initiation of a divorce procedure provide a refutable presumption of the irretrievable breakdown. This could mean that the respondent may try to invoke concrete factors that indicate that a resumption of the relationship is possible. A sincere wish on the part of

[44] For more information on the answer to Question 47, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, pp. 670 and 680.

the respondent to resume marital life, is not sufficient to reject the application for divorce based on irretrievable breakdown.[45] In practice, however, the possibility that a divorce on the ground of separation is refused because although the two-year seperation has been proved, the irretrievable breakdown has not, does not occur.

(b) Separation due to mental illness

Also in the case of a separation due to mental illness, the irretrievable breakdown of the marriage must be established.[46]

49. In so far as separation is relied upon to prove irretrievable breakdown,

(a) Which circumstances suspend the term of separation?

The separation must be continuous.[47] However, occasional meetings between the spouses, e.g. concerning the children, events in the family, or the administration of the material property, do not suspend the term.[48] Neither do occasional meetings involving sexual intercourse.[49]

45 Court of Appeal of Brussels 26.10.1982, *Pas*. 1982, II, 123.
46 For more information on the answer to Question 48, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, pp. 671-672, 681.
47 Court of Appeal of Antwerp 03.06.1981, *R.W*. 1983-84, 2037.
48 Cass. 25.11.1976, *R.W*. 1977-78, 223.
49 Court of Appeal of Liege 30.11. 1987, *Rev. Trim. Dr. Fam*. 1990, 81.

(b) Does the separation need to be intentional?

(i) Separation: Although it is not expressly prescribed in the law , the separation must be intentional on the part of at least one spouse. Coincidental (e.g. by long stays abroad) or forced separations (e.g. by imprisonment, hospitalisation, etc.), as long as there is no intentional separation on the part of one spouse, are not considered to be intended.[1]

(ii) Separation due to mental illness: In the case of a separation due to the mental illness of one spouse, the separation obviously does not have to be intentional on the part of the mentally ill spouse. However, most of the legal literature does advocate an intentional separation on the part of the healthy spouse.[1]

(c) Is the use of a separate matrimonial home required?

The law does not define "separation". Separate households is a requirement, although this does not necessarily imply the use of separate residences. It is very well possible to still inhabit the same dwelling, as long as each spouse establishes a proper and separate household within it. Remaining and profound disagreements or enmity between the spouses cannot lead to a divorce when this has not resulted in having separate households.

50. Are attempts at conciliation, information meetings or mediation attempts required?

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50 Cass. 17.11.1983, *Arr. Cass.* 1983-84, 317.

51 For more information on the answer to Question 49(b), see: C. De Busschere, *De feitelijke scheiding der echtgenoten. De echtscheiding op grond van feitelijke scheiding*, Antwerp: Kluwer, 1985, p. 430-431.

The same rules are applicable as in case of a divorce on the ground of fault (see Question 41).

51. Is a period for reflection and consideration required?

No.

52. Do the spouses need to reach an agreement or to make a proposal on certain subjects? If so, when should this agreement be reached? If not, may the competent authority determine the consequences of the divorce?

A divorce on the ground of separation follows the same rules regarding the claim, the procedure, the proof and the effects of the judgment as in the case a of divorce on the ground of fault. Thus, no agreement needs to be reached and the court determines the consequences of the divorce. It is however allowed, as in the case of divorce on the ground of fault, to reach an agreement as to the preliminary measures concerning the person, the maintenance and the assets of the spouses and/or their children, instead of the court determining such issues (Article 1258(2) Belgian Judicial Code).[52]

53. To what extent must the competent authority scrutinize the reached agreement?

The optional agreement between the spouses on the preliminary measures, that may be either exhaustive or partial, must be ratified by the court. When there is an agreement concerning the children, the court will decide when to ratify it (Article 1258(2) Belgian Judicial Code).

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[52] For more information on the answer to Question 52, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 673.

54. Can the divorce application be rejected or postponed due to the fact that the dissolution of the marriage would result in grave financial or moral hardship to one spouse or the children? If so, can the competent authority invoke this on its own motion?

(a) Separation

The obtaining of a divorce on this ground requires that the material situation of the common minor children may not extensively deteriorate (Article 232(1) Belgian Civil Code). This must be determined on the day when the judgment is pronounced.[53] Whereas this condition does not exist for the other grounds for divorce, it is remarkable since the parental duties and prerogatives are not based on marriage. Nevertheless, it must be stressed that only the *material* situation of the children is looked at, not any moral or psychological aspects. In practice, however, this condition has hardly any meaning at all. There is no similar proviso regarding the spouse.

(b) Separation due to mental illness

The material situation of the minor children may not extensively deteriorate (Article 232(2) Belgian Civil Code).[54]

C. SPOUSAL MAINTENANCE AFTER DIVORCE

I. General

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53 Court of Appeal of Liege 22.10.1984, *Jur. Liège* 1985, 71; Court of Appeal of Liege 07.01.1985, *Jur. Liège* 1985, 241.

54 For more information on the answer to Question 54, see: A.M. Boudart and F. Ligot, 'Note to the Court of Appeal of Liege 01.02.2001', *Div. Act.*, 2001, p. 144; P. Senaeve, 'Het belang van de kinderen in Article 232 B.W. en het gelijkheidsbeginsel', *E.J.* 2002, p. 31-32.

55. What is the current source of private law for maintenance of spouses after divorce?

Belgian Civil Code, Article 295 – 307 *bis* and Judicial Code, Articles 1288 and 1320 - 1322.

56. Give a brief history of the main developments of your private law regarding maintenance of spouses after divorce.

From 1804 until the law of 1 July 1974, there existed only one article in the Belgian Civil Code concerning maintenance after divorce, namely Article 301 Belgian Civil Code. The maintenance after a divorce on the ground of separation (Article 232(1) Belgian Civil Code) was introduced into Belgian law by the law of 1 July 1974.[55] The applicable articles are Article 306 in conjunction with Article 304 *bis* Belgian Civil Code.

Maintenance after a divorce on the ground of separation due to mental illness (Article 232(2) Belgian Civil Code) was also introduced together with this form of divorce by the law of 1 July 1974. The applicable articles are Article 307 in conjunction with Article 307 *bis* Belgian Civil Code.

By the law of 9 July 1975[56] the regulations on maintenance after divorce on the ground of fault werethoroughly amended and vastly expanded, in order to achieve a more detailed system of regulations on the material consequences for the spouses after a divorce. Until that time, Article 301 Belgian Civil Code had never been modified. With the law of 9 July 1975 a coherent normative system was introduced.[57]

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55 *B.S.* 17.08.1974, err. *B.S.* 26.09.1974.

56 *B.S.* 23.07.1975

57 For more information on the answer to Question 56, see: D. Tillemans, 'Het

57. Have there been proposals to reform your current private law regarding maintenance of spouses after divorce?

There have been proposals to eliminate the discrimination in maintenance payments between a divorce on the ground of separation and on the ground of fault. In the former case, the maintenance may be higher than 1/3 of the income of the debtor, in the latter case this is not allowed. The proposals aim to introduce the 1/3 limit in divorces on the ground of separation as well.[58]

It has also been suggested introduce maintenance that is limited in time[59] Another proposal wants to make a conviction for the abandonment of the family possible as soon as an enforceable order to pay has been served on the debtor of maintenance, whereas now this is only possible when the debtor has not paid voluntarily for two months and there is no further possibility of appeal or review.[60]

58. Upon divorce, does the law grant maintenance to the former spouse?

(a) Divorce on the ground of fault

The granting of maintenance is subject to the criterion of fault: maintenance is reserved for the spouse who has obtained the divorce

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onderhoudsgeld na echtscheiding op grond van fout en op grond van feitelijke scheiding', in: P. Senaeve (ed.), *Echtscheiding* , Leuven: Acco, 1990, p. 221-223.

