

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

GERMANY

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A. GENERAL

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

The rules relating to the law of divorce can be found in §§ 1564-1568 of the German Civil Code (*Bürgerliches Gesetzbuch*). Details of the court proceedings governing divorce are laid down in §§ 606-630 of the Code of Civil Procedure (*Zivilprozessordnung*).¹ Some of the effects of divorce (e.g. in the area of parental care, contact, equalisation of accrued gains, distribution of household effects and of the family home) are governed by the rules of voluntary legislation (*Gesetz über die Angelegenheiten der Freiwilligen Gerichtsbarkeit*).² Furthermore, it has to be kept in mind, that the German constitution, the Basic Law (*Grundgesetz*) places the family under the special protection of the state.³ The Federal Constitutional Court (*Bundesverfassungsgericht*) has deducted that therefore certain characteristics of marriage are not at the disposition of Parliament. Accordingly, the law of divorce is formed by conditions set by the constitution.⁴ The legal rules described

¹ *Zivilprozessordnung* (Code of Civil Procedure) 30.01.1877, as continually revised.

² *Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit* (Matters of non-contentious jurisdiction Act) 17.05.1898, as continually revised.

³ Article 6 I *Grundgesetz* der Bundesrepublik Deutschland .

⁴ BVerfG 04.05.1971, *BVerfGE* 31, 58, 82; BVerfG 28.02.1980, *BVerfGE* 53, 224, 245; BVerfG 21.10.1980, *BVerfGE* 55, 134, 142; BVerfG 26.05.1981, *BVerfGE* 57, 361, 378.

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above is interpreted and shaped in detail by the case law of the competent courts.

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

The 19th century knew considerable differences in the law of divorce in the different German states. Rules varied depending on whether the state followed the Catholic or Protestant tradition.

Only from 1 January 1900 onwards was the German Reich governed by a uniform law of divorce.⁵ It seemed self-evident that marriage could only be dissolved by a court order. The grounds for divorce followed the principle of fault. Adultery, bigamy, certain sexual offences, attempted homicide and wilful desertion formed the 'absolute' grounds for divorce. Furthermore, a spouse could seek a divorce order where the other party had caused the breakdown of the marriage by a major violation of his or her marital duties or by disreputable or immoral behaviour. These 'relative' grounds combined fault and the breakdown of the marriage.

In all cases the court order had to name the guilty party and this resulted in grave consequences for the effects of divorce, especially in the area of maintenance. Finally, a divorce could be granted on the ground of mental illness, although here, fault did not play a role.

During the Third Reich the law of divorce was fundamentally altered by a separate 'Marriage Act' introduced in 1938.⁶ The grounds for divorce included therein were in part fault-based and in part not: A divorce-order could now also be granted where the marital community had ceased to exist for 3 years and there could be no expectation that the spouses would restore it because of a grave irretrievable breakdown. Still, even here the question of fault played a role: where the party at fault asked for the divorce the other party could contest it.

After World War II the 1938 'Marriage Act' – altered on several points by the decisions of the Allied Control Council – continued to apply for

⁵ §§ 1564 – 1576 Civil Code (original version).

⁶ Ehegesetz (Marriage Act) 06.07.1938, *RGBl.* 1938 I 807.

quite some time.⁷ Proposals for reform initiated in the following years met with little success. The 1961 Reform Act⁸ tried to limit the right to contest a divorce, but to little avail: In practice, spouses who had been separated for 20 years or more could often not obtain a divorce order because of the innocent spouse's opposition.

The two German states, which existed alongside each other from 1949 until 1990, followed widely differing ideological approaches. The East German GDR was quicker in implementing reform: The 'Family Law Code'⁹ (*Familiengesetzbuch*) of 20 December 1965 now regulated the Family Law outside the German Civil Code. There was only one ground for divorce. It related to the irretrievable breakdown of marriage while at the same time placing it in the context of the state and society: 'A divorce may only be granted where serious grounds exist for which a marriage has lost its meaning for the spouses, the children and therefore for society as a whole'.¹⁰

After the fall of the communist regime in 1989, the 'Family Law Code' was fundamentally redrafted.¹¹ The new Act only came into force for three days, though, as from 3 October 1990 onwards, all laws of the West-German Federal Republic of Germany were made applicable in the territory of the GDR (Article 8 Treaty on German Unification). From now on, a uniform law applied in the whole of Germany.

