

**GROUND FOR DIVORCE AND MAINTENANCE BETWEEN  
FORMER SPOUSES**

**FRANCE**

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**A. GENERAL**

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

The French Code civil. In the first Book, there is a Title VI called *Du divorce* (Articles 229 to 310 Code civil) following Title V concerning Marriage. Title VI is divided into five chapters: chapter 1 (grounds for divorce), chapter 2 (divorce proceedings), chapter 3 (consequences of divorce), chapter 4 (*séparation de corps*, Trennung von Tisch und Bett, judicial separation), chapter 5 (private international law of divorce and *séparation de corps*). The last most important Reform Act concerning divorce law is the *Loi No. 75-617 du 11 juillet 1975*, which came into force on 1 January 1976.

Divorce proceedings are also contained in the *Nouveau Code de procédure civile* (Articles 1070 -1148 Nouveau Code de procédure civile).

The competent authority for divorce is also mentioned in Article L 312-1 Code de l'organisation judiciaire (Code for judicial organisation).

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

The French law of divorce has been modified on several occasions in the past. Already before the Reform Act 1975, French law did recognise divorce. During the *Ancien Droit* (which means before the French Revolution at the end of the 18<sup>th</sup> century), divorce did not exist; only a judicial decree of separation was possible. Divorce was

introduced into French law by the Revolution (*Loi du 20 septembre 1792*). The French Code Napoléon 1804 maintained the possibility for the spouses to obtain a divorce. In 1816, during the Restoration, this possibility was brought to an end, however. The *Loi Naquet*, which was the direct predecessor of the current applicable law, only mentioned divorce based on fault;<sup>1</sup> this situation obliged those spouses who wanted to obtain a divorce by mutual consent, to play a kind of 'comedy' role with a false confession of fault or false evidence dictated to a lawyer. With the evolution of a different line of thinking, the government decided to place before Parliament a Reform Act with broader and various grounds for divorce: fault, mutual consent, six years' separation or more, or the mental insanity of one spouse for six years or more. The project was prepared by an eminent French law Professor: Jean Carbonnier.<sup>2</sup>

This Reform Act 1975 intended to favour divorce by mutual consent without excluding other possible grounds for divorce.

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

A few years ago, the French government did consider creating a new possibility for the spouses to obtain a divorce without having to bring a claim before the court. The spouses would have had the possibility to make a formal divorce declaration before the Mayor (*Mairie*) or before the *Officier d'Etat-civil* (registrar, civil status officer), but only if they had no common children and no common property. It would have been the first time in France that a divorce could be determined by a competent authority other than the Courts. But this project no longer seems to be current. There was never any bill to this effect and the question will certainly not be discussed again in the next couple of years, because it does not belong to the 'priorities' of the new government.

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<sup>1</sup> Articles 229 and 230 Code civil: adultery; Article 231: *condamnation d'un époux à une peine afflictive et infâmante*; Article 232: *excès, sévices ou injures d'un époux envers l'autre*.

<sup>2</sup> See J. Carbonnier, 'La question du divorce, mémoire à consulter', *D.* 1975. Chron. 115.

On 26 June 2001, the French *Assemblée nationale* decided to submit a project in order to modify the French law of divorce.<sup>3</sup> This was not a reform project which had been prepared by the Ministry of Justice, but an initiative by certain French Members of Parliament. The justification for this reform project mentions that in France about 46% of all divorces are still based on fault, so that a great deal of judicial endeavours are required on the part of both the parties and the courts, endeavours which cannot be directed towards determining future events after the divorce. The consequences of a divorce based upon fault are also too harsh for the spouses (at least for the spouse who is 'guilty'). The *Assemblée nationale* wants to modernize the French law of divorce and to suppress divorce based upon fault. Only two grounds of divorce would exist: divorce by consent (which would be called *divorce par consentement mutuel*) and divorce based on irretrievable breakdown (*rupture irrémédiable du lien conjugal*). This second ground for divorce could be relied upon in three cases:

- when the spouses have lived apart for three years;
- when both spouses assert that an irretrievable breakdown has taken place and request a divorce; or
- when only one spouse requests divorce because of an irretrievable breakdown; in this case, the judge must provide a precise time for reflection before the claimant can bring the divorce claim before the court.

This reform project intends to establish a new 'right to divorce' (*droit au divorce*). The fault of one spouse would no longer be a ground for divorce although the other spouse could claim for damages (Article 1382 Code civil or a special rule under Article 266 Code civil for divorce). The project also wants to introduce more mediation in divorce proceedings; the court could, of its own motion, decide to order compulsory mediation.

This project has been modified in a very important way by the Second Chamber of the French Parliament, the *Sénat*<sup>4</sup> In February 2002, the senators decided to retain divorce based upon fault. They were in favour of the new ground created by the *Assemblée nationale* (irretrievable breakdown, called *altération irrémédiables des relations*

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<sup>3</sup> [www.assemblee-nationale.fr](http://www.assemblee-nationale.fr).

<sup>4</sup> [www.senat.fr](http://www.senat.fr).

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*conjugales* and no longer *du lien conjugal*) but wanted to retain divorce based on fault. They were also in favour of the new rules concerning mediation. When only one spouse asserts an irretrievable breakdown of the matrimonial relations, he/she has to wait 18 months before bringing a claim before the court (18 months from the decision of the court stating that no reconciliation has taken place between the spouses). This reflection time is not required where the claimant can prove a two-year separation at least, or where the mental illness of the other spouse suppresses any matrimonial community between the spouses and it cannot be expected that such a community will be resumed.

At this point in time, it is very difficult to know what will happen to this reform project, since the government and the political majority at the *Assemblée nationale* have changed. In October 2002, the French Minister for Family Affairs announced that the reform project concerning divorce would probably be debated before Parliament again in 2003, but in the version adopted by the *Sénat*, which means that the progressive solutions proposed by the *Assemblée nationale* (suppression of fault as a ground for divorce) cannot now become law.

## **B. GROUNDS FOR DIVORCE**

### **I. General**

#### *4. What are the grounds for divorce?*

Even if Article 230 Code civil only mentions three kinds of divorce (divorce by consent, divorce based on separation and divorce based on fault), the French doctrine generally distinguishes between four or five.

The Reform Act 1975 wanted to favour divorce by consent<sup>5</sup> but has retained several other grounds for divorce:

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<sup>5</sup> For example, Article 246 Code civil allows the spouses who have initiated divorce proceedings based on fault or on another ground (separation, mutual confession) to decide to change to proceedings by mutual consent (so-called *technique de la passerelle*).

- divorce by consent (*divorce par consentement mutuel*), Articles 230 – 232 Code civil;
- divorce based upon the ‘mutual confession’ (of fault) of the spouses (*divorce sur double aveu, divorce sur aveu indivisible*, also called *divorce demandé par l’un et accepté par l’autre*), which is sometimes presented as a kind of divorce by mutual consent, but does not really belong to this category, Articles 233 – 236 Code civil. In this kind of divorce, one spouse takes the initiative and brings a claim before the court. He (she) has to assert some facts for which both spouses are responsible and which make the preservation of matrimonial life intolerable (Article 233 Code civil). If the other spouse (the defendant) admits these facts before the court, the court will issue a divorce order without deciding the question of fault on the part of one or both spouses. The court, in its judgment, determines the consequences of the divorce. If, however, the defendant does not admit the facts asserted by the claimant, the court cannot pronounce a divorce judgment (Article 235 Code civil). If a divorce judgment is issued, it has the same consequences as if fault had been attributed both spouses (*divorce aux torts partagés*).
- divorce based upon fault on the part of one spouse or both (*divorce pour faute*), Articles 242 - 246 Code civil.
- divorce based on separation for six years or more (*divorce pour rupture de la vie commune*), Article 237 Code civil. The criterion is ‘*rupture prolongée de la vie commune, lorsque les époux vivent séparés de fait depuis six ans*’. This means that the spouses must have been separated for at least six years and that this separation has terminated conjugal community life.
- divorce based on the mental insanity of one spouse for at least six years (*divorce pour altération des facultés mentales d’un époux depuis six ans*), Article 238 Code civil. The criterion is: ‘*lorsque les facultés mentales du conjoint se trouvent, depuis six ans, si gravement altérées qu’aucune communauté de vie ne subsiste plus entre les époux et ne pourra, selon les prévisions les plus raisonnables, se reconstituer dans l’avenir*’ (Article 238 Code civil). This means that one spouse’s mental health has so deteriorated, so affected, that no matrimonial community life

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has existed for at least six years and that it cannot reasonably be expected that it will again be resumed.

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

Year	Number of divorces granted
1975	5,536
1981	8,576
1995	119,200
2000	114,620

Most of the divorces are based on mutual consent. I do not have the most recent statistics, but the tendency is as follows:<sup>6</sup>

Year	Mutual consent		Fault	Separation		Conversion <sup>7</sup>
	Real mutual consent	Mutual confession		Separation for at least six years	Mental illness	
2000 <sup>8</sup>	48,818	16,556	47,425 (42.2%)	1,757	64	6%
	65,374 (54.7%)			1,821 (2%) <sup>9</sup>		

6. How frequently are divorce applications refused?

In 2000 124,796 judgements were delivered concerning divorce: 114,620 resulted in a direct divorce, 3,906 resulted in a judicial separation, 2,103 converted a judicial separation into a divorce and 4,167 divorces were refused.<sup>10</sup>

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

<sup>6</sup> G. Cornu, *Droit civil, La Famille*, Paris: Montchrestien, 7<sup>ème</sup> éd., 2001, p. 491.

<sup>7</sup> From a judicial separation.

<sup>8</sup> See *Annuaire statistique de la Justice 2002*, Paris: La Documentation française, 2002, p. 83 and <http://www.justice.gouv.fr/publicat/anstat02.htm>.

<sup>9</sup> S.E. Fortis, 'Divorce', *Rép. de droit civil*, No. 450 (around 1,600 divorces were based on this ground in one year).

<sup>10</sup> See *Annuaire statistique de la Justice 2002*, p. 81.

The only procedure in France is a judicial proceeding before the *juge aux affaires familiales* (judge for family matters) who is a judge at the Tribunal de Grande Instance. (See Articles L 312-1 and R 312-1 Code de l'organisation judiciaire, Gerichtsverfassungsgesetz, Code for judicial organisation). Until 1993, there were two possible jurisdictions for divorce, depending on the divorce ground: the *juge aux affaires matrimoniales* and the Tribunal de Grande instance itself as a collegial court of three judges.<sup>11</sup> But the Reform Act 1993 (8 January 1993) now gives exclusive jurisdiction to the *juge aux affaires familiales*, who is nevertheless allowed by law to send the proceedings to the Tribunal de grande instance (3 judges). See also Article 247 Code civil, which institutes the jurisdiction of the Tribunal de grande instance to decide on divorce and its consequences, but which adds that the *juge aux affaires familiales* has jurisdiction over the divorce proceeding regardless of the ground for divorce. The *juge aux affaires familiales* can decide to submit the proceeding to the 'audience collégiale' (3 judges of the Tribunal de grande instance, the family judge being one of these three judges). He is obliged to do so if one party requires this (Article 247 Code civil).

France does not have any administrative proceeding. As mentioned in Question 3, there were some projects which intended to allow the spouses who had neither common children nor common property to go before the Mayor (maire) or the *officier d'état-civil*, but this is no longer an issue.

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

Yes. For every ground of divorce, jurisdiction belongs exclusively to the *juge aux affaires familiales* who is a member of the *Tribunal de Grande Instance*. See Question 7.

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<sup>11</sup> The *juge aux affaires familiales* only had jurisdiction over divorce proceedings by mutual consent (*requête conjointe*). The *Tribunal de grande instance* had jurisdiction over all other kinds of divorce proceedings (fault, separation, mutual confession of fault, for the second stage of the proceedings in this latter case).