58 Proposition de loi modifiant l'article 307*bis* du Code Civil, *Doc. Parl.* Chambre 1999-2000, nr. 50-620; Proposition de loi modifiant, en ce qui concerne la pension alimentaire dans le cadre du divorce pour cause de séparation de fait, l'article 370*bis* du Code Civil, *Doc. Parl.* Chambre 1999-2000, nr. 50-869.

59 Proposition de loi modifiant certaines dispositions relatives au divorce, *Doc. Parl*. Chambre 2000-2001, nr. 50-1191.

60 Proposition de loi modifiant l'article 391*bis* du Code Pénal, *Doc. Parl*. Chambre 2000-2001, nr. 50-1218.

and is therefore considered to be the innocent party (Articles 301 and 306 Belgian Civil Code). Maintenance only has to be paid by the guilty spouse. Only the divorced, innocent spouse is entitled to maintenance. When the divorce is obtained against both spouses, in the case of a successful counterclaim, neither spouse will be entitled to maintenance since both are considered to be guilty.[61]

(b) Divorce on the ground of separation

Maintenance will be due by the claimant since he/she is presumed to be the guilty spouse. When the claimant has successfully countered the presumption against him/her (see Question 45), no maintenance will be granted, or, alternatively, maintenance will be due by the respondent when the claimant has managed to completely reverse the presumption.

(c) Divorce by consent

In the case of a divorce by consent, the maintenance is entirely dependent on the agreement between the spouses, which makes the following questions irrelevant for this type of divorce (Article 1288(4) Belgian Judicial Code).

59. *Are the rules relating to maintenance upon divorce connected with the rules relating to other post-marital financial consequences, especially to the rules of matrimonial property law? To what extent do the rules of (matrimonial) property law fulfil a function of support?*

There is no connection whatsoever between the legal rules concerning maintenance upon divorce, on the one hand, and the rules of matrimonial property law, on the other. Maintenance after divorce has

61 Cass. 05.02.1965, *Pas*. 1965, I, 569.

a specific and independent ground. It has a mixed benefit and support character and is partly the consequence of the notion that it is a sanction imposed on the failure to fulfil marital duties (see Question 58).

Maintenance can only be claimed if the spouse cannot obtain the same standard of living as during the period when the spouses lived together (Article 301 §1 Belgian Civil Code). Positive developments as regards the financial position of the spouse who is liable to pay the maintenance since the separation have no influence on the above-mentioned criterion.[62]

60. Do provisions on the distribution of property or pension rights (including social security expectancies where relevant) have an influence on maintenance after divorce?

Yes, in determining whether the innocent spouse can claim maintenance and in determining the amount of maintenance, the income and the possibilities of the innocent spouse are taken into account. "Income" encompasses professional income as well as income obtained within the scope of the distribution of matrimonial property.

61. Can compensation (damages) for the divorced spouse be claimed in addition to or instead of maintenance payments? Does maintenance also have the function of compensation?

(a) Divorce on the ground of fault

No additional compensation can be claimed alongside maintenance.

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[62] Cass. 11.10.1984, *Arr. Cass.* 1984-85, 244. For more information on the answer to Question 59, see: P. Senaeve, *Compendium van het personen- en familierecht*, Leuven: Acco, 2000, p. 658.

Maintenance after a divorce on the ground of fault has a mixed benefit and support character. Maintenance will also have the function of compensation since this kind of divorce is seen as a sanction for failing to fulfil marital obligations.[63]

(b) Divorce on the ground of separation

Due to the presumption of guilt that is laid upon the spouse who obtains the divorce (see Question 45), the same rules are applicable as in the case of a divorce on the ground of fault.

(c) Divorce on the ground of separation due to mental illness

Since this is the only true non-fault-based type of divorce in Belgian law, the granting of maintenance will take place without any reference to fault. There is no presumption of fault and the maintenance does not have any compensatory function. According to their respective financial positions, either the mentally ill person or the sane ex-spouse may be granted maintenance (Articles 307 and 307 *bis* Belgian Civil Code).[64]

62. Is there only one type of maintenance claim after divorce or are there, according to the type of divorce (e.g. fault, breakdown), several claims of a different nature? If there are different claims explain their bases and extent.

According to the type of divorce there are some differences in the maintenance claim after divorce. This distinction has been made

63 Cass. 19.05.1995, *E.J.* 1995, 89, note J. Roodhooft.

64 For more information on the answer to Question 61, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, pp. 658, 677, 683-684; K. Vanlede, 'De onderhoudsuitkering tussen (ex-) echtgenoten tijdens en na een echtscheidingsprocedure op grond van bepaalde feiten', in: P. Senaeve, (ed.), *Onderhoudsgelden*, Leuven: Acco, 2001, p. 44-47.

throughout the questionnaire. The differences can be located at three levels: (i) is a maintenance, claim possible, (ii) who can claim the maintenance, and (iii) are there restrictions in the amount of the maintenance?

Ground	Fault	Two year separation	Separation due to mental illness	By consent
Possibility?	Yes	Yes	Yes	Conventional
Who ?	Innocent spouse	Innocent spouse	Both spouses	Both spouses
Limits ?	Max. 1/3 of the income and assets of the guilty spouse	No max. limit, but see the judgment of the Constitutional Court (see Question 72)	No max. limit, but see the judgment of the Constitutional Court (see Question 72)	No max. limit.

63. *Are the divorced spouses obliged to provide information to each other spouse and/or to the competent authority on their income and assets? Is this right to information enforceable? What are the consequences of a spouse's refusal to provide such information?*

There is no legal obligation to provide information to the other spouse concerning their income or assets, nor to the competent authority. Under the legal procedure it is possible that the judge will oblige both spouses to provide information about their income and assets. In that way the right to information is enforceable and the spouses can be

compelled to provide the required information (Article 301 *bis* Belgian Civil Code in conjunction with Article 221 Belgian Civil Code in conjunction with Article 1253 *quinquies* Belgian Judicial Code). There is no direct sanction which can be imposed on a spouse's refusal to provide such information, but the court will thereby necessarily suspect additional means and take this into account when determining the amount of maintenance.

II. Conditions under which maintenance is paid

64. *Do general conditions such as a lack of means and ability to pay suffice for a general maintenance grant or do you need specific conditions such as age, illness, duration of the marriage and the raising of children? Please explain.*

There is a general maintenance claim by the innocent spouse who does not attain the same standard of living as during the period of cohabitation, and no specific conditions have any influence. There are three general criteria by which the amount of maintenance is fixed: (i) the standard of living during the cohabitation, (ii) the claimant's income and the possibilities to gain such an income, and (iii) the income of the debtor. Specific conditions such as age, illnessthe raising of children, etc. will only have an indirect effect on the above-mentioned criteria. For example, when the claimant never sought gainful employment during the marriage, preferring instead to remain at home to raise the children, he or she has no income and the possibilities of gaining any income in order to obtain the same standard of living as during the cohabitation become rather limited . These factors will therefore be taken into account when granting maintenance.

65. *To what extent does maintenance depend on reproachable behaviour or fault on the part of the debtor during the marriage?*

As already mentioned, the granting of maintenance after divorce is principally determined by the criterion of fault .

(a) Divorce on the ground of fault

In the case of a divorce on the ground of fault maintenance can only be claimed by the innocent spouse and can only be paid by the guilty spouse.

(b) Divorce on the ground of separation

In the case of a divorce on the ground of two years' separation, the claimant is presumed to be the guilty spouse (Article 306 Belgian Civil Code). Maintenance will be due by the former spouse who is presumed to be the guilty party, the spouse against whom the divorce is obtained. In that respect, it indirectly depends on fault during the marriage. This presumption may nevertheless be reversed (see Question 45).

(c) Divorce on the ground of separation due to mental illness

In case of a divorce on the ground of separation based on mental illness, the fault criterion is not applicable. Nevertheless, the spouse who lacks sufficient means to be able to attain the same standard of living as during the period of cohabitation, can claim maintenance (Article 307 Belgian Civil Code). Here the maintenance only has an alimentary character, which means that the financially stronger ex-spouse will need to pay maintenance for the financially weaker one, in so far as he/she does not reach an equal standard of living as during the cohabitation.