West-German family law underwent a major reform in 1976. The 'First Marriage Law and Family Law Reform Act 1976' placed the law of divorce back within the German Civil Code and put it on a completely new footing:¹² The law of divorce was now based on the principle of broken marriage. This principle applies both to the grounds of divorce as well as to its effects. Furthermore, the reform introduced the concept of special 'Family Law Courts' with jurisdiction over matrimonial affairs and all major connected issues. Apart from some

⁷ Kontrollratsgesetz (Allied Control Council Act) No. 16, 20.02.1946.

⁸ Familienrechtsänderungsgesetz (Family Law Reform Act) 11.08.1961, *BGBl.* 1961 I 1221.

⁹ *GBL* I 1966 Nr.1 S.1.

¹⁰ § 24 I FGB (Family Law Code).

¹¹ Gesetz zur Änderung des Familiengesetzbuches (Matrimonial Code Reform Act) 20.07.1990, *GBL* 1990, 1038.

¹² 14.06.1976 (the divorce law has been in force since 01.07.1977).

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amendments¹³ mandated by a ruling of the Constitutional Court,¹⁴ the system of divorce law as stipulated by the 1976 Reform Act is still in place today.

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

No.

B. GROUNDS FOR DIVORCE

I. General

4. *What are the grounds for divorce?*

The German law of divorce adheres to the following general structure. There is only one ground for divorce: the breakdown of the marriage (§ 1565 I 1 German Civil Code), see Question 11. According to the definition provided for in § 1565 I 2 German Civil Code, a marriage fails if the marital community of the spouses no longer exists and there can be no expectation that the spouses will restore it. This is identical to the irretrievable breakdown of the marriage.¹⁵ The Family Law Court has to analyse the state of the marriage and to arrive at a prediction as to the chances of reconciliation. To avoid prying into the inner workings of the marriage, the Code provides two conclusive presumptions for the failure of a marriage:

- According to § 1566 I German Civil Code, there is a conclusive presumption of the failure of a marriage if the spouses have been separated for a year and both spouses petition for divorce or the other spouse consents to the divorce.
- According to § 1566 II German Civil Code, the same presumption applies where the spouses have been separated for three years.

This principle is limited by three exceptions (hardship clauses):

¹³ Gesetz zur Änderung unterhaltsrechtlicher, verfahrensrechtlicher und anderer Vorschriften, 20.02.1986, *BGBI.* 1986 I 301.

¹⁴ BVerfG 21.10.1980, *BVerfGE* 55, 134.

¹⁵ Cf. W. Jaeger, in: Johannsen and Henrich, *Eherecht*, 3rd Edition, München, 1998, § 1565 German Civil Code Nos. 4-23; D. Schwab, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part II Nos. 11-44; 17-26.

- § 1565 II German Civil Code: If the spouses have been separated for less than a year, the marriage may only be dissolved if the continuation of the marriage would result in unreasonable hardship to the petitioner owing to causes attributable to the other spouse. Divorce will therefore only be possible where the spouses have been separated for at least a year.
- § 1568 Alt. 1 German Civil Code: A marriage shall not be severed also when it has failed, if and as long as the maintenance of the marriage is a necessary exception for special reasons in the interest of minor children born of the marriage or,
- § 1568 Alt. 2 German Civil Code: when and as long as the divorce would result in hardship which is so severe to the party opposing the application owing to exceptional circumstances, that the maintenance of the marriage, also when the interest of the petitioner is taken into account, appears to be a necessary exception.

The German law of divorce therefore appears as a combination of irretrievable breakdown and divorce by consent. Within this system consensual divorce forms a sub-group of irretrievable breakdown.¹⁶ The existing exceptions to the principle of irretrievable breakdown prove that this system is not absolute, but they do not play a significant role in practice.

The table below provides an overview:

¹⁶ Cf. D. Schwab, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part II No. 74.