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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?)

In France, there is no possibility for the claimant and the defendant to personally go to court alone without a lawyer. They always need to be represented by a lawyer, an *avocat*, because before the *Tribunal de grande instance* there is a *monopole d'avocat* (obligatory representation by a lawyer). Of course, when an attempt at conciliation is required, the parties (spouses) must appear personally before Court.

The divorce proceedings can be initiated in several ways, depending on the ground for divorce:

(a) for divorce by mutual consent (*divorce sur requête conjointe*).

Both spouses have to make a joint application for divorce. They do not have to mention the reasons why they want to obtain a divorce (Article 230). The claim is a joint one (Article 1089 Nouveau Code de procédure civile: *requête unique*) and it is brought before the court by the lawyers representing the individual spouses or by a common lawyer. The claim form does not mention the divorce ground, but concentrates on information concerning the spouses (name, profession, nationality...); their social insurance fund and *caisse de retraite* – retirement pension fund; the court before which the case is being brought; the name of the lawyers who represent the spouses; and the form is signed by each spouse and each lawyer. Article 1090 Nouveau Code de procédure civile.

(b) for a divorce application by only one spouse (all other types of divorce: mutual confession of fault, separation or fault).

The claimant must bring a claim before the court through his lawyer (Article 1106 Nouveau Code de procédure civile for divorce by mutual confession of fault; Article 1123 Nouveau Code de procédure civile for divorce based upon separation for at least six years: in this case, the claim form must mention the way in which the claimant will perform his/her *devoir de secours* to the other spouse -material and financial aid obligation - during the divorce proceedings and after the dissolution of



the marriage, and his/her financial obligations towards the children; Article 242 Code civil for divorce based on fault.

*10. When does the divorce finally dissolve the marriage?*

Divorce finally dissolves the marriage when the divorce judgment has *force de chose jugée* (becomes final) (Article 260 Code civil). This means when the judgment can no longer be amended or nullified (there is no longer any possibility of review, appellate review or further appellate review such as *pourvoi en cassation* anymore. In other words, it is an absolute final judgment). Even the *pourvoi en cassation* has a suspensive effect in family matters (Article 1121 Nouveau Code de procédure civile). At this time, the spouses' obligations end (*devoir de secours*,<sup>12</sup> *devoir d'assistance*) and the spouse who has used the family name of the other spouse loses this right (but there are some exceptions).

### **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?*

Yes, it is an autonomous ground for divorce. In France, the legal provisions make a distinction between:

(a) divorce by mutual consent, which does not require any separation or any ground to be mentioned in the spouses' joint divorce application or any evidence concerning the irretrievable breakdown (however, there can only be an application for such a divorce after at least six months of marriage, Article 230, § 3 Code civil), and

(b) divorce based on separation (with the two possible grounds previously mentioned: separation for at least six years or mental illness of one spouse for at least six years and no reasonable possibility that

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<sup>12</sup> Except in the case of a divorce based on separation for at least six years or on one spouse's mental insanity for at least six years.

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matrimonial community life can be resumed). In these two cases, the law presumes that an irretrievable breakdown has taken place.

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?*

Here, we must make a distinction between:

(a) a real divorce by mutual consent (*divorce sur requête conjointe*).

In this case, both spouses must together apply for a divorce (*requête unique*, Article 1089 Nouveau Code de procédure civile, joint application). Article 1088 Nouveau Code de procédure civile classifies this kind of divorce as '*matière gracieuse*' (a non-contentious matter), which means that there is no litigation, no claimant and no defendant, only two persons who decide to apply for the same thing (a divorce by consent) before the court.

For this kind of divorce, the spouses must propose in their joint application:

- a temporary agreement concerning their mutual situation, obligations and rights during the divorce proceedings and
- a proposal for a final, definitive agreement (arrangement) concerning all the consequences of the divorce (assets, children, etc.). See Article 1091 Nouveau Code de procédure civile.

(b) a divorce based upon mutual confession of fault by the two spouses, but after one spouse only has applied for a divorce (*divorce demandé par un époux et accepté par l'autre*, also called *divorce sur double aveu*).

In this case, one spouse only applies for a divorce and has to assert some facts for which both spouses are responsible and which makes the preservation of matrimonial community life intolerable (Article 233 Code civil; Article 1106 Nouveau Code de procédure civile). See also Article 1129 Nouveau Code de procédure civile (the claimant has to write an account – *mémoire* – of the situation of the spouses and the

reasons why he/she is applying for a divorce, without trying to prove which spouse is 'guilty'; it must be an objective description of the matrimonial situation (Article 1130 Nouveau Code de procédure civile)).

The 'defendant' is informed about this claim within 15 days (Article 1131 Nouveau Code de procédure civile) by the clerk of the Court. He can refuse the document (*mémoire*) expressly or tacitly (tacitly means that he/she does not answer within a month after due notice), or accept it (Article 1132 Nouveau Code de procédure civile). In the latter case, the proceedings then proceed and the family judge notifies both spouses to appear for him. He has to check whether the claimant confirms his/her declaration and that the defendant agrees with the asserted facts and is willing to divorce. If the judge has the impression that there is still '*communauté de sentiments*' (common feelings) between the spouses, he will propose to the spouses that they should have time to reflect. If he thinks that both spouses are willing to divorce, he renders a decision (*ordonnance*) stating that both spouses have admitted facts which make the preservation of conjugal community life intolerable (Article 1136 Nouveau Code de procédure civile). The spouses must appear again before the judge who will then enter a divorce order and decide on the consequences of the divorce (Article 1135 Nouveau Code de procédure civile).<sup>13</sup> So, there are two decisions: a first decision called an *ordonnance*, which only states the ground for divorce (mutual confession of fault); and a second called a *jugement*, which pronounces the divorce and determines its consequences.

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

No. But the spouses cannot apply for a divorce by mutual consent (*divorce sur requête conjointe*) during the first six months of marriage.

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

Yes, for a real divorce by mutual consent. At least six months (Article 230 § 3 Code civil) for a *divorce sur requête conjointe* (by mutual consent).

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<sup>13</sup> Against this decision (*ordonnance*) an appeal can be lodged within 15 days, Article 1135 *in fine* Nouveau Code de procédure civile.

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If the proceedings are based on a mutual confession of fault by both spouses (*divorce sur demande acceptée, divorce sur double aveu*), there is no condition as to the duration of the marriage.

26. *Is a minimum age of the spouses required?*

No.

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

Not obligatory, but possible for divorce by mutual consent (Article 251 § 2 Code civil). If the ground for divorce is a mutual consent by both spouses, there may be an attempt at conciliation.

The question is more complicated for divorce by mutual confession of facts which makes the preservation of matrimonial community life intolerable. Here again we must make the distinction between *divorce sur requête conjointe* (by real mutual consent) and *divorce sur demande acceptée ou sur double aveu* (by mutual confession of fault by both spouses):

(a) *Divorce sur requête conjointe.*

Article 231 Code civil: The judge first examines the divorce claim with each spouse separately; thereafter, with both spouses together; after this, the lawyers are also called before the judge. The judge tries to discover whether or not a reconciliation is reasonably possible. He can make an attempt at conciliation. If the spouses maintain their intention to divorce, the judge informs them that they have to relodge their claim after a period of three months (*délai de réflexion*, time for reflection and consideration). If the spouses do not again bring the divorce application within six months after the expiry of this time-limit of three months, their joint application then becomes null and void (*caduque*). The meeting mentioned in Article 231 Code civil is at the same time an attempt at conciliation and an information meeting. Mediation is not expressly mentioned in the provisions on divorce, but

it can be a possibility since the *Loi No. 95-125 du 8 février 1995* (see Article 21).

(b) *Divorce sur demande acceptée* (also called *divorce sur double aveu*).

See Article 251 Code civil and Article 1106 et seq. Nouveau Code de procédure civile. Article 251 Code civil seems to state that an attempt at conciliation is possible, but not obligatory (as in the divorce *pour requête conjointe*, because both divorce grounds are '*divorces par consentement mutuel*' under French law). However, at the same time, Article 1134 Nouveau Code de procédure civile, which applies to *divorce demandé par un époux et accepté par l'autre* states that if the defendant accepts the facts asserted by the claimant, the family judge has to invite the parties to appear before him. The 'claimant' is asked whether he confirms his first declarations and the contents of his *mémoire* (a written statement of the facts which justify the divorce). The defendant is invited to confirm that he accepts this *mémoire* and the divorce. If, in the written statements or when the parties appear before him, the judge can find some elements which can lead to the conclusion that there are still common feelings (*communauté de sentiments*) between the spouses, he will propose a conciliation (*il oriente leurs réflexions en ce sens*'). Article 1134 also states that the rules Articles 1110 and 1111 Nouveau Code de procédure civile on an attempt at conciliation will apply. This is the reason why it is not very clear whether the attempt at conciliation is obligatory or not. But the majority of the legal literature<sup>14</sup> nowadays thinks that the attempt at conciliation is not in fact obligatory; it is only a possibility for the family judge if he thinks that conciliation could be attained.

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

(a) *Divorce sur requête conjointe*.

The spouses first appear before the judge (mentioned in Article 231 Code civil) for an attempt at conciliation and for the purpose of information. Then they have three months to contemplate further

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<sup>14</sup> See for example E. Fortis, 'Divorce', *Rép. Dr. Civil. Dalloz*, No. 578, who explains the difficulties in interpreting Article 1134 Nouveau Code de procédure civile.

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proceedings or to decide to discontinue. If they maintain their will to divorce, they again have to appear before the *juge aux affaires familiales* after three months with a proposed definitive, final agreement (arrangement) concerning all the consequences of the divorce. See Question 29.

(b) *Divorce sur demande acceptée* (also called *divorce sur double aveu*).

The parties first appear before the judge; if he has the impression that there are still common feelings between the spouses, he can propose conciliation. In this case, the proceedings are the same as for the divorce based on fault or on separation. A possible second attempt at conciliation may be ordered by the judge (Article 252-1 Code civil).

Then, if the parties decide to continue with the proceedings and have both admitted facts which make matrimonial community life intolerable, they have to relodge their claim (Article 1135 Nouveau Code de procédure civile). The *juge aux affaires familiales* will then grant the divorce and decide on its consequences.

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?*

Here again, we have to make a distinction between the real divorce by mutual consent (*divorce sur requête conjointe*) and the divorce by mutual confession of facts by both spouses (*divorce sur demande acceptée, divorce sur double aveu*).

(a) *Divorce sur requête conjointe*.

Article 1091 Nouveau Code de procédure civile: The spouses' joint application must contain:

- a temporary agreement as to the provisional measures during the proceedings
- a proposed definitive agreement (arrangement) on all the possible consequences of the divorce (assets, property, minor children...).

Article 1094 Nouveau Code de procédure civile: During the attempt at conciliation (at the first meeting with the family judge), the judge examines, together with the spouses and their lawyer(s), the proposed definitive agreement on the divorce consequences. He can inform the spouses that he will only accept the agreement and grant the divorce if they modify some parts of the arrangement, or, for example, if one spouse provides security.

After three months, the spouses who want to divorce must make a new application which contains a description of the execution of the provisional measures during the proceedings and a definitive arrangement on all the possible consequences of the divorce (Article 1097 Nouveau Code de procédure civile). During the second meeting before the judge, the family judge must check:

- the real will of both spouses to obtain a divorce (Article 232 Code civil);
- the contents of the definitive arrangement.

This arrangement must really determine all the consequences of the divorce. If the judge thinks that the agreement does not sufficiently protect the interest of one spouse or that of the children, he can decide not to approve or not to confirm it (*refus d'homologation*); in such a case he cannot grant the divorce (because the consequences thereof have not been determined) and he informs the parties that he will only pronounce such a judgment when the spouses will have submitted a modified arrangement (Article 1100 Nouveau Code de procédure civile).