(d) Divorce by consent

In the case of a divorce by consent the fault criterion is absent due to the fact that this type of divorce has a purely conventional character.[65]

66. Is it relevant whether the lack of means has been caused by the marriage (e.g. if one of the spouses has give up his/her work during the marriage)?

The fact that the lack of means has been caused by the marriage is not relevant as such, but may be taken into account when determining the claimant's possibilities to earn a proper income, e.g. when the wife has given up her job in order to raise the children and has been non-active in the employment market for many years (see Question 70).

67. Must the claimant's lack of means exist at the moment of divorce or at another specific time?

During the marriage, Article 213 Belgian Civil Code and Article 221(1) Belgian Civil Code govern the duties of aid and assistance between the spouses. During the divorce procedure, they continue to be the basis awarding maintenance. Only after the dissolution of the marriage, will the question be raised whether the innocent spouse is entitled to maintenance, based on his/her current means and possibilities. After the divorce, the maintenance may be adapted to changed circumstances, i.e. the granting of maintenance for the first time is still possible long after the divorce, when the innocent spouse lacks sufficient means at that time (see Question 70).[66]

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65 For more information on the answer to Question 65, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven/Amersfoort: Acco, 2000, pp. 659, 674-677 and 683-684.

66 For more information on the answer to Question 67, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven/Amersfoort: Acco, 2000, pp. 658, 661.

III. Content and extent of the maintenance claim

68. Can maintenance be claimed for a limited time-period only or may the claim exist over a long period of time, maybe even lifelong?

There is no provision, as such, for limiting maintenance in time - principally it is granted indefinitely. Nevertheless, the court may still impose a limitation, e.g. when it takes into account the short duration of the marriage, to state that the innocent spouse, given his / her income and possibilities, will after a certain period of time be able to support him / herself at a similar standard of living as during the marriage.[67]

69. Is the amount of the maintenance granted determined according to the standard of living during the marriage or according to, e.g. essential needs?

The amount is determined according to the standard of living during the period of cohabitation (Article 301(1) Belgian Civil Code) (see Question 70).

70. How is maintenance calculated? Are there rules relating to percentages or fractional shares according to which the ex-spouses' income is divided? Is there a model prescribed by law or competent authority practice?

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67 Cass. 15.03.1991, *R.W.* 1991-1992, 45; Court of First Instance of Malines 07.12.1978, *R.W.* 1979-80, 1386. For more information on the answer to Question 68, see: J. Gerlo, 'De beperking van de uitkering na echtscheiding in de tijd. Een doorbraak?', *R.W.*, 1991-92, p. 45-47; J. Roodhooft, 'De beperking in de tijd van de onderhoudsuitkering tussen ex-echtgenoten na echtscheiding op grond van feiten, *E.J.*, 1995, p. 118-121; J. Roodhooft, *De* gerechtelijke *begroting van de onderhoudsuitkering tussen ex-echtgenoten. Rechtsvergelijkende studie en proeve van model*, Antwerp: Kluwer, 1996, pp. 130-132, 147 and 152; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 663-664.

(a) Divorce on the ground of fault

(i) General: The calculation of maintenance will take place in three steps; first, the standard of reference is established, this is the amount that the claimant is potentially entitled to; second, the question is asked whether the claimant cannot reach this standard according to his / her own means; third, when this is not the case, the financial abilities of the debtor are established, in order to determine whether they are sufficient.

1. *The reference*: The innocent spouse is entitled to maintenance when he / she is not able to maintain an equal standard of living as during the period of cohabitation (Article 301 §1 Belgian Civil Code), no matter how high it was. Here, legal literature does not agree on the exact reference standard. According to some, it is the average standard of living from the wedding until the separation, according to others only the fairly recent standard of living is to be taken into account (e.g. in the case of a 25-year marriage, only the last few years, or in practice often only the last year, should be considered). The years of separation before the divorce are generally not taken into account,[68] nor are positive developments in the means of the debtor during the separation (see Question 79).[69] However, additional costs since the separation, which are often a direct result thereof , must be considered.[70]

2. The means of the claimant: To establish the means of the claimant, both his / her current income, of whatever nature (e.g. professional, real estate, etc.), as well as his / her possibilities to obtain an income, even if he / she has never worked during the marriage, are to be considered.

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68 Cass. 26.11.1999, *E.J.* 2000, 54, note P. Senaeve.
69 Cass. 11.10.1984, *Arr. Cass.* 1984-85, 244.
70 Cass. 23.11.1978, *Arr. Cass.* 1978-79, 332; Cass. 28.09.1989, *Arr. Cass.* 1989-90, 132.

Only when the current income and / or possibilities to obtain such an income do not suffice to equal standard enjoyed during the marriage is, is he / she entitled to maintenance. It is possible for maintenance to be first awarded a relatively long time after the divorce, when at this point in time the former spouse is not able to attain this standard, e.g. because of his / her retirement.

3. *The means of the debtor*: To establish the means of the debtor, only his / her current income and costs are considered, not his / her future possibilities (Article 301 §4 Belgian Civil Code), except in the case of fraud, e.g. deliberately enforced poverty.[71] The considered costs also include maintenance for children, even the children of a new spouse who are not part of his / her family (Article 208 Belgian Civil Code).[72] The Court of Cassation maintains that the financial capacity of the debtor should be evaluated at the time of the dissolution of the marriage, and not at the time when maintenance is awarded, which may be much later.[73] This view is nevertheless controversial, especially since the Law of 9 July 1975 , which introduced flexibility concerning the amount of maintenance.[74] In any case, an improvement in the situation of the debtor after the dissolution of the marriage may not be taken into account, unless this is necessary to ensure that the claimant enjoys an equal standard of living as during the marriage.[75]

(ii) Fractional shares: The amount of maintenance to be awarded , is limited to 1 / 3 of the earnings of the debtor (Article 301, §4 Belgian Civil Code) (see Question 72(a)).

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71 Cass. 20.12.1973, *Arr. Cass.* 1974, 467.
72 Cass. 21.04.1983, *J.T.* 1983, 663.
73 Cass. 18.11.1965, *Pas.* 1966, I, 373.
74 Court of Appeal of Antwerp 05.01.1988, *Turnh. Rechtsl.* 1989, 13.
75 Cass. 11.06.1992, *J.T.* 1992, 676.

(iii) Calculation Model: There are several models by which maintenance may be calculated, none of which is prescribed by law. One of the models is the "Roodhooft"method, named after its developer.

(b) Divorce on the ground of separation

See divorce on the ground of fault. The 1/3 limitation is not applicable in the case of a divorce on the ground of separation (Article 307 *bis* Belgian Civil Code) (see Question 72(b)).

(c) Divorce on the ground of separation due to mental illness

See divorce on the ground of separation.[76]

71. What costs other than the normal costs of life may be demanded by the claimant? (e.g. Necessary further professional qualifications? Costs of health insurance? Costs of insurance for age or disability?)

Since the amount is determined according to the standard of living during the period of cohabitation, all the costs, including possible further education, are covered by the general maintenance grant.

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[76] For more information on the answer to Question 70, see: S. Brouwers, 'De conventionele kwantificering van onderhoudsgelden', *Not. Fisc. M.* 1998, p. 66-68; N. Dandoy, 'Critères et méthodes de calcul des pensions alimentaires entre époux et après divorce', *Rev. trim. dr. fam.*, 2001, p. 605-606; W. Pintens, *Ehescheidung und Unterhalt im Belgischen Recht*, Regensburg: *pro manuscripto*, October 2002; J. Roodhooft, *De gerechtelijke begroting van de onderhoudsuitkering tussen ex-echtgenoten. Rechtsvergelijkende studie en proeve van model*, Antwerp: Kluwer, 1996; J. Roodhofft, *Calcul des pensions alimentaires entre ex-époux*, Brussels: Larcier 2000, p. 137; J. Roodhooft, *Alimentatierekenen tussen ex-echtgenoten*, Brussels: Larcier 2000, p. 145; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven/Amersfoort: Acco, 2000, p. 659-663; C. Van Gysel and J.E. Beernaert, *Etat actuel du droit civil et fiscal des obligations alimentaires*, Brussels: Kluwer, 2001, p. 35.