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Time separation	Conditions for divorce	Hardship clauses
Less than 1 year	a) Contested divorce: Divorce only, if the marriage has failed and the conditions of § 1565 II Civil Code apply b) Consensual divorce: as supra a)	a) Contested: divorce can be denied under § 1568 Alt. 1 and 2 Civil Code b) Consensual: divorce can be denied under § 1568 Alt. 2 Civil Code
1 to 3 years	a) Contested divorce: a divorce is granted where the court is convinced that the actual marriage has failed. b) Consensual divorce: Conclusive presumption of failure of marriage (§ 1566 I German Civil Code), no further enquiry by the court.	a) Contested: divorce order can be denied under § 1568 Alt. 1 and 2 German Civil Code b) Consensual: divorce order can be denied under § 1568 Alt. 2 German Civil Code
3 years and more	Conclusive presumption of failure of marriage in all cases (§ 1566 II German Civil Code)	a) Contested: divorce order can be denied under § 1568 Alt. 1 and 2 German Civil Code b) Consensual: divorce order can be denied under § 1568 Alt. 2 German Civil Code

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

Since German Reunification (1990) the following statistics apply to divorce:

Year	Overall	Marriage with children under 18		Children under 18 concerned
		Number	Per 100 divorces granted	
1990	154,786	80,713	52.1	118,340
1991	136,317	67,142	49.3	99,268
1992	135,010	68,089	50.4	101,377
1993	156,425	81,853	52.3	123,541
1994	166,052	89,244	53.7	135,318
1995	169,425	92,664	54.7	142,292
1996	175,550	96,577	55.0	148,782
1997	187,802	105,000	55.9	163,112
1998	192,416	100,806	52.4	156,735
1999	190,590	91,777	48.2	143,728
2000	194,408	94,850	48.8	148,192
2001	197,498	98,027	49.6	153,517

From the year 1991 onwards we see a significant increase in divorce numbers. In nearly $\frac{3}{4}$ of the cases the divorce follows a 1-year separation period.¹⁷

6. *How frequently are divorce applications refused?*

No statistics exist; the numbers should no be significant, however.

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

¹⁷ Pressemitteilung des Statistischen Bundesamts, 27.06.2002 – No. 300/02.

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Under German law, a valid marriage can only be dissolved by judicial decision upon the petition of one or both of the spouses (§ 1564 sentence 1 German Civil Code).

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

Since 1971, jurisdiction lies with the special Family Law Courts. This jurisdiction comprises other family law matters such as the effects of separation and divorce (e.g. parental care, contact, maintenance, marital property law, equalisation of accrued gains, distribution of household effects and the matrimonial home).¹⁸ Not all family law matters underlie the jurisdiction of the Family Law Courts, though (not, e.g., claims for the return of gifts).

In the first instance, the Family Law Courts form departments of the Local Courts (*Amtsgerichte*).¹⁹ Such courts are presided over by one judge. Appellate jurisdiction lies with the Higher Regional Courts (*Oberlandesgerichte*),²⁰ where special Family Law Divisions have been instituted (*Familiensenate*).²¹ In the third instance, cases may be heard before the Federal High Court, although here special conditions apply.

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?)*

Divorce proceedings are instituted by a petition by one or both of the spouses before the competent Family Law Court.²² Representation by a lawyer is compulsory,²³ though where divorce is by consent, only one lawyer may represent the parties jointly.²⁴ Where the spouses agree on divorce by consent under § 1566 I German Civil Code they have to

¹⁸ § 23b I 2 Nr.2-10 Gerichtsverfassungsgesetz; § 621 I Nr.1-9 Zivilprozessordnung. Cf. H.-U. Maurer, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part I No. 43 - 85.

¹⁹ § 23a Nr.4, § 23b I 2 Nr.1 Gerichtsverfassungsgesetz ; § 606 I 1 Zivilprozessordnung.

²⁰ § 23b I 1 Gerichtsverfassungsgesetz.

²¹ § 119 II Gerichtsverfassungsgesetz.

²² § 622 I Zivilprozessordnung.