(b) *Divorce sur demande acceptée* (also called *divorce sur double aveu*).

In this case, the spouses do not have to reach an agreement on the consequences of the divorce. This is logical, because only one spouse has applied for divorce. The other party has only accepted the facts asserted in the claim form and the divorce. There is no other agreement between the spouses. They can make a proposal or several proposals to this end, but this is not obligatory. If the spouses want to decide together which consequences the divorce will have, they can always change the kind of proceedings and decide to choose a *divorce sur requête conjointe* (divorce by real mutual consent). See Question 4.

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The family judge will determine the consequences of the divorce in the divorce order.

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?*

(a) *Divorce sur requête conjointe.*

The agreement must be exhaustive (see Question 29 and Articles 1091 and 1097 Nouveau Code de procédure civile). It must determine all the possible consequences of the divorce (childrens' custody, the division of assets, property, liquidation of the matrimonial property rights, maintenance between the former spouses, maintenance for children...)

(b) *Divorce sur demande acceptée* (also called *divorce sur double aveu*).

No agreement is required. As already mentioned, the spouses or one spouse can make some proposals, but this is not compulsory.

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

(a) *Divorce sur requête conjointe.*

The family judge must scrutinize the reached agreement with respect to the interests of each spouse and of the children. See Article 232 Code civil. This legal provision means that the family judge must first control the spouses' real will concerning divorce; then, he must check the reached agreement with regard to two points:

- does this agreement sufficiently protect the children's interests?;
- does it also sufficiently protect the interests of each spouse (for example, when the agreement does not mention any maintenance between the spouses).<sup>15</sup>

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<sup>15</sup> Case-law examples: Cass. Civ. 2, 04.03.1981, *Bull. civ. II*, No. 45: it is the duty of the judge to check, of his own motion, whether the interests of the spouses and the children are sufficiently protected by the agreement which reached. TGI La Rochelle, 19.10.1977, *D.* 1978. IR. 435, obs. A. Bénabent: an agreement which cancels the wife's maintenance in the case of a new marriage or other kind of cohabitation



32. *Is it possible to convert divorce proceedings, initiated on another ground, to proceedings on the ground of mutual consent, or must new proceedings be commenced? Or, vice versa, is it possible to convert divorce proceedings on the ground of mutual consent, to proceedings based on other grounds?*

Yes, it is possible to modify the basis on which the proceedings have been taken (Article 246 Code civil). When the proceedings have been initiated on a ground other than mutual consent, the spouses can request the family judge to change their application to one mutual consent and to confirm by judgment the agreement reached as to the consequences of the divorce. This so-called *technique de la passerelle* is technically interesting, because the spouses do not need to initiate new proceedings. They can simply proceed, because it is the same judge who has jurisdiction over divorce, regardless of the grounds therefor. This legal possibility exists because of the preference given by French law to divorce by mutual consent.

Vice versa, however, it is not possible to convert divorce proceedings on the ground of mutual consent to proceedings based on another ground. The spouses have to halt the initial proceedings and to initiate a new procedure.

## **2. Divorce on the ground of fault/ matrimonial offence**

33. *What are the fault grounds for divorce?*

There are two possibilities and two legal provisions:

(a) Article 242 Code civil: This is usual in the case of divorce by fault.

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does not sufficiently protect the wife's interests. *Contra*: Cass. Civ. 2, 16.01.1985, *Gaz. Pal.* 1985. 2. Panor. 211. Cass. Civ. 2, 26.05.1992, *Bull. civ. II*, No. 153: the parties are free to exclude any index-linked adjustment clause for maintenance between the former spouses. Cour d'appel Douai, 27.03.1980, *JCP* 1981. IV. 390: the family judge refused to confirm the agreement which had been reached because it determined very low maintenance to be paid by the father for the child in order to give the mother a greater opportunity to receive social benefits.

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The claimant must prove facts which are based on the other spouse's behaviour and which are a serious or renewed breach of marital duties. These facts must make the preservation of matrimonial community life intolerable.

So, two cumulative conditions are required:

1) facts which can be described as a serious or renewed breach of matrimonial duties:

The fact in question must be attributable to one spouse. If the spouse is mentally insane, his/her conduct will not be attributable to him/her.

The Court has the discretion to decide whether or not the facts asserted and proved amount to a fault. The *Cour de cassation* only controls whether both conditions mentioned in Article 242 Code civil have been considered by the court as having been fulfilled.<sup>16</sup> This requirement has been determined by the *Cour de cassation* in order to prohibit a divorce judgment based on fault without any grounds, which could create a *de facto* a new 'objective' ground for divorce.<sup>17</sup>

Which matrimonial duties? For example:

- the duty to live together (*obligation de communauté de vie*): if the spouses have separated, the family judge will have to decide which spouse is responsible for the separation. The spouse who has left the matrimonial home is not necessarily responsible, because he/she may have been obliged to do so if the other spouse was, for example, violent.
- the duty of fidelity (*obligation de fidélité*): adultery with a male or female person. Adultery is no longer anymore a compulsory ground for divorce. The judge has to check whether the act of adultery in question has influenced the irretrievable breakdown of the marriage. The other spouse's

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<sup>16</sup> Cass. Civ. 2, 18.12.1995, *Bull. civ. II*, No. 313.

<sup>17</sup> See E. Fortis, 'Divorce', *Répertoire de droit civil*, Dalloz, No. 686.

conduct can offset the seriousness of the adultery as a breach of matrimonial duties.<sup>18</sup>

In certain cases, a spouse's refusal to be treated for infertility can amount to a fault.<sup>19</sup>

Certain conduct amounting to a criminal offence (burglary, violence...) can also be considered to be a breach of matrimonial duties,<sup>20</sup> but only if the direct or indirect victim is the other spouse.

2) These facts must make the preservation of matrimonial community life intolerable.

This depends on the spouses' usual lifestyle. If the spouses have decided on an 'open' marriage, with possible other partners, then subsequent adultery will not necessarily make the preservation of matrimonial community life intolerable.<sup>21</sup>

It is possible that during the proceedings evidence will show that not only the claimant can assert facts which are attributable to the other spouse (Article 245 Code civil).

Even if a claimant's fault has been proved, the judge can decide to grant the divorce although this fault can suppress the seriousness of the other spouse's fault. The defendant can bring a counterclaim based on the claimant's fault. If both claims are accepted, the judge will grant a divorce based on mutual fault (shared fault, *torts partagés*). Even if no counterclaim has been initiated, the family judge can grant a divorce on the ground of shared fault (Article 245 § 3 Code civil).

(b) Article 243 Code civil: An unusual case.

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<sup>18</sup> Cass. Civ. 2, 05.02.1986, *Bull. civ.* II, No. 9. See also Cass. Civ. 2, 29.04.1994, *Bull. civ.* II, No. 123: no serious or renewed breach of matrimonial duties when the husband's adultery took place two years after the beginning of the divorce proceedings.

<sup>19</sup> Cour d'appel Bordeaux, 07.06.1994, *JCP* 1996. II. 22 590.

<sup>20</sup> Cour d'appel Bordeaux, 07.06.1994, *JCP* 1996. II. 22 590.

<sup>21</sup> Cour d'appel Bordeaux, 19.11.1996, *D.* 1997. 523, note Th. Garé: this behaviour corresponded to the conjugal agreement between both spouses.

France

*'Il (le divorce) peut être demandé par un époux lorsque l'autre a été condamné à l'une des peines prévues par l'article 131-1 du Code pénal'.*

Article 131-1 Code pénal contains a list of the possible sanctions for certain crimes.

Such a criminal sentence is nowadays the only compulsory ground for divorce based on fault, so that the judge has no discretion as to whether or not to grant the divorce.

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

Adultery is not an express kind of fault. It can only be taken into account if it can be described as a fact which leads to a *violation grave ou renouvelée des devoirs et obligations du mariage* (a serious or renewed breach of marital duties) which makes the preservation of matrimonial community life intolerable (Article 242 Code civil).

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

Only under the general conditions laid down in Article 242 Code civil: facts attributable to a spouse which are a serious or renewed breach of matrimonial duties, if these facts make the preservation of matrimonial community life intolerable.

*36. Is an intentional fault required?*

No. The fault does not need to be intentional, e.g. the intention to harm the other spouse is not required, although the fault must have been committed consciously.<sup>22</sup> The spouse must therefore have acted consciously.

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<sup>22</sup> Cass. Civ. 2, 19.07.1976, *Bull. civ.* II, No. 257.

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?*

It is not necessary that the fault is offensive to the other spouse. But it must consist of a serious or renewed breach of matrimonial duties and make the preservation of matrimonial community life intolerable.

The prior fault of one spouse can deprive the guilty/fault-based nature of the behaviour of the other spouse. French law (Article 245 Code civil) allows two possible kinds of decision by the judge:

- either the family judge decides that the fault of one spouse suppresses the seriousness of the behaviour of the other. If the spouses have on an 'open' marriage, with possible other partners, then subsequent adultery will not necessarily make the preservation of matrimonial community life intolerable.<sup>23</sup>
- or he grants a divorce on the ground of the shared fault of both spouses.

It depends on the facts and the individual situation in each case. It is a discretionary decision taken by the judge and is not controlled by the Cour de cassation.

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?*

Yes. See Article 244 Code civil.

The spouses' reconciliation after the asserted facts (as a divorce ground) have occurred prohibits the claimant from relying upon these facts in order to obtain a divorce judgment. If he/she does rely on such facts, the action (the claim) is inadmissible. A new claim is admissible

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<sup>23</sup> Cour d'appel Bordeaux, 19.11.1996, *D.* 1997. 523, note Th. Garé: this conduct corresponded to the conjugal agreement between both spouses.

France

if new facts can be proved and if such facts have occurred or have been discovered after the reconciliation.

Reconciliation means that the spouses want to continue the matrimonial community, and that the 'innocent' spouse has agreed to forgive to the other party.

That is the reason why Article 244, § 3 Code civil states that the preservation of matrimonial community life or its temporary revival do not amount to reconciliation where they only occur because of necessity, are a mere attempt at conciliation or this occurs for the purposes of the children's education.

*40. How is the fault proved?*

Every kind of evidence is possible: written or oral statements, confession by one spouse, letters, official verification and assessment by a bailiff (*huissier de justice*, for example for adultery) etc. See Article 259 Code civil.

Written statements are very frequently used in France. Letters and official assessments by a bailiff are also commonplace (but the latter kind of evidence only in divorces based on fault, because the '*constat d'huissier*' (bailiff's assessment) generally concerns adultery). The spouse's confession is also often used as evidence in divorce proceedings.

Letters can also be brought before the Court as evidence, but only if they have not been obtained through duress or fraud (see Article 259-1 Code civil).

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

Yes. See Articles 251 to 252-3 Code civil and Articles 1108 – 1112 Nouveau Code de procédure civile.

The proceedings are the same for a divorce based on fault and for a divorce based on separation (see Article 251 Code civil). The attempt at

conciliation is obligatory. Several attempts are possible if the judge has the impression that the spouses may reconcile.

The defendant is informed by the clerk of the court that an attempt at conciliation will take place.

The family judge first has to meet each spouse separately and without their lawyers. Then both spouses appear before the judge; at the end of the meeting, the lawyers may take part in the conference, if the spouses so wish (Article 252 Code civil).

The attempt at conciliation can be stayed for 8 days in order for the spouses to reflect and to consider the situation. If more time seems to be necessary for consideration and reflection, the family judge can decide that a new attempt at conciliation will take place within the following six months (Article 252-1 Code civil).

If the family judge cannot convince the spouses not to divorce, he must try to persuade them to organize the consequences of the divorce, especially concerning the childrens' custody. The spouses are invited to reach agreements that the judge can take into account in the future divorce judgment (Article 252-2 Code civil).