72. Is there a maximum limit to the maintenance that can be ordered?

(a) Divorce on the ground of fault

The amount of maintenance to be awarded , is limited to 1/3 of the earnings of the debtor (Article 301(4) Belgian Civil Code). This means that the same standard of living will not be ensured to the innocent spousein all cases. The 1/3 limit is calculated on a net basis, which means after the deduction of social and fiscal payments.[77] Other obligations, e.g. towards the children, are not taken into account. It is only calculated on an income basis, not on a property or goods basis.[78]

(b) Divorce on the ground of separation

The 1/3 limit is not applicable in the case of divorce on the ground of separation (Article 307 *bis* Belgian Civil Code). According to the law, there is no maximum limit. Here the *ratio legis* is that in this case the innocent spouse has been forced into a divorce. The rule under article 307 *bis* of the Belgian Civil Code has been condemned by the Constitutional Court as being discriminatory and contrary to the principle of equal rights,[79] and it has been proposed to amend the law on this point (see Question 57). With reference to this judgment by the Constitutional Court the judge has the choice between following the judgment or asking the Constitutional Court a new prejudicial question concerning the matter. In practice, however the courts no longer apply this rule and never award a maintenance that which exceeds the 1/3 limit.

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77 Cass. 11-06-1987, *Arr.* Cass. 1986-87, 1397.

78 Cass. 23.04.1992, *R.W.* 1992-93, 412.

79 Const. Ct. 03.05.2000, *B.S.* 05.07.2000, *E.J.* 2000, 78, note K. Vanlede.

(c) Divorce on the ground of separation due to mental illness

See divorce on the ground of separation.[80]

73. Does the law provide for a reduction in the level of maintenance after a certain time?

No, but a change is always possible if circumstances have changed (see Question 77).

74. In which way is the maintenance to be paid (periodical payments? payment in kind? lump sum?)?

(a) Divorce on the ground of fault

Normally, the maintenance will be paid in periodical payments. There are two exceptions to this rule, in which case the periodical payments may be replaced by a lump-sum payment (Article 301(5) Belgian Civil Code): i) the spouses may agree, either during the divorce procedure or after the divorce, to a lump-sum payment. The agreement must be

[80] For more information on the answer to Question 69, see: S. Demars, 'Développements récents en matière de divorce pour cause de séparation de fait: analyse de la loi du 16.04. 2000 et de l'arrêt de la Cour d'arbitrage du 3 mai 2000', *Rev. trim. dr. fam.*, 2000, p. 319-352; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco 2000, pp. 663 and 678-679; P. Senaeve, 'Niet-toepasselijkheid van één derde-grens is discriminatoir', *E.J.*, 2002, p. 15-16; A-Ch. Van Gysel, 'La pension après divorce pour cause de séparation de fait de plus de cinq ans peut-elle constitutionellement dépasser la limite du tiers des revenus du débiteur?', note to the Court of Appeal of Brussels 11.05.1999, *Div. Act.*, 1999, p. 136; K. Vanlede, 'De ongelijke behandeling van onderhoudsschuldenaars na echtscheiding op grond van feitelijke scheiding in het licht van het Arbitragehofarrest van 03.05.2000', *E.J.*, 2000, p. 81-84; K. Vanlede, 'De onderhoudsuitkering tussen (ex-)echtgenoten tijdens en na een echtscheidingsprocedure op grond van bepaalde feiten', in: P. Senaeve, (ed.), *Onderhoudsgelden*, Leuven: Acco, 2001, p. 49-53.

ratified by the court, which will check whether both parties have freely agreed thereto, without however checking the underlying motives, and ii) the court may impose a lump-sum payment when this is requested by the debtor. In this case, the capitalisation rules must be followed. In practice, a lump-sum payment will very rarely occur.

(b) Divorce on the ground of separation

There is controversy in the case law concerning whether or not the-lump sum payment is a possibility in the case of a divorce on the ground of separation. Some maintain that there is an explicit reference in Article 306 Belgian Civil Code to Article 301 Belgian Civil Code, and that therefore a lump-sum payment is indeed possible. Others claim that, given the fact that in this case maintenance does not have an indemnifying function but only one of support, there is no possibility of a lump-sum payment. A lump-sum payment is a settlement out of court by which the relationship between the parties is permanently regulated, and the strict support function of maintenance is contrary to such a settlement.

(c) Divorce on the ground of separation due to mental illness

A court-imposed lump-sum payment requested by the debtor is not possible in the case of a divorce on the ground of separation due to mental illness, given the fact that there is no reference in Article 307 and 307 *bis* Belgian Civil Code to Article 301 Belgian Civil Code. Moreover, it is generally accepted that no compensation is intended in this case.[81]

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[81] For more information on the answer to Question 74, see: C. De Busschere, *De feitelijke scheiding der echtgenoten. De echtscheiding op grond van feitelijke scheiding*, Antwerp: Kluwer, 1985, pp. 386-390 and 445-446; J. Roodhooft, *De gerechtelijke begroting van de onderhoudsuitkering tussen ex-echtgenoten. Rechtsvergelijkende studie en proeve van model*, Antwerp: Kluwer, 1996, pp. 115, 143-145 and 151; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, pp. 664, 684 and 786; K.

75. Is the lump sum prescribed by law, can it be imposed by a court order or may the claimant or the debtor opt for such a payment?

See Question 74.

76. Is there an (automatic) indexation of maintenance?

(a) Divorce on the ground of fault

The court that awards the maintenance must order it to be automatically adjusted to the consumer price index, even without a request to this effect by the claimant (Article 301(2) Belgian Civil Code).[82] A standard formula is provided by the law, but the court may decide on another adjustment method if it so wishes.[83]

(b) Divorce on the ground of separation

The automatic indexation of Article 301(2) Belgian Civil Code is also applicable in the case of a divorce on the ground of separation.[84]

(c) Divorce on the ground of separation due to mental illness

In the case of a divorce on the ground of separation due to mental illness, there is no automatic indexation since Article 307 Belgian Civil Code does not contain any reference to Article 301 Belgian Civil Code.

Vanlede, 'De onderhoudsuitkering tussen (ex-)echtgenoten tijdens en na een echtscheidingsprocedure op grond van bepaalde feiten', in: P. Senaeve (ed.), *Onderhoudsgelden*, Leuven: Acco, 2001, p. 54.

82 Cass. 07.05.1998, *E.J.* 1999, 22, note K. Broeckx; Cass. 05.11.1998, *R.W.* 1999-2000, 477.

83 Cass. 23.10.1981, *Arr. Cass.* 1981-82, 288.

84 Cass. 05.11.1998, *R.W.* 1999-00, 477

Therefore, any indexation by the court is only possible at the request of the parties.[85]

77. How can the amount of maintenance be adjusted to changed circumstances?

(1) Divorce on the ground of fault

The original maintenance may only be adjusted in the case of

(i) a considerable improvement in the situation of the claimant, in which case the maintenance may be reduced or extinguished,

(ii) a considerable worsening of the situation of the debtor, in which case it may also be diminished or extinguished, and

(iii) a considerable worsening of the situation of the claimant, in which case it may be increased.

An improvement in the situation of the debtor may only lead to an increase in the maintenance amount when the initial amount, due to the 1/3 limit, does not suffice to ensure an equal standard of living.[86] For the adjustment, the same criteria must be used as with the original determination of the maintenance amount, e.g. the 1/3 limit may not be surpassed.[87] Also, the debtor may not be responsible for any decrease in his means, nor may the claimant be responsible for any increase in his or her needs. Finally, in the case of a decrease of maintenance due to the improvement of the situation of the claimant, he/she may not receive

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85 For more information on the answer to Question 76, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven/Amersfoort: Acco, 2000, p. 664; K. Vanlede, 'De onderhoudsuitkering tussen (ex-)echtgenoten tijdens en na een echtscheidingsprocedure op grond van bepaalde feiten', in: P. Senaeve, (ed.), *Onderhoudsgelden*, Leuven: Acco, 2001, p. 48-49.