²³ § 78 II Zivilprozessordnung.

²⁴ § 630 II 2 Zivilprozessordnung.

meet further criteria set out in § 630 I, III Zivilprozessordnung. The petition for divorce thus has to include concurrent statements in which the spouses agree as to parental care, maintenance for any children of the marriage, maintenance among each other and the distribution of household effects and the matrimonial home (see Question 19(a)).

10. When does the divorce finally dissolve the marriage?

The marriage is dissolved as soon as the order becomes final, § 1564 sentence 2 German Civil Code, i.e. it cannot be appealed. The effect is ex-nunc.

The law recognises the continuing responsibility of the spouses for each other even after divorce, especially in relation to maintenance. German law does not follow the doctrine of a clean break, even though duties before and after divorce follow a strictly separate set of rules. The duty to maintain a spouse during the separation period is therefore regulated differently from maintenance after divorce.

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

II. Divorce on the sole ground of irretrievable breakdown of the marriage

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

Now, the German Civil Code only recognises ground for divorce: that the marriage has failed, § 1565 German Civil Code. Such failure is considered to have occurred where the marital community of the spouses no longer exists and there can be no expectation that the spouses will restore it, i.e. in the case of the irretrievable breakdown of the marriage. Each of the spouses may petition for a divorce, fault is no longer decisive.

The 'marital community' referred to in § 1565 I 2 German Civil Code does not relate mainly to the cohabitation of the spouses, but refers to

an inner attitude.²⁵ The court has to be convinced of the irretrievable breakdown. It is therefore under a duty to analyse the state of the marriage and to arrive at a prediction as to the possibilities of reconciliation. The Court will look at external factors such as the length of the separation period, consent, major marital offences or the presence of new partners.

In § 1656 German Civil Code, the Code provides for two conclusive presumptions for the failure of a marriage:

- According to § 1566 I German Civil Code there is a conclusive presumption of the failure of a marriage if the spouses have been separated for a year and both spouses petition for a divorce or the opposing party consents to the divorce.
- The same presumption will apply when the spouses have been separated for three years, § 1565 II German Civil Code.

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

Fault or possible marital offences are not conditions for granting the divorce order. These questions may play a certain role, though:

- They may prevent a speedy divorce (in cases of separation for less than one year). According to § 1565 II the spouses are required to have lived apart for a period of at least one year. This separation period is intended to prevent any hasty decisions and to facilitate attempts at reconciliation.²⁶ Where the spouses have lived apart for less than a year, a divorce may only be granted under special circumstances. Such a

²⁵ Cf. BGH 14.06.1978, *BGHZ* 72, 107 and *FamRZ* 1978, 671; BGH 31.01.1979, *FamRZ* 1979, 422; BGH 05.11.1980, *FamRZ* 1981, 127, 128; OLG Schleswig 16.09.1977, *FamRZ* 1977, 802, 803; OLG Düsseldorf 12.09.1977, *FamRZ* 1977, 804; OLG Stuttgart 22.07.1977, *FamRZ* 1977, 646, 647; OLG Karlsruhe 13.04.1978, *NJW* 1978, 1534 and *FamRZ* 1978, 592; OLG Oldenburg 26.09.1996, *FamRZ* 1997, 1213. Cf. J. Gernhuber and D. Coester-Waltjen, *Lehrbuch des Familienrechts*, 4th Edition, München, 1994, § 27 I; W. Jaeger, in: Johannsen and Henrich, *Eherecht*, 3rd Edition, München, 1998, § 1565 Civil Code No. 6 – 23; D. Schwab, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part II No. 11 – 41.

²⁶ Cf. W. Jaeger, in: Johannsen/Henrich, *Eherecht*, 3rd Edition, München, 1998, § 1565 Civil Code No. 41 – 65; D. Schwab, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part II No. 42 – 48.

'quick divorce' is possible if the continuation of the marriage would result in unreasonable hardship to the petitioner owing to factors *attributable to the other spouse*.