Article 252-3 Code civil states that everything which has been said or written during or with regard to the attempt at conciliation cannot be invoked (called upon) against a spouse or a third person during the subsequent proceedings.

*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, not in the case of a divorce based on fault. This possibility only exists in the case of a divorce on the ground of at least six years' separation, or on the ground of a spouse's mental illness for six years or more.

France

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

Yes. See Questions 33 and 37.

### **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 French provisions do not use the terminology 'irretrievable breakdown', but two provisions (Articles 237 and 238 Code civil) can be connected with this concept. Both provisions deal with a kind of separation (factual or mental). They were created by the Reform Act 1975, but at the beginning there was a great deal of criticism against this kind of '*divorce-répudiation*'. Indeed, the proceedings based on such a ground are very few: only 2% of all divorce proceedings. But the position under the law is that the spouse who wants to 'get rid' of the other spouse retains his duty to maintain the other spouse (*devoir de secours*, see Article 239 Code civil). The divorce judgment based on Article 237 or 238 Code civil is considered to be awarded against the claimant.

Article 237 Code civil: A spouse can bring a divorce claim based on a long break in matrimonial community life when the spouses have lived separately for at least six years. The '*séparation de fait*' means that the two essential parts of matrimonial community life have disappeared (the material one: cohabitation of the spouses; the intentional one: wanting to live together). The separation can be only factual, or it can be based on a judicial separation. (*séparation de corps*).

Article 238 Code civil: A spouse can initiate a divorce claim when the mental health of the other spouse has changed to such an extent that there is no longer any matrimonial community life and that it cannot be reasonably expected that such a community life will be rebuilt in the future.



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

This is a difficult question. Indeed the ground for divorce excludes any notion of fault, because the criterion is lengthy separation or lengthy mental insanity which has ended any matrimonial community life. But French law sees this kind of divorce as a 'repudiation'; that is the reason why the legal provisions state that the divorce judgment based on such a ground does not suppress the claimant's duty to help and to support the former spouse financially. They also mention that the divorce is considered to have been awarded against the claimant (Article 265 Code civil). The claimant must also bear all the costs of the divorce.

So, the notion of fault is still of some relevance, but as against the claimant, who is treated as if he/she were 'guilty'.

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

Only indirectly. Indeed, the law requires a certain duration for the separation (six years at least), so this means that the marriage must also have lasted six years at least.

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

Six years of separation (Article 237 Code civil), or six years of one spouse's mental illness, so that matrimonial community life no longer exists and that it cannot reasonably be expected that it could be rebuilt (Article 238 Code civil).

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

Yes, for a divorce based upon a separation of at least six years (Article 237 Code civil), because in this case, the legal requirements are only a '*rupture prolongée de la vie commune*', which means a separation of at least six years.

France

No, for a divorce based on one spouse's mental illness (Article 238 Code civil), because the law requires that because of the mental illness, there is no longer any matrimonial community life and it cannot reasonably be expected that such a matrimonial community life can be rebuilt. Article 1125 Nouveau Code de procédure civile also states that the family judge cannot grant a divorce based on one spouse's mental illness without having obtained a medical report written by three experts (doctors) chosen by the judge from a list of experts. This medical report must describe the defendant's mental health and contain a medical prognosis.

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

(a) Which circumstances suspend the term of separation?

Reconciliation with cohabitation having been resumed. But the French courts often decide that real resumed cohabitation requires that matrimonial community life has recommenced as regards its two essential parts (material and intentional, see Question 44).

(b) Does the separation need to be intentional?

Yes, because the two elements of matrimonial community life must have terminated: the material one (real cohabitation) and the intentional one (sometimes also called the psychological element): the desire to live together.

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

Not directly. In most of the concrete cases, separation means two separate homes. There is no actual case law, as in Germany, for those cases in which a spouse still resides in the matrimonial home with the other spouse, but separately.

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

Yes. For every kind of divorce there is an obligatory attempt at conciliation. Only for the real divorce by mutual consent (*divorce sur*

*requête conjointe*), is there no such legal obligation, although the judge can decide to organize a meeting in order to convince the spouses to reconcile.

See Article 251 Code civil: So, an attempt at conciliation is obligatory. The proceedings are the same as in the case of a divorce based on fault (see Question 41, which explains the details of the proceedings in both cases).

*51. Is a period for reflection and consideration required?*

If there is no reconciliation before the judge during the attempt at conciliation, the judge enters a decision (*ordonnance*) which can order a new attempt at conciliation or allow the claimant to summon the defendant immediately (to bring a divorce claim against the defendant). There is only a period for reflection and consideration if the judge has the impression that the spouses may reconcile. In that case, the family judge can suspend the attempt at conciliation to give the spouses a reflection period not exceeding eight days. If a longer period of reflection seems to be useful, the family judge can suspend the proceedings and order a new conciliation attempt in the following six months.

See Article 252-1 Code civil.

*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?*

No. The competent authority (the family judge, *juge aux affaires familiales*) determines the consequences of the divorce. Of course, one spouse or both can make certain proposals, but the judge is not obliged to agree to them. In the case of children's custody, he has to decide which solution is the best in the child's interests (*critère de l'intérêt de l'enfant*).

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

France

Not relevant.

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?*

Yes. See Articles 238 and 240 Code civil.

(a) In the case of one spouse's mental illness (Article 238 Code civil).

The judge can dismiss the divorce claim of his own motion if the divorce would result in consequences which are too detrimental to the defendant's illness.

(b) In this case and in the case of a divorce based on separation for at least six years.

Article 240 Code civil contains a '*clause de dureté*' (Härteklausel, hardship clause). In this case, the judge cannot dismiss the claim of his own motion due to the fact that the divorce would result in consequences which are too detrimental. The defendant must invoke this '*clause de dureté*' and prove that the divorce would result in substantial material or moral consequences which would be exceptionally 'harsh' (*conséquences d'une exceptionnelle dureté*) for the defendant or for a child (or children). The legal provision mentions two possible criteria: the defendant's age and how long the marriage has lasted.

At the beginning, at the end of the 1970s, French judges were rather liberal and were willing to apply this clause in many cases (for example, when the wife invoked her strong Catholic beliefs).<sup>24</sup> Nowadays, they are much stricter. The two reasons which are most accepted by the courts are: the defendant's health<sup>25</sup> and the loss of

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<sup>24</sup> See *Code des personnes et de la famille 2002*, Paris: Litec éd., Article 240 Code civil, No. 1097. See also Cour d'appel Riom, 09.05.2000, *Juris-data* No. 113790; *Dr. Famille* Nov. 2000, p. 127: the religious beliefs and the poor health of one spouse.

<sup>25</sup> CA Toulouse, 11.04.2000, *Dr. Famille* Nov. 2000, comm. p. 127; CA Poitiers, 21.05.1999, *Dr. Famille* Nov. 2000, comm. p. 127, second case; CA Grenoble,

financial rights<sup>26</sup> (or, for example, the modification of the living conditions: the matrimonial home).<sup>27</sup> The French courts have never applied Article 240 Code civil when the defendant was the husband.<sup>28</sup>

The judge has the discretion to dismiss the claim if he has enough grounds to decide that the divorce would result consequences which are too detrimental to the defendant or the children.<sup>29</sup> The Cour de cassation does not want to have to control the application of the '*clause de dureté*', even if the courts must provide the grants for their decision. The possible control by the Cour de cassation only concerns the grounds for the decision. They must mention the consequences which they consider to be too detrimental.

### **C. SPOUSAL MAINTENANCE AFTER DIVORCE**

#### **I. General**

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

The Code civil, Book I, Title VI, Chapter III, Section 2 (*Des conséquences du divorce pour les époux*), § 3: *Des prestations compensatoires* (Articles 270 to 280-1 Code civil) and § 4: *Du devoir de secours après le divorce* (Articles 281 to 285-1 Code civil). The main provisions are laid down in the *Loi No. 75-617 du 11 juillet 1975*, but a new Reform Act (*Loi No. 2000-596 du 30 juin 2000*)<sup>30</sup> has modified some rules concerning maintenance and its possible modification.

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11.05.1999, *Dr. Famille* sept. 1999, comm. p. 97. In most cases, the illness consists of depression.

<sup>26</sup> See for example CA Paris, 05.06.1997, *Dr. Famille* Dec. 1997, comm. p. 177, first case: loss of a pension because of the divorce.

<sup>27</sup> TGI Aix-en-Provence, 18.11.1976, *JCP* 1977. II. 18 532, note R. Lindon: loss of the matrimonial home and the fact that the defendant was not able to work because of his age and his poor health.

<sup>28</sup> *Code des personnes et de la famille*, No. 1098.

<sup>29</sup> Consequences which are too detrimental for the children are very seldom invoked and are never admitted by the French courts.

<sup>30</sup> See A. Batteur and G. Raoul-corneil, 'Fin ou éclatement de la notion de prestation compensatoire?', *Droit et Patrimoine* Oct. 2001, p. 34.

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

The most recent reform concerning maintenance of spouses after divorce is the *Loi No. 2000-596 du 30 juin 2000* which has modified the rules concerning the kind of maintenance which is allowed and the possibility to request a reduction in the amount. Before this recent Act, the extensive Reform Act 1975 which modified the grounds for divorce had also changed the rules concerning maintenance between former spouses. In 1975, for all the kinds of divorce (except for divorce based upon a separation of six years or upon mental insanity for at least six years), the Reform Act created a system of *prestation compensatoire* (compensatory benefit or allowance) which should in principle be paid as a capital sum (lump sum), e.g. in one, two or three payments, not as a monthly payment). But in practice, the rule became the exception rather than the rule and most of the *prestations compensatoires* were paid as *rentes mensuelles* (monthly payments) by the debtor. The Act in 2000 is intended to counteract this Court practice and obliges the debtor in most cases to pay a capital sum, eventually in several instalments.<sup>31</sup> If the debtor is really unable to provide maintenance to the former spouse in the form of capital, then the court allows a life annuity which has to be paid on a monthly basis. So, some academics have asserted that there is not only one kind of *prestation compensatoire*, but several.<sup>32</sup> The *prestation* which is contained in the spouses' agreement in the case of a divorce by mutual consent (*divorce sur requête conjointe*) can be determined for a set period of time and can end upon a certain event mentioned in the agreement (such as remarriage etc.); the freedom concerning the *prestation* is much greater in this type of divorce than in others.

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

A few years ago, a very intense discussion began in France concerning the possibility for the debtor to apply for a reduction in the amount of

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<sup>31</sup> The 'capital' can also be 'paid' *in naturalia*, for example by giving a spouse a building, an apartment, the right to use property, a building etc.

<sup>32</sup> See A. Battaur and G. Raoul-Cormeil, *Droit et Patrimoine* Oct. 2001, p. 34.

maintenance. The French provisions were very strict indeed and only in exceptional situations could the debtor obtain a court order to reduce the amount of maintenance (the legal provision, Article 273 Code civil, required 'circumstances of exceptional gravity', *circonstances d'une exceptionnelle gravité*).

Many associations (such as the *Association pour la réforme des prestations compensatoires*, ARPEC) advocated a more flexible provision taking into account the evolution of the debtor's life and financial capacity. After a long discussion, the Loi No 596-2000 du 30 juin 2000 was enacted.

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

Yes. During the marriage, both spouses have a mutual duty of financial support and aid (*devoir de secours pendant le mariage*, see Article 212 Code civil: '*Les époux se doivent mutuellement fidélité, secours et assistance*'). This duty is not maintained after divorce, except in the case of a divorce based on a separation of at least six years or on the deterioration of one spouse's mental health since six years or more. So, we have to make a distinction between these two divorce grounds and the others:

(a) Divorce based on six years' separation or mental illness (Articles 237 and 238 Code civil).