86 Cass. 15.02.1979, *Arr. Cass.* 1978-79, 711.

87 Cass. 29.09.1978, *Arr. Cass.* 1978-79, 133.

less than that which is necessary to attain the former standard of living.[88]

The maintenance claim may terminate when there is a considerable improvement or a considerable worsening of the situation of the debtor, but in the former case, new maintenance may be requested by the claimant when his / her situation once again worsens.[89]

After the divorce, the former spouses may also agree on a change in maintenance, or the claimant may renounce the right to maintenance.[90] The agreement is valid without ratification by the court and is governed by contract law. Agreements during the divorce proceedings, however, i.e. at the time when the duties of aid and assistance between the spouses still exist, are only valid after they have been confirmed by the court, which must check whether the legal criteria concerning maintenance after divorce (Article 301 Civil Code) have been respected.[91] The right to maintenance may be altered as soon as it is obtained through divorce. Beforehand, an agreement between the parties will only be valid when the future right to maintenance is not compromised. This follows from the mandatory character of maintenance law.

(2) Divorce on the ground of separation

The amount of maintenance can be adjusted or extinguished according to changes in the needs and incomes of the ex-spouses (Article 307 *bis* Civil Code). This means that in this case, an adjustment is not limited to the three options in the case of a divorce on the ground of fault, but that

88 Cass. 12.03.1981, *Arr. Cass.* 1980-81, 733.
89 Court of First Instance of Malines 14.12.1989, *Pas.* 1990, III, 69.
90 Cass. 09.09.1994, *Div. Act.* 1995, 123, note J. Roodhooft.
91 Cass. 14.11.1974, *Pas.* 1975, I, 304-306; Cass. 22.06.1967, *Pas.* 1967, I, 1247-1250.

an increase in maintenance is also possible when there is an improvement in the situation of the debtor. Nevertheless, maintaining an equal standard of living as during the cohabitation should be seen as a maximum limit, which means that there will be a principal difference with a divorce on the ground of fault, but not a practical one.

Also, the improvement or worsening of the situation of the claimant must in this case not necessarily be "considerable". Otherwise, the above-mentioned rules which apply to a divorce on the ground of fault are applicable.

(3) Divorce on the ground of separation due to mental illness

See divorce on the ground of separation.[92]

IV. Details of calculating maintenance: Financial capacity of the debtor

78. Do special rules exist according to which the debtor may always retain a certain amount even if this means that he or she will not fully fulfil his maintenance obligations?

(a) Divorce on the ground of fault

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92 For more information on the answer to Question 77, see: J. Roodhooft, 'De wijzigbaarheid van de onderhoudsuitkering na echtscheiding op grond van feiten', *R.W.* 1994-95, p. 458-463; A.C Van Gysel and J.E. Beernaert, *Etat actuel du droit civil et fiscal des obligations alimentaires*, Brussels: Kluwer, 2001, pp. 15 and 42-43; P.Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, pp. 665-667 and 679-690; K. Vanlede, 'De onderhoudsuitkering tussen (ex-)echtgenoten tijdens en na een echtscheidingsprocedure op grond van bepaalde feiten', in: P. Senaeve, (ed.), *Onderhoudsgelden*, Leuven: Acco, 2001, p. 53-54; E. Vieujean, 'Les effets du divorce pour cause déterminé', in: *Le divorce en Belgique: controverses et perspectives*, Brussels: Story-Scientia, 1988, p. 203.

The debtor may always retain 2/3 of his income (see Question 72(a)).

(b) Divorce on the ground of separation

Since the 1/3 limit is not applicable, there is in principle no set amount that the debtor may always retain, although this rule has been condemned by the Constitutional Court (see Question 72(b)).

79. To what extent, if at all, is an increase of the debtor's income a) since the separation, b) since the divorce, taken into account when calculating the maintenance claim?

(a) Divorce on the ground of fault

(i) A positive development in the means of the debtor during the separation is generally not taken into account.[93] Nevertheless, there is controversy concerning this subject in the legal literature. Some argue that it may not be taken into consideration, since the law refers to the cohabitation and not to the marriage in order to calculate the standard of living on which the maintenance is based (Article 301(1) Belgian Civil Code), while others claim that the increased means up until the actual divorce must be taken into account since the marital duties of aid and assistance will continue until the divorce itself.

(ii) An improvement in the situation of the debtor after the divorce may only lead to an increase in the maintenance amount when the initial amount, due to the 1/3 limit, did not suffice to ensure an equal standard of living (see Question 77).

(b) Divorce on the ground of separation

93 Cass. 11.10.1984, *Arr. Cass.* 1984-85, 244.

(i) See divorce on the ground of fault.

(ii) See Question 77.

(c) Divorce on the ground of separation due to mental illness

See divorce on the ground of separation.[94]

80. How far do debts affect the debtor's liability to pay maintenance?

Only a limited number of costs will negatively affect the means. Acquisition costs, i.e. costs relating to the acquisition of an income, and costs relating to a new family or to other maintenance obligations, are traditionally considered. Debts are in priciple not taken into account, unless they have been incurred in order to attain necessary means of existence. In the case of common debts that have been incurred during the period of cohabitation, the spouse who will continue to repay such debts will be compensated by the law of matrimonial property, but this will not affect the amount of maintenance.[95]

81. Can the debtor only rely on his or her other legal obligations or can he or she also rely on his or her moral obligations in respect of other persons, e.g. a de facto partner or a stepchild?

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94 For more information on the answer to Question 79, see: N. Dandoy, 'Critères et méthodes de calcul des pensions alimentaires entre époux et après divorce', *Rev. trim. dr. fam.*, 2001, p. 596-600; J. Roodhooft, *De gerechtelijke begroting van de onderhoudsuitkering tussen ex-echtgenoten. Rechtsvergelijkende studie en proeve van model*, Antwerp: Kluwer, 1996, pp. 120-121, 145-146 and 151; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 660.

95 For more information on the answer to Question 80, see: S. Brouwers, 'De conventionele kwantificering van onderhoudsgelden', *Not. Fisc. M.*, 1998, p. 67-68; J. Roodhooft, *Alimentatierekenen tussen ex-echtgenoten*, Brussel: Larcier, 2000, pp. 97-99 and 116.

(a) Divorce on the ground of fault

The debtor's ability to pay is evaluated *in concreto*; his / her general financial position is taken into account and considered. The court may consider the financial implications of extra-marital cohabitation, whether or not this is based on a sexual relationship (see Question 70).

(b) Divorce on the ground of separation

See divorce on the ground of fault.[96]

82. Can the debtor be asked to use his or her capital assets in order to fulfil his or her maintenance obligations?

The debtor's current income is taken into consideration in order to determine the amount of the maintenance, i.e. the income obtained through employment, capital or any possible other source of income. Principally, the capital assets themselves are not taken into account. However, if the maintenance debt is not willingly paid, a forced execution is possible, in which case the capital assets, or a part thereof, may be seized.[97]

83. Can a "fictional" income be taken into account where the debtor is refusing possible and reasonable gainful employment or where he or she has deliberately given up such employment?

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96 For more information on the answer to Question 81, see: F. Aps, 'Enkele beschouwingen omtrent het bewijs inzake onderhoudsuitkeringen', *E.J.*, 1998, p. 107; A.C. Van Gysel, 'Le divorce pour cause déterminée et ses conséquences alimentaires: quelques rappels, note to the Court of First Instance of Mons September 19th, 2001', *Div. Act.*, 2002, p. 6-7.

97 For more information on the answer to Question 82, see: P. Senaeve, *Compendium van het Personen- en* Familierecht, Leuven / Amersfoort: Acco, 2000, p. 787.