Among such factors which have been recognized by the courts to be 'attributable to the other spouse' major marital offences play a significant role, thus introducing an element of fault. Not every marital injustice will render the continuation of the marriage unbearable, but major offences against the basis of the marriage will. The courts are also in agreement in including such offences within the range of § 1565 II German Civil Code, which are directed against basic values of human interaction and respect, such as e.g. physical maltreatment,²⁷ but also other insupportable forms of misdemeanour such as threats,²⁸ severe verbal abuse, excessive use of alcohol.²⁹ Those offences may render the continuation of the marriage unreasonably difficult for the other spouse, as well as wilful desertion of the spouse or the children³⁰ or major offences within the duty to maintain.³¹

There is no clear line as regards the approach towards marital fidelity.³² Most court rulings agree, though, that not every marital infidelity will render the continuation of the marriage unreasonably difficult for the other party, but only such offences which clearly symbolise that the offending spouse has no further intention to continue the marriage (e.g. taking up

²⁷ BGH 05.11.1980, *FamRZ* 1981, 127, 129; OLG Düsseldorf 12.09.1977, *FamRZ* 1977, 804; OLG Düsseldorf 26.10.1977, *FamRZ* 1978, 26; OLG München 21.11.1977, *FamRZ* 1978, 29; KG 03.07.1985, *FamRZ* 1985, 1066, 1067.

²⁸ OLG Frankfurt/M. 09.12.1977, *FamRZ* 1978, 115, 116.

²⁹ OLG Stuttgart 26.10.1977, *FamRZ* 1977, 807; KG 04.07.1978, *FamRZ* 1978, 897, 898.

³⁰ AG Berlin-Charlottenburg 14.12.1977, *FamRZ* 1978, 186 (desertion with the documented intention not to return); OLG Schleswig 14.07.1988, *NJW-RR* 1989, 260 (desertion of the wife after the birth of the common child).

³¹ OLG Stuttgart 08.08.1978, *FamRZ* 1978, 778, 779; OLG Hamm 06.10.1978, *FamRZ* 1979, 586.

³² Cf. W. Jaeger, in: Johannsen/Henrich, *Eherecht*, 3rd Edition, München, 1998, § 1565 Civil Code No. 68 – 70; D. Schwab, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part II No. 61 – 65; J. Gernhuber and D. Coester-Waltjen, *Lehrbuch des Familienrechts* 4th Edition, München, 1994, § 27 II 3.

work as a prostitute,³³ desertion of the wife in order to live with a new male partner³⁴ or inviting the new partner to live in the family home).³⁵

Even though the reasons referred to above do not necessarily have to be fault-based, they will usually include an element of fault. The important difference is, though, that these faults are *not the basis for the divorce as such, but only for the special 'quick divorce'*. The ground for the divorce remains the irretrievable breakdown of the marriage, while the special causes attributable to the other spouse only facilitate the enquiry into the state of the marriage, as the Federal High Court has pointed out.³⁶

- They may prevent a divorce from being awarded at all. According to § 1568 Alt. 2 German Civil Code, a marriage shall not be severed, even though it has failed, if the other partner opposes the divorce *and if* a divorce because of the special circumstances of the case would result in such exceptional hardship that the continuation of the marriage is more advisable.

The wording does not allude to fault on the side of one of the spouses, and objective reasons such as the serious illness of the other partner will suffice. The courts have refused to accept a direct relationship between fault on the one side and unreasonable hardship on the

³³ OLG Bremen 26.09.1995, *FamRZ* 1996, 489.

³⁴ OLG München 23.12.1977, *FamRZ* 1978, 113 (adultery on the part of the wife, who refuses to return to her husband); AG Lörrach 07.12.1977, *FamRZ* 1978, 116, 117 (living together with a new partner under the eyes of the spouse); OLG Oldenburg 10.12.1991, *FamRZ* 1992, 682 (wife living together with the brother of the spouse in the house of her parents); OLG Karlsruhe 23.04.1992, *FamRZ* 1992, 1305 (admitting the new partner into the family home immediately after the spouse moves out 'in rural surroundings'); OLG Köln 26.08.1990, *FamRZ* 1991, 822; OLG Schleswig 14.07.1988 *NJW-RR* 1989, 260 (desertion of the wife after the birth of a common child).