The duty of financial support and aid still exists, but only in favour of the defendant. The claimant must pay a '*pension alimentaire*' (maintenance). See Article 281 Code civil: In the case of the defendant's mental illness, the financial duty to support him/her includes all the expenses which are necessary for the required medical treatment.

Article 282 Code civil: The claimant will have to pay an amount of money every month which may be subject to revision when the income or the needs of one spouse subsequently change.

(b) All other divorces.

Article 270 Code civil: The spouses have no further duty of mutual financial support, but one spouse can be obliged by the divorce

judgment to pay to the other spouse a '*prestation*' (which may be roughly translated as an 'indemnity') in order to compensate, as far as possible, the disparity (difference) between the spouses' living conditions which has been caused by the divorce.<sup>33</sup> This form of maintenance is called '*prestation compensatoire*'. Its amount is fixed by the family judge who takes into account the creditor's needs and the debtor's financial capacity, and also the financial situation of the spouses at the time of the divorce and its foreseeable evolution in the future. See Article 271 Code civil. For determining the needs and the financial capacity, see Article 272 Code civil.

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?*

Indirectly yes, because Article 270 Code civil, which allows the judge to order one spouse to pay maintenance (*prestation compensatoire*) to the other, requires that there is a disparity between the spouses' standards of living. If both spouses can maintain the same living conditions, no *prestation compensatoire* has to be paid. So, if the rules of matrimonial property law lead to a similar financial situation between the spouses, there will not be any disparity which has to be compensated, and no *prestation compensatoire* has to be paid. Article 272 Code civil states the criteria which can be used by the judge to determine the spouses' needs and financial capacity: to these criteria belongs 'the spouses' assets, as a capital sum and as income, after the liquidation of the matrimonial regime'.

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 indirectly, as mentioned in Question 59. Article 272 Code civil states the criteria which the family judge can use in order to determine whether or not a *prestation compensatoire* has to be paid by one spouse.

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<sup>33</sup> See G. Cornu, *Droit civil, La famille*, 7<sup>ème</sup> éd., 2001, Paris: Montchrestien, No. 409: la *prestation compensatoire* est une '*indemnité économique tendant à un rééquilibrage patrimonial après divorce*'.



One of these criteria is 'the situation of both spouses regarding the retirement pension'; additionally, their 'existing and foreseeable rights' must also be taken into account.

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?*

Yes, compensation for the divorced spouse can be claimed in addition to maintenance. Two legal provisions exist:

- One which is applicable only in the case of a divorce based on fault. If the divorce judgment states that one spouse alone is entirely 'guilty' (*divorce prononcé aux torts exclusifs d'un époux*), then the other spouse can claim damages (*dommages-intérêts*) in order to compensate the material or moral prejudice (damage) caused by the dissolution of the marriage. The compensation claim must be brought together with the divorce claim. It is not admissible at a later date.<sup>34</sup> See Article 266 Code civil.
- One which is applicable even if both spouses are responsible for a fault and are both considered to be the 'guilty parties' in the divorce decision: when a spouse can prove the other spouse's fault, he/she can claim damages on the ground of Article 1382 Code civil, which contains a general clause concerning torts (*Tout fait quelconque de l'homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer*).<sup>35</sup> The damages can be paid as a lump sum or as an annuity.

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<sup>34</sup> Examples: CA Besançon, 05.05.1994, *Juris-Data* No. 045 929 (the wife was suddenly left alone and had to take care of the children; she had stopped working – parental leave – just before the husband left the matrimonial home to live with his girlfriend. Material and 'moral' prejudice for the wife; CA Orléans, 15.12.1997, *Juris-Data* No. 047 379 (wife's depression and psychological trauma); Cass. Civ. 2, 22.10.1975, *D.* 1976. IR. 7 (wife's moral and emotional isolation after a very long matrimonial community life).

<sup>35</sup> Examples of fault which can lead to damages: violence during the matrimonial community life (CA Metz, 21.11.1993, *Juris-Data* No. 050 345); the fact that one spouse has left the matrimonial home when the children were very young (CA Paris, 01.06.1993, *Juris-Data* No. 022 018).

France

Maintenance has a compensatory function in all cases of divorce except separation or one spouse's mental illness. The '*prestation compensatoire*' is clearly defined as a means to 'compensate, as far as possible, the disparity between the spouses' standards of living which has been caused by the divorce (Article 270 Code civil, see Question 58).

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.*

See Question 58. There are two pertinent situations:

(a) Divorce based on separation of at least six years or a deterioration of one spouse's mental health since at least six years.

In both of these cases, the claimant's duty to support the other spouse financially is maintained, in the way of a *pension alimentaire* which is paid monthly. Its amount depends on the creditor's needs and on the debtor's financial capacity. It can be modified if there is any significant change in the needs or the financial capacity of one spouse. See Articles 281 and 282 Code civil. The payment of the *pension alimentaire* automatically terminates if the creditor remarries (Article 283 Code civil). If he/she cohabitates with another partner outside marriage (*concubinage notoire*), the debtor can bring a claim in order to obtain a decision to halt the payment (Article 283, § 2 Code civil). In the case of the debtor's death, his/her heirs have to pay the *pension*, except if they do not accept the inheritance (Article 284 Code civil).

Exceptionally, the monthly payment can be replaced by the payment of a lump sum (*capital*). If this lump sum does not cover the creditor's needs, he/she can bring a claim in order to obtain an additional monthly payment; see Article 285 Code civil.

(b) Divorce based on another ground.

There is no further duty to support the other spouse financially. If there is disparity between the spouses' standards of living due to the

divorce (and not due to a previous separation) and if this disparity has been caused by the divorce, one spouse may have to pay a *prestation compensatoire* which should compensate this disparity as far as possible. The amount is determined with regard to the creditor's needs, the debtor's financial capacity, the situation at the time of the divorce and its foreseeable evolution. See Articles 270 and 271 Code civil.

Article 272 provides the judge with several criteria in order to decide whether or not to grant maintenance (this decision is always contained in the divorce judgment itself). These criteria are: the spouses' age and health, the duration of the marriage (new criteria since the Reform Act of 30 June 2000), the time that the spouses or one spouse has devoted or will have to devote to the childrens' education, the spouses' professional qualifications and situation (new criterion since the Reform Act 2000), existing and foreseeable spouses' rights (financial rights), the position of each spouse concerning a retirement pension (new criterion since 2000) and their assets, in the form of capital and income, since the liquidation of the matrimonial regime.

The *prestation compensatoire* is *forfaitaire* (a lump-sum payment) (Article 273 Code civil). It is in general paid as a lump-sum (capital) determined by the family judge (Article 274 Code civil). The legal provisions mention several kinds of payment (see Article 275 Code civil):

- the payment of a lump sum;
- the transfer of property (real property, movable property) or the transfer of only a usufructuary right (*usufruit*), or a right of use (*droit d'usage*) – property transfer orders;
- the deposit of shares or other funds in the hands of a third person who will pay to the creditor the income derived from the funds during the period of time fixed by the judge.

The Code civil prefers the payment of a lump sum or the transfer of property, in order to obtain a 'clean break'. But if the debtor is not able to pay under the conditions laid down in Article 275 Code civil, the family judge has to decide how the lump sum has to be paid (annuities, index-linked monthly payments) within eight years or less. The debtor can bring a claim in order to modify these payment

conditions if there is an important change in his/her situation. Very exceptionally, the judge can order the payment of the lump sum (capital) during a period which exceeds eight years. See Article 275-1 Code civil.

Exceptionally, with regard to the creditor's age or his/her poor health which does not allow him/her to provide for him/herself, the family judge can enter a decision with special grounds for allowing the payment of the *prestation compensatoire* to be made every month as a *rente viagère* (life annuity). He has to take into account the several criteria mentioned in Article 272 Code civil (see above). Since the Reform Act 2000, France no longer has the possibility for the *prestation compensatoire* to be paid as a monthly payment limited to one, two or several years (except in the case of a divorce based on real mutual consent, *divorce sur requête conjointe*: in this case, the spouses are free to agree to limit the maintenance to a certain period of time). The only possibility is for a life annuity (*rente viagère*) until the creditor's death. But Article 267-3 Code civil provides some further provisions: the *prestation compensatoire* fixed as a life annuity can be modified,<sup>36</sup> suspended or even dispensed with in the case of important changes to the parties' income or needs.

In the special case of a divorce based on real mutual consent (*divorce sur requête conjointe*), Article 278 Code civil states that the spouses, who must prepare a proposed agreement on all the consequences of the divorce and to submit it to the judge for approval, can decide that the payment of maintenance will terminate upon the occurrence of a precise event (such as remarriage etc.); the spouses can also agree that the maintenance will only be paid for a limited period of time (one, two, five years etc.).

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?*

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<sup>36</sup> But the modification cannot lead to an increase in the amount initially determined by the judge, see Article 267-3, § 2 Code civil.

Yes. The divorced spouses are obliged to provide the necessary information to the family judge (the Court of appeal in the case of an appellate review) concerning their income and assets.

Already at the beginning of the proceedings, the spouses must provide the judge with information concerning their health insurance and pensions (Article 1075 Nouveau Code de procédure civile).

The judge can require that the spouses provide information concerning their charges and income, for example the production of tax returns, salary slips etc. (Article 1075-1 Nouveau Code de procédure civile).

The spouses must provide the judge with a declaration of honour which certifies that they have provided the court with the correct information concerning their means, income, assets and living conditions See also Article 271, § 2 Code civil.

The right to information is not directly enforceable, but the judge can order the production of the necessary documents subject to an *astreinte* (a fine which has to be paid if the party does not provide the information within a certain period of time). The judge can also obtain information from some administrative bodies and from the *Sécurité sociale* (the social security authorities).

The consequences of the spouse's refusal to provide such information are the following: The judge who requires certain information from a party can draw adverse inferences from the spouse's refusal to provide such information. In a divorce case, he can presume that the spouse's income and assets are much higher than those asserted by the spouse.

## **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.*

Here, we must make a distinction between *prestation compensatoire* and *pension alimentaire* after divorce.

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(a) *Pension alimentaire*: (only in the case of a divorce based on six years' separation or one spouse's mental illness for at least six years, Articles 237 and 238 Code civil).

In this case, the only criteria are the creditor's needs and the financial capacity of the debtor, who was the claimant in the divorce proceedings. The defendant's living conditions before the divorce should be maintained as far as possible.<sup>37</sup> The creditor's needs are not limited to vital necessities; the spouses' social standing must also be taken into account.<sup>38</sup> The amount of the *pension* can be revised when the spouses' needs or financial capacity change (Article 282 Code civil). If the debtor's assets so allow, a lump sum can be paid, but if this lump sum becomes too low to cover the creditor's needs, the creditor can bring a claim in order to obtain an additional pension annuity (Article 285 Code civil).

In these kinds of divorce, it is not necessary to prove a creditor's lack of means. The *pension* has to be paid even if the defendant (creditor) has some means, because its purpose is to maintain, as far as possible, the standard of living before the divorce. Let us here not forget that this divorce ground is considered to be a 'repudiation' for which the claimant has to bear complete responsibility and every charge.

(b) *Prestation compensatoire* (all other cases).

The purpose of this payment is to compensate, as far as possible, the disparity between the standards of living of the spouses which the divorce has caused (Article 270 Code civil). So it is a kind of 'indemnity' which is not directly a maintenance based on one spouse's lack of means. Article 271 Code civil states that the *prestation compensatoire* is determined with regard to the creditor's needs and to the debtor's means (*ressources*); the spouses' financial situation at the time of the divorce and the foreseeable situation must also be taken into account. When the family judge controls the creditor's needs and the debtor's means, he has to consider several criteria which have already been mentioned under Question 62 (Article 272 Code civil). So, the conditions to be fulfilled are:

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<sup>37</sup> Cass. Civ. 2, 19.02.1997, *Dr. Famille* 1997, No. 101, obs. H. Lécuyer.