In principle, only real income is taken into account and not the possibilities of the debtor to obtain such income. Nevertheless, when the debtor deliberately refrains from obtaining any income to which he/she is entitled,[98] or when he/she is deceitfully responsible for his/her own poverty, such possibilities, and therefore a fictional income, may be considered.[99]

84. Does the debtor's social security benefits, which he or she receives or could receive, have to be used for the performance of his/her maintenance obligation? Which kinds of benefits have to be used for this purpose?

The debtor's current income is taken into consideration in order to determine the amount of maintenance, i.e. the income obtained through employment, capital, social security benefits, or any other possible source of income.

There is no uniform regulation under social security law concerning the problem of divorce; only in the fields of pensions, disability benefits and occupational sickness benefits does it play a decisive role. Under certain conditions, the divorced spouse will receive a right to the retirement pension of his/her former spouse, but this will have no influence on existing maintenance. Also, disability benefits and occupational sickness benefits will be granted to one spouse after the death of his/her former spouse, even after divorce, in the case of a fatal occupational accident.[100]

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98 Cass. 21.12.1973, *Arr. Cass.* 1974, 467.

99 For more information on the answer to Question 83, see: P. Senave, *Compendium van het Personen- en Familierecht*, Leuven/Amersfoort: Acco, 2000, p. 661.

100 For more information on the answer to Question 84, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven/Amersfoort: Acco, 2000, p. 774; V. Vervliet, 'Het socialezekerheidsrechtelijk statuut van uit de echt gescheiden echtgenoten', *Not. Fisc. M.*, 1999, p. 193-209.

85. In respect of the debtor's ability to pay, does the income (means) of his or her new spouse, registered partner or de facto partner have to be taken into account?

Only the debtor's own income and costs are to be considered. Of course, the costs of the debtor may diminish when the means of the new spouse or partner increase, which means that, indirectly, it may indeed affect the maintenance obligation.[101]

V. Details of calculating maintenance: The claimant's lack of own means

86. In what way will the claimant's own income reduce his/her maintenance claim? Is it relevant whether the income is derived, on the one hand, from employment which can be reasonably expected or, on the other, from employment which goes beyond what is reasonably expected?

The innocent spouse is entitled to maintenance when he / she is not able to attain an equal standard of living as during the period of cohabitation by his / her own means (Article 301(1) Belgian Civil Code). To establish the means of the claimant, both his / her current income, whatever its nature (e.g. professional, real estate, etc.), as well as his / her possibilities to obtain an income, even if he / she has never worked during the marriage, are to be considered. The current income is generally taken in account, and no distinction is made as to whether or not it is derived from employment which can be reasonably expected.[102]

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101 For more information on the answer to Question 85, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, pp. 661 and 773.

102 For more information on the answer to Question 86, see: P. Senaeve, *Compendium van het* Personen- *en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 661.

87. To what extent can the claimant be asked to seek gainful employment before he or she may claim maintenance from the divorced spouse?

Since the possibilities of the claimant to maintain the same standard of living as during the period of cohabitation are taken into consideration, the court will determine whether the claimant possesses the possibility to obtain an income. If so, additional maintenance will only be granted when this income is not sufficient in order to attain the same standard of living as during the period of cohabitation (see Questions 70 and 86). The judge will autonomously determine what the actual possibilities of the claimant are, so that the demands on the claimant will vary from case to case,[103] and it is up to the judge to decide what employment can be reasonably expected, given the possibilities of the claimant. Generally, the claimant will only be asked to seek employment that matches his/her professional qualifications.

88. Can the claimant be asked to use his or her capital assets, before he or she may claim maintenance from the divorced spouse?

Only the income from the capital assets may be ordered to be used, since all possible income is to be considered, and within reasonable limits, the claimant may be asked to reinvest capital in more advantageous ways. The capital assets themselves are not taken into account and the claimant cannot be required to sell property.[104]

89. When calculating the claimant's income and assets, to what extent are the maintenance obligations of the claimant in relation to third persons (e.g. children from an earlier marriage) taken into account?

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103 Cass. 15.03.1991, *R.W.* 1991-92, 45.

104 For more information on the answer to Question 88, see: J. Roodhooft, *Alimentatierekenen tussen ex-echtgenoten*, Brussels: Larcier, 2000, p. 78-79; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven/Amersfoort: Acco, 2000, p. 661.

Both costs relating to the forming of a new family and to other maintenance obligations of the claimant, are taken into consideration in order to calculate the claimant's means.[105]

90. Are there social security benefits (e.g. income support, pensions) the claimant receives which exclude his/her need according to the legal rules and/or court practice? Where does the divorced spouse's duty to maintain rank in relation to the possibility for the claimant to seek social security benefits?

Concerning pensions, unemployment benefits, health insurance benefits, etc., the claimant is obliged first to claim the benefits he/she is entitled to, and only when this does not suffice is he/she entitled to maintenance. This follows from the principle that income of all sorts and the possibilities to achieve it must be taken into account in order to calculate the claimant's means (see Questions 70 and 86). However, this rule will not apply when the benefits are subsidiary, which means that they are only due when the debtor is not able to pay maintenance.

Real income support, in case the claimant falls below the subsistence level, is generally considered to be a last remedy when the claimant has no other means of supporting him/herself. When there are sufficient proper means available, the support will be refused, or only partly granted. Nevertheless, maintenance after divorce is in this case not considered to be a kind of income that the social security services (O.C.M.W.) may rely upon in order to refuse income support. The general rule, under which the claimant's current income and his/her means to achieve it are taken into consideration, is not applicable. The

105 For more information on the answer to Question 89, see: S. Brouwers, 'De conventionele kwantificering van onderhoudsgelden', *Not. Fisc. M.* 1998, p. 67; A.C Van Gysel, 'Le divorce pour cause déterminée et ses conséquences alimentaires: quelques rappels, note to the Court of First Instance of Mons 19.09.2001', *Div. Act.*, 2002, p. 6-7.

claimant may therefore never be obliged to rely upon the maintenance to which he/she is entitled from his/her former spouse when he/she requests income support, nor can an agreement between the spouses to the effect that maintenance is excluded be relied upon by the O.C.M.W. in order to refuse income support[106]. Also, when the claimant is entitled to income support, the debtor may demand that he/she claims it, and a fictional income may be taken into account when he/she refuses to do so.[107]

VI. Questions of priority of maintenance claims

91. How is the relationship between different maintenance claims determined? Are there rules on the priority of claims?

The law does not foresee a priority in maintenance claims. In the case law, a certain priority is accepted where the debtor is not able to fullfil all his or her maintenance obligations:

- the maintenance claim of non self-sufficient children proceeds all others, even the claim of the spouse, and whether or not they are common children.[108]
- the claim of the spouse proceeds relatives and in-laws, and the claim of the current spouse has the same ranking as the claim

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106 Art. 6, 2 of the Law of 07.08.1974 introducing the right to income support; *contra*: Labour Court of Antwerp 19.05.1976, *De Gem*. 1977, 183; *R.W*. 1977-78, 1133, note D. Simoens.

107 For more information on the answer to Question 90, see: J. Roodhooft, *Alimentatierekenen tussen ex-echtgenoten*, Brussels: Larcier, 2000, pp. 63 and 78; J. Roodhooft, *Calcul des pensions alimentaires entre ex-époux*, Brussels: Larcier, 2000, p. 61-62; P. Senaeve and D. Simoens, *O.C.M.W. - dienstverlening en bestaansminimum*, Bruges: Die Keure, 1995, pp. 20-45 and 66; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven/Amersfoort: Acco, 2000, p. 781-782; V. Vervliet, 'Het socialezekerheidsrechtelijk statuut van uit de echt gescheiden echtgenoten', *Not. Fisc. M.*, 1999, p. 203 ff.

108 Court of Appeal of Brussels 19.06.1984, *Rev. trim. dr. fam.* 1987, 378.

of the former spouse (This is contested, however, and some are of the opinion that the claim of the present spouse proceeds a former spouse) (see Question 92).