³⁵ Cf. OLG Köln 18.09.1998, *FamRZ* 1999, 723.

³⁶ BGH 05.11.1980, *FamRZ* 1981, 127, 129,

other.³⁷ Moral offences alone, such as desertion³⁸ will not justify the continuation of the marriage. On the other side, the psychological situation of the deserted spouse will in most cases reflect how the other spouse has acted.³⁹

But even in this narrow sense, fault does not play a significant role. The courts have been very cautious in applying § 1568 Alt. 2 German Civil Code, regarding it as a means of protection from exceptional hardship resulting specifically from the act of divorce. As described above, these have mostly been cases of severe illnesses relating to a spouse who opposes the divorce.⁴⁰ This does not prevent a divorce for all time, however, as a new application can be made whenever circumstances will have changed.⁴¹

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

No.

14. *Is a period of separation generally required before filing the divorce papers? If not, go to question 16. If so, will this period be shorter if the respondent consents than if he or she does not? Are there other exceptions?*

³⁷ OLG Celle 11.05.1978, *FamRZ* 1978, 508 (lack of support in the care for a handicapped child); OLG Düsseldorf 22.10.1979, *FamRZ* 1980, 146 (unilateral desertion).

³⁸ BGH 16.09.1981, *FamRZ* 1981, 1161; different in a obiter dictum OLG Hamm 16.02.1989, *FamRZ* 1989, 1188, 1189 (planned, unilateral and intentional disruption of the marriage).

³⁹ Cf. BGH 31.01.1979, *FamRZ* 1979, 422, 423.

⁴⁰ Cf. BVerfG 21.10.1980, *BVerfGE* 55, 134 ff. and *FamRZ* 1981, 15; reluctant: BGH 11.04.1979, *FamRZ* 1979, 469, 470; BGH 22.02.1984, *FamRZ* 1984, 559, 560; BGH 05.06.1985, *FamRZ* 1985, 905. Cf. OLG Düsseldorf 22.10.1979, *FamRZ* 1980, 146; KG 22.04.1983, *FamRZ* 1983, 1133, 1134.

⁴¹ W. Jaeger, in: Johannsen and Henrich, *Eherecht*, 3rd Edition, München, 1998, § 1568 Civil Code No. 41.

Generally, the spouses have to have lived apart for one year before an application for divorce may be made (§ 1565 II). According to the case law, this also applies where both spouses consent to the divorce.⁴²

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

No. Even after one year of separation, the court has to be convinced that the marriage has failed. The separation is a presumption, but not complete proof. An irrefutable presumption of the failure of a marriage only applies where the spouses have lived apart for three years, or after one year in the case of a consensual application for divorce by both spouses.

16. In so far as separation is relied upon to prove irretrievable breakdown:

(a) Which circumstances suspend the term of separation?

The spouses live in a state of separation when there is no household community between them and one of the spouses manifestly refuses to restore it because he or she rejects conjugal community, § 1567 I 1 German Civil Code. The conditions therefore are:

- physical separation
- at will
- the intention to reject the conjugal community.⁴³

Separation ends if the spouses again continue to live together. Living together for a short period (e.g. 2 weeks), though, will not interrupt or stop the running of a separation period (§ 1567 II German Civil Code),

⁴² Likewise the majority of courts: OLG Stuttgart 22.07.1977, *FamRZ* 1977, 646, 647; OLG Köln 05.09.1977, *FamRZ* 1977, 717; KG 07.11.1977, *FamRZ* 1977, 810; OLG Düsseldorf 28.10.1977, *FamRZ* 1978, 26; OLG Düsseldorf 30.10.1978, *FamRZ* 1979, 37; OLG Hamm 24.11.1977, *FamRZ* 1978, 28; OLG Frankfurt/M. 09.12.1977, *FamRZ* 1978, 115, 116; OLG München 21.11.1977, *FamRZ* 1978, 28, 29; AG Lüdenscheid 17.03.1993, *FamRZ* 1994, 314. Different (no application of § 1565 II in the case of consensual divorce: OLG Koblenz 02.11.1977, *FamRZ* 1978, 31, 33; J. Gernhuber and D. Coester-Waltjen, *Lehrbuch des Familienrechts*, 4th Edition, München, 1994, § 27 II 4.