<sup>38</sup> Cass. Civ. 2, 11.07.1979, *Bull. civ.* II, No. 207.

- disparity between the spouses' standards of living because of the divorce (it does not mean a lack of means by one spouse)
- proof thereof by examining the spouses' financial situation after divorce and in the immediate future

The creditor's needs and the debtor's means must be analysed with the aid of several criteria: the spouses' age and health; the duration of the marriage; the time devoted or still to be devoted to the children's education; the spouses' professional qualifications and situation; existing and foreseeable rights of the spouses; retirement pensions which are foreseeable; and assets (capital and income) after the liquidation of the matrimonial regime. These criteria are not exhaustive; it is an open list.<sup>39</sup>

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

Article 280-1 Code civil excludes any *prestation compensatoire* in favour of the spouse against whom the divorce judgment has exclusively been entered (*divorce aux torts exclusifs*). This spouse cannot claim such an allowance; he/she cannot claim a *pension alimentaire* because the mutual duty to support the other spouse financially terminates with a divorce judgment based on fault.

However, if matrimonial community life has lasted for a long time and if this spouse has contributed to the other spouse's professional standing, it may be fair to grant him/her an exceptional amount in the form of an indemnity. The family judge must decide whether equity requires that such an indemnity has to be paid.

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)?*

Not directly (see Question 64). A lack of means is not the real criterion chosen by the French legal provisions in order to allow or not to allow maintenance after divorce. But in the case of a *prestation compensatoire*, some criteria are connected with the problem raised in Question 66 (lack of means caused by the marriage): the time already devoted or

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<sup>39</sup> Cass. Civ. 2, 01.04.1987, *Bull. civ.* II, No. 77.

still to be devoted to the children's education; the spouses' professional qualifications and situation. The fact that one spouse has given up his/her work during the marriage so as to care for the children can play a role, when, because of one spouse's lack of professional qualifications, the disparity between the spouses' standards of living is important or will be important in the immediate future.

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

Article 271 Code civil states that the *prestation compensatoire* is determined with regard to the creditor's needs and the debtor's means, but the judge must consider the spouses' situation at the time of the divorce judgment and the foreseeable evolution.

### **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?*

We again have to distinguish between *prestation compensatoire* and *pension alimentaire* after divorce.

(a) *Prestation compensatoire*.

Except in some rare cases, the *prestation compensatoire* must be paid as *capital* (a lump-sum payment), see Article 274 Code civil ('*La prestation compensatoire prend la forme d'un capital dont le montant est fixé par le juge*'). It is very clear that French law prefers this kind of payment, which better expresses the notion of compensation, indemnity and a clean break. The family judge has several possibilities: he can decide that the debtor will:

- pay a lump sum, or
- transfer to the other spouse real property or movable property (payment in kind; a property transfer order), or
- give to the other spouse a right of use (*droit d'usage*) or a usufructuary right (*usufruit*), or
- deposit shares or other funds in the hands of a third person who will have to pay to the creditor the income derived from the funds during the period of time determined by the judge.



These are the only legal possibilities to pay the *prestation compensatoire* in the form of *capital*. The judge cannot propose or decide another kind of payment.

The judge can decide that the divorce will only be granted when the debtor will have paid the lump sum or made the security deposit (Article 275 Code civil).

If the debtor is not able to pay as indicated in Article 275 Code civil, Article 275-1 Code civil states that the family judge will determine exactly how the *prestation compensatoire* is to be paid, within not more than eight years, in monthly or annual payments (annuity) which have to be indexed to the cost of living. In very rare cases, if the debtor's financial situation has seriously changed, the debtor can claim a payment over more than eight years.

Very rarely, the judge can decide that due to the creditor's age or health, and if he/she cannot provide for him/herself, then the *prestation compensatoire* will be paid as a life pension (*pente viagère*) every month (index-linked) (Article 276 Code civil). This must be an exception. Article 276-3 Code civil states that in such a case, the amount of the *prestation compensatoire* can be modified (but not increased), so that the payment may be suspended or suppressed if there are important changes in the parties' needs and means. But when it is so determined by the judge, the life pension is always for the whole life of the creditor. Only later can another decision be rendered in order to suspend or even to terminate the creditor's duty to pay.

In the special case of a divorce by real mutual consent, the spouses have to decide on all the divorce consequences. They may decide that one spouse will pay maintenance to the other for a limited period of time (one, two, three years etc.). This is the only case in which a *prestation compensatoire* can be limited in time from the very outset.

*(b) Pension alimentaire.*

As already mentioned, the consequences of a divorce based on separation for at least six years or one spouse's mental illness for at least six years are regulated by the law in the defendant's interest. Court practice has analysed this duty to continue to support the

defendant financially as a duty to maintain a certain equality in the spouses' standards of living, so that the debtor must pay more than only the minimum necessities. The courts take the needs and the means of each spouse<sup>40</sup> into account as well as the necessity to maintain the defendant's previous standard of living.<sup>41</sup> The duty to support the defendant financially lasts during the defendant's lifetime, so that in the case of the debtor's death, his heirs have to continue to pay the maintenance, except if they renounce the inheritance (Article 284 Code civil).

The amount of the *pension alimentaire* can always be modified with regard to the needs and to the financial capacity of both former spouses (Article 282 Code civil).

The *pension alimentaire* terminates upon the creditor's remarriage (Article 283 Code civil). When the creditor cohabits with another partner (*concubinage notoire*), and in the event of a claim by the debtor, the judge must render a decision stating that the *pension* is no longer applicable.

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?*

More according to the standards of living during the marriage. This is the case not only for *prestation compensatoire* after divorce (which supposes a disparity between the spouses' standards of living due to the divorce), but also for the *pension alimentaire* in the case of a divorce based on separation for at least six years or a deterioration of one spouse's mental health since at least six years. See Questions 64 and 68.

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?*

The French legal provisions do not provide any guidance for the judge to calculate the maintenance payment. There are no rules relating to

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40 Cass. Civ. 2, 08.07.1999, *Dr. famille* 2000, No. 6, obs. Lécuyer.

41 Cass. Civ. 2, 19.02.1997, *Dr. famille* 1997, No. 101, obs. Lécuyer.

percentages or fractional shares according to which the ex-spouses' income shall be divided. There is no special model prescribed by law and no official Court practice like, for example, the *Düsseldorfer Tabelle* in Germany. That is the reason why the amount of maintenance after divorce seems to vary a great deal from court to court. There is no set practice. And there is no possibility to precisely predict what amount will be decided upon by the judge.<sup>42</sup>

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?)*

There is no direct demand for precise costs by the claimant. As has been mentioned, the criterion is the disparity between the spouses's standards of living. The judge determines a global amount, but does not divide this amount precisely to cover costs such as health insurance, insurance for age or disability and so on.

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

Yes as regards the *prestation compensatoire* in general, because it must normally be paid as a lump sum. So, when the debtor has paid the amount decided upon by the judge (for example, in five or six or even eight years if he/she was unable to pay the whole amount at once), he/she has nothing more to pay.

No as regards the *pension alimentaire*, because it has to be paid during the creditor's lifetime, except in the case of remarriage or cohabitation with another partner outside marriage (Article 283 Code civil).

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

Not after a certain time, but in some cases.

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<sup>42</sup> For some examples, see J. Hugot and J-F. Pillebout, *La prestation compensatoire et le divorce, Loi du 30 juin 2000*, Paris: Litec 2000, p. 198 ff.

France

For the *pension alimentaire* after divorce, see Article 282 Code civil (a possible reduction in the level of the maintenance due to changes in the needs and means of one former spouses).

For the *prestation compensatoire*, see Article 276-3 for the case of a *prestation* which has been ordered to be paid as a life pension (*rente viagère*) on a monthly basis. The monthly amount can be modified so that the pension can be suspended or even terminated in the case of an important change in the means and needs of the parties. But such a revision cannot increase the monthly amount which has to be paid.

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

See the details mentioned under Question 62 for the *prestation compensatoire*. See also the answer to Question 62 for the *pension alimentaire*.

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?*

(a) For the *prestation compensatoire*.

A lump-sum payment is the normal rule; it can be imposed by a court order if the assets and the income of the debtor are sufficient. The claimant or the debtor can also propose this solution to the court. But the court decides of its own motion in which way the maintenance has to be paid.

(b) For the *pension alimentaire*.

A monthly payment is the normal way of paying this amount. But if it is possible with regard to the assets and the income of the debtor, the monthly pension can be totally or partly replaced by a lump sum (Article 285 Code civil).

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

Yes, if it is paid monthly or in the form of annuities. See Article 275-1 Code civil for the *prestation compensatoire* if it is paid in several monthly amounts or in the form of annuities.

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

The amount of maintenance can be adjusted to changed circumstances in two cases:

(a) When the *prestation compensatoire* is paid as a life pension (*rente viagère* (Article 276 Code civil).

In this case, the amount can be modified so that the pension can be suspended or even terminated in the case of an important change in the needs or means of the parties (Article 276-3 Code civil). The revision of the amount cannot lead to an increase in this amount. Both the debtor and his/her heirs can bring a claim in this respect.

(b) When a *pension alimentaire* has to be paid, it is in general in the form of a monthly payment.

Article 282 Code civil states that the pension can always be revised with regard to the means and the needs of each spouse. The formulation is largely the same as that in Article 276-3 Code civil, so that the same conditions have to be fulfilled.

#### **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?*

In general, for *pensions alimentaires*, and this also applies to the *prestation compensatoire* in the form of a monthly payment (life pension, *rente viagère*), the debtor can retain a kind of minimum living wage (*minimum vital*) which corresponds to what the French legal provisions call *Revenu Minimum d'Insertion (RMI)*. This RMI is an amount of money which is paid on a monthly basis (social aid) to those who have

no means and cannot provide for themselves. The special provisions on enforcement of judgements state that even in the case of a judgement ordering the payment of maintenance (*pension alimentaire* or *prestation compensatoire* in the form of a monthly payment), the enforcement of the decision cannot deprive the debtor of a minimum living amount corresponding to the official amount of the RMI (about 405 euros for one person; this amount being higher when the person who receives it has a legal obligation to provide for other persons such as a spouse and/or children. The French government has passed décret No. 2002-1150 on 11 September 2002 which states that in the case of an attachment (*saisie*) on bank accounts, the debtor will have a right to retain an amount corresponding to the RMI, so that a creditor who wants to be paid and who decides to attach the money deposited with the bank cannot seize the whole amount in the bank account.

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?*

An increase in the debtor's income since the separation can be taken into account because (as mentioned in Question 63), the spouses must provide information to the court as to their income and assets (Article 1075-1 Nouveau Code de procédure civile). The judge can require that the spouses provide information concerning their charges and means, for example the production of taxation returns, salary slips etc. These documents must be as current and as recent as possible, so that the judge can take into account the recent changes to the debtor's means and income.

The maintenance amount must be calculated before the divorce is granted, so that in general, an increase in the debtor's income since the divorce will not be taken into account, at least when the maintenance is a *prestation compensatoire* which has to be paid as a lump sum, or as a transfer of real or movable property, or as a deposit of shares. Only if the *prestation compensatoire* is a life pension (*rente viagère*), which in principle has to be paid on a monthly basis, is a revision, suspension or termination possible. But Article 276-3 Code civil states that '*La révision ne peut avoir pour effet de porter la rente à un montant supérieur à celui fixé initialement par le juge*'. This means that the amount of the life annuity

or pension cannot be increased, only reduced or even terminated. So, an increase in the debtor's income since the divorce has no effect on the amount of the maintenance.