- the claim of the former spouse proceeds the maintenance obligation within the family at large.

When two or more claimants have equal ranking according to the priority rules, they will be paid in proportion to their respective claims. In the case of claimants with the same ranking, e.g. several children, the maintenance will depend on their respective claims (e.g. depending on age, costs of education, etc).[109]

92. *Does the divorced spouse's claim for maintenance rank ahead of the claim of a new spouse (or registered partner) of the debtor?*

[109] For more information on the answer to Question 91, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 779-780.

Most of the legal literature maintains that the former and new spouse have the same ranking. Others claim that the maintenance obligation towards a new spouse ranks ahead of the obligation towards the former spouse.[110]

93. Does the claim of a child of the debtor, if that child has not yet come of age, rank ahead of the claim of a divorced spouse?

Yes, regardless of whether or not the child is the common child of the former spouses.[111]

94. What is the position if that child has reached the age of majority?

A distinction should be madeas to whether whether or not the child has completed his/her education after coming of age. If the education has not been completed , the same maintenance obligation remains as if he/she were a minor (Article 203 Belgian Civil Code), and the

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110 For more information on the answer to Question 92, see: J. Gerlo, 'Onderhoudsgelden', *T.P.R.* 1985, p. 160-161; J. Pauwels, 'Artikel 301 B.W. en het nieuw huwelijk van de onderhoudsplichtige', note to Justice of the Peace Borgerhout 04.03.1982, *R.W.* 1982-83, p. 472; J. Gerlo, 'Onderhoudsgelden', in: *Recht en Praktijk*, Antwerp: Kluwer, 1994, p. 58, nr. 77; J. Pauwels, 'Artikel 301 B.W. en het nieuw huwelijk van de uitkeringsplichtige', note to Justice of the Peace of Borgerhout 04.03.1982, *R.W.* 1982-83, p. 472; J. Roodhooft, *De gerechtelijke begroting van de onderhoudsuitkering tussen ex-echtgenoten. Rechtsvergelijkende studie en proeve van model*, 1995, Antwerp: Kluwer, 1996, p. 129; J. Roodhooft, note to Justice of the Peace of Westerlo 02.02.1996, *E.J.* 1996, p. 59 ff.; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven/Amersfoort: Acco, 2000, p. 780; D. Tillemans, 'Het onderhoudsgeld na echtscheiding op grond van fout en op grond van feitelijke scheiding', in: P. Senaeve, (ed.), *Echtscheiding* , Leuven: Acco, 1990, p. 277, nr. 430.

111 Court of Appeal of Brussels 19.06.1984, *Rev.Trim.Dr. Fam*. 1987, 378; Court of First Instance of Brussels 29.03.1988, *J.T*. 1988, 587. For more information on the answer to Question 93, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven/Amersfoort: Acco, 2000, p. 780.

obligation towards the child will still rank ahead of the one towards the former spouse. When the education has been completed, but the child nevertheless cannot maintain him / herself, a maintenance obligation will remain but it will become of a general civil law nature (Article 207 Belgian Civil Code). In this case, the divorced spouse will rank ahead of the child.[112]

95. *Does the divorced spouse's claim for maintenance rank ahead of the claims of other relatives of the debtor?*

Yes, except for the claims of the minor children or adult children whose education has not yet been completed and of the new spouse.[113]

96. *What effect, if any, does the duty of relatives or other relations of the claimant to maintain him or her have on the ex-spouse's duty to maintain him or her?*

The law does not establish any priority rules in the case of multiple maintenance debtors. Nevertheless, it is generally accepted that the claimant should respect a certain ranking in claiming maintenance. This derives from the different nature of the maintenance obligations and of the intensity of the relationship with the debtors. The following ranking is commonly followed:

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112 For more information on the answer to Question 94, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, pp. 431, 769 and 780.

113 For more information on the answer to Question 95, see: J. Gerlo, 'Onderhoudsgelden', *T.P.R.*, 1985, p. 160; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 780.

- the present spouse must first be asked for maintenance[114]
- each parent must provide for non-self-sufficient children, before asking other relatives and in-laws[115]
- the former spouse is obliged to provide maintenance before other relatives or in-laws[116]
- relatives proceed in-laws,[117] and closer-related relatives rank ahead, i.e. parents proceed grandparents and children proceed grandchildren
- finally, in-laws may be called upon.

When certain debtors are not liable for maintenance (e.g. the innocent spouse after divorce on the ground of separation) or are unable to pay, the debtors of the next rank may be called upon.[118]

VII. Limitations and end of the maintenance obligation

97. Is the maintenance claim extinguished upon the claimant's remarriage or entering into a registered partnership? If so: may the claim revive under certain conditions?

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114 Cass. 27.06.1969, *Arr. Cass.* 1969, 1079.

115 Court of First Instance of Brussels 06.01.1987, *Rev. trim. dr. fam.* 1988, 139.

116 Cass. 08.01.1982, *Arr. Cass.* 1981-82, 592; Court of Appeal of Brussels 13.11.1973, *R.W.* 1974-75, 48.

117 Cass. 16.03.1995, *R.W.* 1995-96, 743, note J. Roodhooft.

118 For more information on the answer to Question 96, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 778.

(1) Divorce on the ground of fault

In the case of a new marriage, the Court of Cassation has ruled that the maintenance obligation of the former spouse is only extinguished when it is no longer necessary.[119] Only when the duties of aid and assistance between the present spouses do not lead to an equal or superior standard of living for the divorced spouse as during the former marriage, will it be possible for him/her to obtain an additional maintenance from his/her former spouse. Therefore, there is no automatic dissolution, but the maintenance obligation of the present spouse will merely rank ahead of the maintenance obligation of the former (see Question 96).

However, there is still controversy in the legal literature. Some maintain that the maintenance claim is automatically extinguished, since a new duty of aid and assistance will arise between the new spouses. The maintenance claim is not automatically extinguished in the case of a registered partnership or other form of cohabitation, but if it leads to a considerable increase in the means of the claimant, it may be taken into consideration in order to adjust the amount of maintenance due to changed circumstances (see Question 77).

If the new relationship should come to an end and no maintenance is awarded, the new and changed circumstances may once again lead to a revival/adjustment of the original maintenance.

(2) Divorce on the ground of separation

In the case of a divorce on the ground of separation, the increase in means must not be considerable (see Question 77).[120]

98. Are there rules according to which maintenance may be denied or reduced if the claimant enters into an informal long-term relationship with another person?

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119 Cass. 03.04.1975, *Pas*. 1975, I, p. 756-757.

120 For more information on the answer to Question 97, see: J. Roodhooft, *Alimentatierekenen tussen ex-echtgenoten*, Brussels: Larcier, 2000, pp. 69-71 and 79.

There are no explicit legal regulations (see Question 97). Case law has reached different solutions in this respect.[121]

99. Can the maintenance claim be denied because the marriage was of short duration?

No, but the court can take the short duration of the marriage into consideration in order to conclude that the innocent spouse will, after a certain period of time, be able to support him / herself at a similar standard of living as during the marriage, in order to impose a maintenance obligation that is limited in time (see Question 68).[122]

100. Can the maintenance claim be denied or reduced for other reasons such as the claimant's conduct during the marriage or the facts in relation to the ground for divorce?

The claimant's conduct during the marriage or the facts in relation to the ground of divorce cannot result in a denial or reduction of maintenance. In this case, the divorce will probably be obtained against both spouses, since a counterclaim will be issued by the respondent, which means that there will be no maintenance granted to either spouse. However, when the divorce has been obtained against one spouse only, and maintenance has been granted to the claimant, there is no further possibility of adjusting the maintenance claim in order to take his / her conduct into account.