⁴³ Cf. J. Gernhuber and D. Coester-Waltjen, *Lehrbuch des Familienrechts*, 4th Edition, München, 1994, § 27 VII; W. Jaeger, in: Johannsen and Henrich, *Eherecht*, 3rd Edition, München, 1998, § 1567 Civil Code No. 7 – 12; D. Schwab, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part I Nos. 137 – 148.

as the requirement of separation shall not hinder a possible reconciliation or attempts at such.

(b) Does the separation need to be intentional?

The separation has to be intended by at least one of the spouses. Involuntary separation (e.g. a prison sentence) will not suffice, except where an intention is manifest from other circumstances.

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

According to § 1567 I 2 German Civil Code, the spouses may also live in a state of separation within their conjugal home. Often, the financial situation of the spouses will prohibit them from setting up two separate households for any length of time. Such separation within the conjugal home will be accepted by the courts where no joint household exists and any meetings between the spouses will be as a result of the spatial proximity⁴⁴ rather than due to the personal relations between the partners.⁴⁵ The Family Law Court may also attribute part of the conjugal home to one of the spouses for the purposes of the separation.⁴⁶

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

The actual court proceedings are often preceded by a mediation session at the court,⁴⁷ where the possibilities of an agreement are looked into.

⁴⁴ BGH 14.06.1978, *FamRZ* 1978, 671, 672 and *NJW* 1978, 1810.

⁴⁵ BGH 14.06.1978, *FamRZ* 1978, 671, 672 and *NJW* 1978, 1810. Cf. D. Schwab, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part I No. 150 – 160; W. Jaeger, in: Johannsen and Henrich, *Eherecht*, 3rd Edition, München, 1998, § 1567 Civil Code No. 18 – 28.

⁴⁶ § 1361b I 1 Civil Code: 'If the spouses are separated or one of them will live in a state of separation, either may demand that the other give up the marital home or a part thereof for individual use, insofar as this is necessary to avoid a serious hardship.'

⁴⁷ §§ 608, 278 II Zivilprozessordnung.

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Also, the court may interrupt the divorce proceedings, if it arrives at the conclusion that a continuation of the marriage is still possible. Such an interruption shall not occur against the wishes of both of the spouses where their separation has lasted for more than three years.⁴⁸

18. Is a period for reflection and consideration required?

No.

19. 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?

Within the normal divorce proceedings, it is not necessary for the spouses to reach an agreement as to the effects of the divorce in order to be granted a divorce order.

This is different in the case of the consensual divorce, which is sought after a separation period of one year (§ 1566 I German Civil Code). Here, an application for a divorce will only be successful if the spouses have agreed on maintenance in relation to each other and their children as well as on the family home and any household effects (§ 630 I No. 3 Zivilprozessordnung). Furthermore, the spouses have to declare that they will not seek court orders relating to parental care and contact because they have agreed on the topics or that such applications will be made jointly (§ 630 I No. 2 Zivilprozessordnung).

As a rule, the court will institute proceedings relating to the equalisation of accrued gains ex officio (§ 623 I3 Zivilprozessordnung).

Other effects of the divorce will be joined to the divorce proceedings if one of the spouses applies for such a decision until the end of the last hearing in the first instance. In this case, the courts will hear proceedings and grant the orders for the specific effects together with the divorce order. (§ 623 I 1, § 629 I Zivilprozessordnung). This is done in order to avoid the accumulation of several court proceedings and their potential negative and disruptive effects on the spouses.

⁴⁸ § 614 II Zivilprozessordnung.

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

In general, the Family Law Court is not authorised to scrutinise any agreements which the spouses may have reached.

Two exceptions apply to this rule: in the area of parental care and of the equalisation of accrued gains.