In the case of a *pension alimentaire* between former spouses, the solution is not the same: Article 282 Code civil states that '*la pension alimentaire peut toujours être révisée en fonction des ressources et des besoins de chaque époux*'. Here, the change in the needs and means of *each* spouse is mentioned as a possible ground for modifying the amount of maintenance. So, a substantial increase in the debtor's income since the divorce could be taken into account when the creditor claims an increase in the amount of the maintenance; it is doubtful whether the creditor should also prove or disprove that his own needs have increased.<sup>43</sup>

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

It depends on the kind of debts and on the existence or non-existence of an attachment (*mesure d'exécution forcée*) on the assets and/or income of the debtor. A maintenance debt must be taken into account, but only if, for example, the creditor of this maintenance has already imposed measures of attachment or distraint in order to obtain the maintenance. In this case, the other creditor cannot ignore this measure.

*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?*

Only the legal obligations can be taken into account. A mere moral obligation does not play a role.

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<sup>43</sup> See TGI Saint-Etienne, 12.05.1997, *RTDCiv.* 1997, p. 646, obs. J. Hauser: the court regularly has to upgrade (*remettre à niveau*) the defendant's material living conditions; this can be done through a modification of the pension amount in the case of a divorce based on a separation of at least six years.

France

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

Yes. This is not directly laid down in the legal provisions, but it is logically possible, because the purpose of the legal provisions concerning maintenance is that the creditor should obtain the maintenance, regardless of the source of payment (income, capital assets...).

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?*

This question has not been raised in French legal practice, certainly as far as I am aware.

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 or her maintenance obligation? Which kinds of benefits have to be used for this purpose?*

It depends on the kind of social security benefits. Most benefits cannot be attached (*saisis*) because they have the nature of a 'minimum living wage', so that they do not have to be used for the performance of the debtor's maintenance obligation. This is for example the case if the debtor receives an RMI from the State and the social security service (on the RMI, see Question 78). The French legal provisions state that social security benefits (*indemnités de sécurité sociale*) are '*incessibles et insaisissables*' (not transferable and not attachable or distrainable)<sup>44</sup>, although most of them can be attached by a creditor of maintenance (*créancier alimentaire*). For example:

- *prestations familiales (allocations pour jeune enfant, allocations familiales, allocation de rentrée scolaire...)*: Such payments cannot be attached except for the payment of maintenance (*obligation alimentaire*). See Article L 553-4 Code de la sécurité sociale.
- *indemnités journalières d'assurance maladie* (social security benefits connected with sickness, Article L 323-5 Code de la

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<sup>44</sup> See the many details mentioned in: R. Perrot and Ph. Theyry, *Procédures civiles d'exécution*, Paris: Dalloz 2000, No. 214, p. 228.



sécurité sociale), or *indemnités journalières d'accident du travail* (social security benefits due to an industrial accident, Article L 433-3 Code de la sécurité sociale),<sup>45</sup> *indemnités de chômage* (unemployment benefit, Article L 352-3 Code de la sécurité sociale), *indemnités de vieillesse ou d'invalidité* (Article L 355-2 Code de la sécurité sociale): such payments can be attached but only a percentage corresponding to the attachable part of a salary.

- *Allocation aux adultes handicapés* (social security benefits for handicapped adults), Article L 821-5 Code de la sécurité sociale: not attachable, except for the payment of expenses which are necessary to maintain the handicapped adult.
- *RMI (Revenu minimum d'insertion)* cannot be attached, because it corresponds to a 'vital minimum' which the French state pays to persons who have no means at all and who cannot provide for themselves (*Loi No. 88-1088 du 1<sup>er</sup> décembre 1988*, Article 31).

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 income or means of the spouse.

In the case of a PACS (*Pacte civil de solidarité*, registered partnership), Article 515-4 Code civil states that the partners '*s'apportent une aide mutuelle et matérielle. Les modalités de cette aide sont fixées par le pacte*'. Mutual material assistance is required by this legal provision, but the details and methods of this assistance must be determined in the PACS contract. The legal obligation of mutual and material assistance and support is indeed very vague. The French *Conseil constitutionnel* (09.11.1999, decision No. 99-419 DC (*Conformité à la Constitution*)) has decided that this mutual and material assistance is a real obligation between the PACS partners; the will of the partners can be expressed in the details and methods of support, but a clause in the contract stating that no support is owed would automatically be void. Does this mutual material assistance mean that the means of one partner should

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<sup>45</sup> If the indemnity is paid as a lump sum (*capital*), the entire amount can be attached, see Article L 434-19 Code de la sécurité sociale.

be included in order to calculate the maintenance which the other partner must pay to a former spouse? At this time, there is no court practice and no published case law dealing with this question.

A *de facto* partner has no duty to support the other partner financially (no *devoir de secours*), so that his/her income or means do not have to be taken into account in order to calculate the amount of the maintenance owed by the other partner to a former spouse.

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

86. *In what way will the claimant's own income reduce his or 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 claimant's own income is one of the elements which the family judge considers before granting the divorce judgment that also determines the amount of maintenance. We have already mentioned the criteria under the French legal provisions on maintenance (see Questions 58 and 62). In both forms of maintenance (*pension alimentaire* and *prestation compensatoire*), the maintenance does not depend on a creditor's lack of means.

In the case of a *prestation compensatoire*, the purpose is to compensate as far as possible, the disparity between the spouses' standards of living which has been caused by the divorce.

The *pension alimentaire* compensates the *devoir de secours* between spouses (the duty to support the defendant financially). The idea is also a certain equality in the standards of living of both spouses,<sup>46</sup> so that the judge takes into account the needs and means of *each* spouse,<sup>47</sup> with regard to the defendant's standard of living before the separation.<sup>48</sup> So, the claimant's own income is an element to be considered by the judge, but only in connection with comparing the

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<sup>46</sup> See *Code des personnes et de la Famille 2002*, Paris: Litec, No. 1479.

<sup>47</sup> Cass. Civ. 2, 08.07.1999, *Dr. famille* 2000, No. 6, obs. Lécuyer.

<sup>48</sup> Cass. Civ. 2, 19.02.1997, *Dr. famille* 1997, No. 101, obs. Lécuyer.

standard of living of the other spouse, or the standard of living of the defendant before the separation.

The question whether the income is derived from employment which can reasonably be expected or from employment which goes beyond what may reasonably be expected does not seem to be relevant in French legal practice.

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

It depends on the spouses' situation. In the most frequent case of divorce based on a ground other than separation or mental illness, the judge has to determine whether the divorce has caused a disparity between the spouses' standards of living. Then, if this question can be answered in the affirmative, he will have to check the creditor's needs and the debtor's means (he has to take into account the financial situation at the time of divorce and its foreseeable evolution in the immediate future). Article 272 Code civil provides the judge with a (non-exhaustive) list of criteria in order to determine needs and means: the spouses' age and health, the duration of the marriage, the time already devoted or to be devoted to the children's education, the spouses' professional qualifications and situation, existing and foreseeable rights; retirement pensions; the assets and income of each spouse after the liquidation of the matrimonial regime. These elements can lead the judge to the conclusion that the spouse who claims maintenance could seek gainful employment because of his/her age, health, professional qualifications, because of the children's age and so on. So, the family judge can dismiss the maintenance claim or accordingly reduce the amount claimed. But, as already said, he has to consider all the elements communicated by the parties.

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

It depends on the financial situation of the other spouse (the debtor). The answer is along the same lines as that in response to Question 87.

For a *prestation compensatoire* (all kinds of divorce except divorce based on six years' separation or the spouse's mental illness for at least six years.): Is there a disparity between the spouses' standards of living? What are the claimant's needs and the defendant's means? If the defendant's means are not sufficient to pay the maintenance, it will often mean that there is no real disparity between the former spouses' standards of living. The claimant can only be asked to use his or her capital assets when the defendant is not able to pay the maintenance.

For a *pension alimentaire*, the judge considers the needs and means of each spouse. If the defendant, who has claimed divorce on the ground of separation or the mental illness of the other spouse, is in such a detrimental financial situation that he/she cannot pay a monthly pension, there are two possibilities:

- either the family judge refuses to grant the divorce, because the claimant will not have explained how he/she will assume his/her (financial) obligations concerning the other spouse and the children (see Article 239 Code civil and Question 45).
- or the family judge grants the divorce judgment without any maintenance, because the defendant has more means than the claimant and does not need any financial support, or he/she can be asked to use his or her capital assets. But this is only possible when the financial situation of the 'creditor' is better than that of the debtor.

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?*

Maintenance obligations of the claimant in relation to third persons are one of the criteria taken into account by the family judge in order to determine the claimant's needs.

90. *Are there social security benefits (e.g. income support, pensions) the claimant receives which exclude his or 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?*

This question is not relevant to French law, because maintenance does not depend on the claimant's lack of means. This is the same in the case of a *prestation compensatoire* or *pension alimentaire*: Social security benefits can remove any disparity between the spouses' standards of living, or a necessity to equalize the material living conditions of both former spouses. But the fact that one spouse receives social security benefits does not in itself exclude the right to maintenance.

## **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?*

Not directly. There is no specific legal provision on the priority of claims.

Case law, however, has developed some general rules concerning the relationship between several debtors (not claimants): no hierarchy between the maintenance obligation of a child and the one of a son-in-law or a daughter-in-law.<sup>49</sup> For more details see Question 96.

The 'no hierarchy rule' does not always apply. In the case of maintenance obligations of a spouse and of the parents of the other spouse, the cour d'appel Paris<sup>50</sup> has decided that the spouses' mutual duty of financial support ranks ahead of the maintenance obligation based on the relationship between parents and children. It means that a wife cannot claim maintenance against her father if she cannot prove that her husband is unable to maintain her.<sup>51</sup>

The spouses' obligation to provide for their children only excludes the maintenance obligation of other relatives (grandparents) if the spouses are able to fulfil their duty.<sup>52</sup>

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<sup>49</sup> See Cass. Civ., 02.01.1929, *D.* 1929. 1. 137, note R. Savatier; the same in CA Paris, 26.01.1963, *JCP* 1963. II. 13 123, note J.A.

<sup>50</sup> CA Paris, 20.03.1952, *JCP* 1952. II. 7 219 note G.M.

<sup>51</sup> The same solution in: CA Douai, 28.07.1953, *D.* 1954. 477.

<sup>52</sup> Cass. Civ. 1, 06.03.1974, *D.* 1974. 329, note Gaury; Cass. Civ. 1, 06.03.1990, *JCP* 1991. II. 21 664, note Garé.

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

There is no legal provision on this point. No French book on family and maintenance law mentions the question of ranking between several maintenance duties or claims, only the ranking of debtors.

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?*

There is no provision on this point.

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

The fact that the child has reached the age of majority is not in itself relevant. The duty to maintain does not end with the child's majority. If the child is still studying and has no means, the parents must still maintain that child. Article 203 Code civil states that the spouses must maintain and educate their children. This obligation is called *obligation d'entretien* and it does not automatically end with the child's majority if that child does not earn a salary.<sup>53</sup> Most of the time, the child's maintenance presupposes that that child is still studying and has no means to provide for him/herself and to live independently.<sup>54</sup> Some Court decisions do not require that the child is still studying, if he/she is very sick,<sup>55</sup> or if he is undergoing his national service.<sup>56</sup>

The duty to maintain lasts until the child has completed his/her his studies.<sup>57</sup> Sometimes, however, the courts require that the child informs the parents concerning the progress of the studies.

When the parents' duty to maintain (*obligation d'entretien*) ends, and if the child is not able to provide for him/herself, Articles 206 and 207 Code civil lay down a mutual obligation to maintain between the children and the parents (*obligation alimentaire générale*), so that the

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<sup>53</sup> Cass. Civ. 2, 06.02.1985, *Bull. civ.* II, No. 32; see also Cass. Civ. 2, 12.07.1971, *D.* 1971. 689; 08.02.1989, *Bull. civ.* II, No. 31.