101. Does the maintenance claim end with the death of the debtor?

(a) Divorce on the ground of fault

The death of the debtor brings an end to the maintenance claim, but a maintenance obligation will arise at the expense of the estate (Articles 301(6) and 205 *bis* Belgian Civil Code). However, in this case the conditions for claiming maintenance are stricter. Whereas during the

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121 Cass. 14.02.1975, *Arr. Cass.* 1975, p. 663; Cass. 01.02.1980, *Arr. Cass.* 1979-80, p. 652; Court of Appeal of Brussels 08.01.1974, *Pas.* 1974, II, p. 90; Court of First Instance of Brussels 21.10.1984, *R.W.* 1985-86, p. 57, note W. Pintens; Court of First Instance of Brussels 21.06.1989, *T.B.B.R.* 1990, p. 351.

122 For more information on the answer to Question 99, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 664.

life of the debtor, maintenance is granted according to the standard of living during the period of cohabitation, after the death of the debtor, the claimant must be in need at the time of death (Articles 301(6) and 205 *bis* (2) Belgian Civil Code). The maintenance must be claimed within one year after the death of the debtor (Article 205 *bis* (5) Belgian Civil Code). The heirs have a maintenance obligation in the proportion of what they receive from the estate, and unrelated to their ties with the deceased (Article 205 *bis* (3) Belgian Civil Code). The death of the claimant will also end the maintenance obligation.[123]

(b) Divorce on the ground of separation

Article 306 Belgian Civil Code makes the regulation for a divorce on the ground of fault also applicable to a divorce on the ground of separation.

(c) Divorce by consent

Since it is conventional, the maintenance obligation will pass to the heirs, unless this is excluded in the divorce agreement (Article 1122 Belgian Civil Code).[124]

VIII. Maintenance agreements

102. May the spouses (before or after the divorce or during the divorce proceedings) enter into binding agreements on maintenance in the case of (an eventual) divorce?

(a) Divorce on the ground of fault

(i) Before the divorce: Before the divorce, maintenance agreements are not allowed, e.g. in the marriage contract it is not possible to predetermine maintenance in case of an eventual divorce.

(ii) After the divorce: After the divorce, the former spouses may agree

123 Cass. 13.011.1967, *Pas*. 1967, I, p. 571.

124 For more information on the answer to Question 101, see: W. Pintens, 'De erfrechtelijke gevolgen van het overlijden van de debiteur voor de uitkering na echtscheiding', note to Cass. 04.11.1976, *R. W.*, 1976-77, p. 2549-2551.

on a change in maintenance, or the claimant may renounce the right to maintenance. The agreement is valid without ratification by the court and is governed by contract law.[125]

(iii) During the divorce procedure: Agreements during the divorce procedure are only valid after they are confirmed by the court, that must check wether the legal criteria concerning maintenance after divorce (Article 301 Belgian Civil Code) were respected (see Question 77).[126]

(b) Divorce on the ground of separation

See divorce on the ground of fault.

(c) Divorce by consent

(i) Before the divorce: The question of maintenance must necessarily be addressed in the agreement to be drawn up between the spouses, before initiating the divorce procedure (see Question 30).

(ii) After the divorce: As soon as the procedure ends and the marriage is dissolved, the former spouses may alter their agreement by mutual consent at any time (Article 1134(2) Belgian Civil Code). Also, the law of 30 June 1994 laid down that one of the spouses can ask the court to alter the agreement when an adaptation clause has been included therein (Article 1288(1)(4) Judicial Code). Therefore, such an adaptation clause must be placed in the agreement when the spouses desire a later possibility of change; if not, a change is only possible by mutual consent.[127] A judgment by the Court of Cassation in 2000,[128] made it possible for a court to annul the part of the agreement concerning maintenance after divorce, without compromising the validity of the divorce itself.

(iii) During the divorce procedure: During the divorce procedure the

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125 Cass. 14.11.1974, *Pas*. 1975, I, p. 304-306.
126 Cass. 14.11.1974, *Pas*. 1975, I, p. 304-306; Cass. 22.06.1967, *Pas*. 1967, I, p. 1247-1250
127 Cass. 11.06.1992, *Arr. Cass.* 1991-92, p. 965; Court of First Instance of Brussels 22.05.2001, *Rev. trim. dr. fam*. 2001, p. 704.
128 Cass. 16.06.2000, *R.W.*. 2000-01, p. 238, note W. Pintens

spouses twice have to appear before the court with the same agreement. When they wish to change it after the first appearance, they need to start anew, apart from a few exceptions (see Question 30).[129]

103. May a spouse agree to renounce his/her future right to maintenance? If so, are there limits on that agreement's validity?

(a) Divorce on the ground of fault

A renunciation of the future right to maintenance is never valid before or during the divorce procedure. A renunciation is not possible before the right to maintenance has been obtained, i.e. before the divorce judgment. The right to maintenance can, however, be renounced after the divorce.[130] This renunciation cannot be undone by the court, since after the divorce the parties are subject to contract law, and conventionality will strict apply (Article 1134 Belgian Civil Code).

(b) Divorce on the ground of separation

See divorce on the ground of fault.

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[129] For more information on the answer to Question 102, see: For more information on the answer to Question 2, see: S. Brouwers, 'De echtscheiding op grond van bepaalde feiten - De echtscheiding op grond van feitelijke scheiding - De echtscheiding door onderlinge toestemming', in: M. Maus and F. Moeykens, *Het echtscheidingsrecht geactualiseerd*, Bruges: Die Keure, 1996, p. 52; F. Buyssens, 'De onderhoudsbijdrage voor de kinderen en de onderhoudsuitkering tussen echtgenoten bij echtscheiding door onderlinge toestemming', in: P. Senaeve (ed.), *Onderhoudsgelden*, Leuven: Acco, 2001, p. 136-151; W. Pintens, 'De vernietiging van de overeenkomsten bij echtscheiding door onderlinge toestemming', note to Cass. 16.06.2000, *R.W.* 2000-01, p. 239-242; W. Pintens and F. Buyssens, 'De echtscheiding door onderlinge toestemming', in: P. Senaeve and W. Pintens, (eds.), *De hervorming van de echtscheidingsprocedure en het hoorrecht van minderjarigen*, Antwerp: Maklu, 1997, p. 235; P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, pp. 666, 696 and 697; P. Senaeve, 'De nietigverklaring van een beding van de overeenkomst voorafgaand aan de echtscheiding door onderlinge toestemming na de ontbinding van het huwelijk', *E.J.* 2001, p. 26-31; A.C. Van Gysel, 'La survenance de circonstances nouvelles et indépendantes de la volonté des parties, condition de mutation des conventions préalables à divorce par consentement mutuel', note to Court of First Instance of Brussels 06.02.2001, *Div. Act*. 2001, p. 73; A.C. Van Gysel and J.E.Beernaert, *Etat actuel du droit civil et fiscal des obligations alimentaires*, Brussels: Kluwer, 2001, p. 42-43.

[130] Cass. 09.09.1994, *E.J.* 1995, 25, note J. Roodhooft.

(c) Divorce by consent

A spouse may agree to renounce his / her future right to maintenance, since maintenance is purely conventional in this case and since Article 1288(4) Judicial Code speaks of "an eventual maintenance" to be paid. As in the case of a divorce on the ground of fault, the parties are free to renounce their right to maintenance after the divorce.[131]

104. Is there a prescribed form for such agreements?

There is no prescribed form for such agreements.

105. Do such agreements need the approval of a competent authority?

(a) Divorce on the ground of fault

The agreements will only need the approval of the court when they have been reached during the divorce procedure (see Question 77). After the divorce, they are subject to contract law.

(b) Divorce by consent

See Questions 28 to 31 (Boek 1, ABC) and 102.[132]

131 For more information on the answer to Question 103, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 667; A.C. Van Gysel and J.E. Beernaert, *Etat actuel du droit civil et fiscal des obligations alimentaires*, Brussels: Kluwer, 2001, p. 15.

132 For more information on the answer to Question 105, see: P. Senaeve, *Compendium van het Personen- en Familierecht*, Leuven / Amersfoort: Acco, 2000, p. 666; A.C. Van Gysel and J.E. Beernaert, *Etat actuel du droit civil et fiscal des obligations alimentaires*, Brussels: Kluwer, 2001, p. 42-43.