<sup>54</sup> CA Paris, 20.05.1988, *D.* 1988. IR. 201.

<sup>55</sup> Cass. Civ. II, 12.07.1971, *Bull. civ.* II, No. 31.

<sup>56</sup> Cass. Civ. 2, 08.06.1978, *Bull. civ.* II, No. 156.

<sup>57</sup> Paris, 17.06.1965, *JCP* 1966. II. 14 854.

parents can be obliged to continue to maintain the child, but under legal provisions other than Article 203 Code civil.

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

There is no legal provision on this question.

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 French Code civil contains no legal provision on this question. There is a duty on the part of relatives to maintain, for example a mutual duty between parents and children to support each other financially if necessary (Articles 203<sup>58</sup> and 205 Code civil), a maintenance obligation on the part of sons-in-law and daughters-in-law in favour of the father-in-law and mother-in-law when they lack the necessary means (Article 206 Code civil) and vice versa. The criteria used by the court to determine whether or not maintenance must be ordered are: the claimant's need (lack of means) and the defendant's means (Article 208 Code civil). The court can order an indexation of the maintenance amount.

The Cour de cassation<sup>59</sup> decided in 1929 that there is no hierarchy between children and sons-in-law or daughters-in-law of the creditor, and that no distinction should be made between them: they are all personally obliged to contribute to the payment of maintenance, but the court must take into account the financial situation of each debtor. No legal provision requires that the claimant should bring a common claim against all the potential debtors or bring several successive maintenance claims in a certain order.

(a) In the case of a divorce based on separation or a spouse's mental illness, the duty to support the defendant financially is maintained

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<sup>58</sup> Article 203 does not state any mutual duty on the part of parents and children, but only the parents' duty to maintain and educate the children.

<sup>59</sup> Cass. Civ., 02.01.1929, *Epoux Giraud*, *D.* 1929. I. 137, note R. Savatier; the same opinion in: CA Paris, 26.01.1963, *JCP* 1963. II. 13 123, note J.A.).

(*devoir de secours*). In that case, the claimant has to pay maintenance (*pension alimentaire*) and is the first debtor. It means that the duty of the creditor's relatives to maintain him/her has a lower ranking (see Question 91): the creditor must claim maintenance against his (former) spouse before he/she can claim against other relatives. The duty of the claimant's relatives to maintain him/her has no effect on the defendant's duty.

(b) In case of a divorce based on another ground, the duty of relatives to maintain the claimant has no effect, because the judge will enter a judgment allowing a *prestation compensatoire* in the case of disparity between the spouses' standards of living. The fact that other relatives have a duty to maintain the creditor is not relevant, because the criterion for the *prestation compensatoire* is not a lack of means but an actual disparity.

## **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?*

(a) In the case of a *prestation compensatoire*.

The *prestation compensatoire* is usually paid as a lump sum (or in several payments, depending on the debtor's capacity to pay at once. See Question 62). In this case, the question whether the maintenance claim is extinguished upon the claimant's remarriage or entering into a registered partnership is not relevant: the whole amount determined by the family judge as 'capital' has to be paid. The fact that the creditor has remarried or entered into a registered partnership has no influence and does not result in any change.

If the *prestation compensatoire* is a *rente viagère* (life annuity in the form of monthly payments), which is a very rare solution which is only resorted to if the creditor's age or poor health (see Article 276 Code civil) prevents him/her from providing for him/herself, Article 276-3 Code civil states that the *prestation* can be revised, suspended or even terminated in the case of an important change in the means or the needs of the parties. The fact that the creditor remarries could amount



to such an important change, so that the maintenance claim may be extinguished, or the amount reduced. But in general, the duty to pay is not extinguished upon the claimant's remarriage or '*concubinage notoire*'.<sup>60</sup>

(b) In the case of a *pension alimentaire*.

See Article 283 Code civil: The maintenance claim is extinguished upon the creditor's remarriage; it is an automatic effect of the remarriage, so that the court does not have to take a decision on this point.

In the case of a registered partnership or of *concubinage notoire* (cohabitation outside marriage), the debtor must request that the maintenance be terminated, because this is not automatic. The registered partnership is not directly mentioned, but it can be treated as a '*concubinage notoire*', as the French legal literature is of the opinion that both situations are similar.<sup>61</sup>

The debtor must then prove the situation (registered partnership, cohabiting with another partner)<sup>62</sup>. The court practice requires that cohabitation with another partner resembles matrimonial community life in two respects: public knowledge – *notoriété* – and common economic and financial interests on the part of the partners; a mere close relationship and sexual relations are not sufficient in this respect.<sup>63</sup> The claim may not revive after it has been so extinguished.

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<sup>60</sup> See Cass. Civ. 2, 02.05.1984, *D.* 1984. 579, note R. Lindon and A. Bénabent (the court may not decide that maintenance will only be paid until the eventual remarriage of the creditor).

<sup>61</sup> See *Code des personnes et de la famille 2002*, Paris, Litec, No.1483.

<sup>62</sup> Evidence of cohabitation is mostly difficult to obtain, see *Code des personnes et de la famille 2002*, Paris: Litec, No. 1483. See also CA Paris, 12.05.1978, *D.* 1978. IR. 427, obs; A. Bénabent; *JCP* 1978. II. 18 895, note R. Lindon).

<sup>63</sup> See CA Paris, 04.05.1991, *Juris-Data* No. 021 799. See also CA Dijon, 17.03.1998, *RTDCiv.* 1999, 823, obs. J. Hauser: the relationship must appear to third persons to be stable and organised (*stable et organisée*).

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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?

See Question 98. Yes for the *pension alimentaire* in the case of a *concubinage notoire* with another partner. The maintenance claim is extinguished, but not automatically, so that the debtor must bring a claim before the courts in this respect. The court must render a decision stating that the maintenance has been extinguished; it has no discretion to render enter a different decision.

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

This criterion only applies to those kinds of divorce with a possible *prestation compensatoire* after divorce, not to a *pension alimentaire* in the case of at least six years' separation or the spouse's mental illness for at least six years.<sup>64</sup>

Article 272 Code civil lays down several criteria in order to assist the court to determine the needs and the means of the parties. One of these criteria is the duration of the marriage; it has been added to the legal provision by the Reform Act of 30 June 2000, so that there is as yet no visible court practice. So, it is possible that a very short duration of the marriage will lead to the dismissal of the maintenance claim.

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?

Yes. See Question 65.

In the case of a divorce based on fault, if the court has entered a judgment stating that only one spouse is 'guilty' (*divorce aux torts exclusifs*), this spouse cannot claim maintenance (*prestation compenstoire*); he/she has no right to maintenance as such (Article 280-

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<sup>64</sup> Because in these two cases the marriage cannot be of short duration, because a period of at least six years of separation or mental illness is required.

1 Code civil). In exceptional cases, however, he/she can obtain a kind of indemnity, see Question 65.

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

(a) For the *pension alimentaire*.

No. When the debtor dies, his/her heirs must pay the maintenance, except when all of them have renounced the inheritance (see Article 284 Code civil).

(b) For the *prestation compensatoire*.

No. The question is relevant in two cases:

- if the capital (lump sum) has to be paid in several payments (within not more than eight years in general) and if the debtor dies before paying the amount in its entirety, Article 275-1 Code civil states that the obligation to pay the capital passes to his/her heirs. It is an automatic transmission (as in the case of the *pension alimentaire* or the *prestation compensatoire* as a *rente viagère*)
- if the *prestation* has to be paid as a *rente viagère* (life annuity). In this case, Article 276-2 Code civil states that when the debtor dies, the obligation to pay the maintenance passes to his/her heirs (again except when all of them have renounced the inheritance).

### **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) In the case of a divorce based on real mutual consent (*divorce sur requête conjointe*), the question of the *prestation compensatoire* must be resolved by the spouses in the proposed agreement that they must submit to the family judge for his approval (Article 278 Code civil).

The spouses must determine the amount of the maintenance and how it will be paid (lump sum, monthly payments etc.). They can decide

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that the payment will terminate upon the occurrence of a certain event (such remarriage, or cohabiting with another partner, or the debtor's death etc.). The spouses can also decide that the *prestation compensatoire* will be paid for a limited period of time (one year, five years etc.). This is not possible in other kinds of divorce.

Of course, the family judge must check whether the spouses' arrangement sufficiently protects the interests of one spouse and those of the children. The agreement must be fair for each spouse, although it can nevertheless determine an unequal share of the assets for one spouse, if both spouses have freely decided this.<sup>65</sup> If not, the judge will not accept the proposed agreement and the spouses will be required to make modifications before the divorce will be granted (Article 232 Code civil).

Article 279 Code civil states that the spouses can decide in their agreement that each of them can request a modification to the maintenance in the case of an important change in the means and the needs of the parties.

Such an agreement on the consequences of the divorce (and necessarily on eventual maintenance) is only required for a divorce by real mutual consent. It takes place during the divorce proceedings and is binding on the spouses if it is confirmed by the judge's decision.

(b) In all divorce cases: general legal practice has decided that the spouses may not agree in advance on their future rights to maintenance after divorce.<sup>66</sup> During the divorce proceedings, the spouses can propose an agreement on this point, but the family judge is never obliged to accept and to confirm this agreement in his judgment.

After divorce, the former spouses may agree on, for example, the methods of payment, or the creditor can accept that the debtor does not have to make any payment. But it is not a binding agreement and the creditor can always decide to take measures in order to attach the assets and bank accounts of the debtor or to initiate proceedings such

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<sup>65</sup> See *Code des personnes et de la famille 2002*, Paris: Litec, No. 1458.

<sup>66</sup> Cass. Civ. 2, 21.03.1988, *Bull. civ.* II, No. 74.

as *paiement direct des pensions alimentaires* (direct payment of the maintenance through the employer who deducts it from the debtor's wages, *Loi du 3 janvier 1973*).

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

No. A spouse may not agree to renounce his future right to maintenance before the divorce proceedings have begun.<sup>67</sup> The only possibilities to renounce are:

- in the case of a divorce by real mutual consent (*divorce sur requête conjointe*), the spouses can decide that no maintenance will be paid. However, this agreement must be controlled by the family judge, who can refuse to confirm it if one spouse's interests are not sufficiently protected (see Question 103).
- in any other case of divorce, based on another ground, the spouse who can obtain maintenance can decide not to lodge such a claim. But this decision is taken during the divorce proceedings, and the French court practice accepts that a spouse makes a maintenance claim only for example before the *cour d'appel* which has to decide on the appellate review.<sup>68</sup>

*104. Is there a prescribed form for such agreements?*

For the agreement in the case of a divorce based on real mutual consent (*divorce sur requête conjointe*), the spouses merely have to submit a written proposal concerning the consequences of the divorce. The agreement must contain the liquidation position of the matrimonial regime (*état liquidatif du régime matrimonial*) which must have been signed by a *notaire* (notary) if it concerns real property. The agreement must also be signed by each spouse.

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

Yes. Agreements on maintenance in the case of a divorce by real mutual consent (*divorce sur requête conjointe*) must be controlled and

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<sup>67</sup> See Cass. Civ. 2, 21.03.1988, *Bull. civ. II*, No. 74.

<sup>68</sup> See Cass. Civ. 2, 28.01.1987, *Bull. civ. II*, No. 28. See also E. Fortis, 'Divorce', *Répertoire de droit civil*, No. 999 and 1000.

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confirmed by the family judge, who must decide whether the agreement sufficiently protects the interests of each spouse and those of the children. See Question 102.

In the case of agreements in other kinds of divorce, the agreement is not binding on the parties and the judge does not have to take it into consideration. He may do so, but he is not obliged to. He can modify the agreement, or refuse it if it does not protect the interests of one spouse or those of the children.