- Usually, joint parental care continues even after divorce. Each of the parents may apply for sole parental care, however. Where the other spouse consents to this application, it should be granted in most cases. (§ 1671 II No. 1 German Civil Code). The parental agreement is not binding on the Court, if other legal provisions demand an order which differs from this agreement, e.g. if the welfare of the child would be endangered (§ 1671 III, § 1666 I German Civil Code). The same is true where the child has reached the age of 14 and contests the parental agreement.
- According to § 1587o German Civil Code the spouses may enter into an agreement relating to the equalisation of accrued gains in the course of the divorce proceedings. This agreement has to be certified by a notary and needs the consent of the Family Law Court. (§ 1587o II 1, 3 German Civil Code). Such consent should only be refused, however, where the agreement evidently does not serve to insure an adequate security for the claimant or where it does not reconcile the parties' interests in a just manner (§ 1587o II 4 German Civil Code).

Moreover, in the case of consensual divorce after a one-year separation period, the courts will not accept an agreement relating to the effects of marriage (§ 630 II Zivilprozessordnung, see Question 19(a)) if this is evidently invalid.

21. 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

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hardship to one spouse or the children? If so, can the competent authority invoke this on its own motion?

According to the hardship clause laid down in § 1568, the application for a divorce order shall be refused upon two conditions, even if the marriage has failed:

- if and as long as the maintenance of the marriage is a necessary exception for special reasons in the interest of minor children born of the marriage.
- when and as long as the divorce would result in hardship so severe to the party opposing the application owing to exceptional circumstances, that the maintenance of the marriage, also when the interest of the petitioner is considered, appears to be a necessary exception.

Even though many children suffer because of a divorce, the provision does not play a significant role in practice.⁴⁹ It is said that:

- The hardship clause is limited to special exceptions, the usual suffering in the course of a divorce will not suffice.
- Usually, the children will suffer more from the continuation of the marriage than from the divorce.
- The children suffer not because of the divorce order, but because of the separation of their parents. Applying § 1568 German Civil Code cannot prevent the latter.

See also Question 12.

III. Multiple grounds for divorce

German law only recognises one ground for divorce, the irretrievable breakdown of the marriage. However, consensual divorce plays a special role. Therefore the following questions are answered in additional:

⁴⁹ Cf. OLG Celle 05.11.1978, *FamRZ* 1978, 508; OLG Schleswig 16.09.1977, *FamRZ* 1977, 802, 803; OLG Köln 08.05.1981, *FamRZ* 1981, 959; OLG Zweibrücken 09.12.1981, *FamRZ* 1982, 293, 294. A divorce was denied by OLG Hamburg 07.12.1985, *FamRZ* 1986, 469 where there was a danger that the child might commit suicide.

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?*

It is based on the ground of the irretrievable breakdown of the marriage. Where the spouses have been separated for one year and jointly apply for a divorce order there is a conclusive presumption of the failure of the marriage.

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?*

A consensual divorce may be sought in a twofold way:

- either both spouses apply jointly for the divorce order
- or the other spouse joins the application which has already been made by the other party. This may be done at any point during the proceedings and is freely revocable until the end of the final hearing (§ 630 II 1 Zivilprozessordnung). The advantage of this is that only one lawyer is required, as only the application of the divorce order has to be made by a lawyer, but not the declaration of consent.

Other than this aspect, both forms of consensual divorce follow the same set of rules.

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

Yes, a one-year period of separation, see Questions 4 and 11.

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

No.

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

No.

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

No.

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

See Question 19(a).

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?*

See Question 19.

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?*

See Question 19.

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

See Question 20.

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?*

As the ground for divorce is the irretrievable breakdown of the marriage, a contested divorce may be transformed into a consensual one (and vice versa) without new court proceedings being necessary. The application for divorce may be made unilaterally by one of the spouses and in the course of the proceedings the other spouse consents to this application. This does not infer a change in the procedural

objective, as the divorce is granted according to the situation, as is apparent in the last hearing, which will then include the consent given. Likewise, where a spouse withdraws the consent which was initially given, there will be no consensual divorce order, but the marriage will be severed according to the rules for contested divorce (§ 1565 I German Civil Code) if it has failed.

C. SPOUSAL MAINTENANCE AFTER DIVORCE

I. General

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

The current source of private law for the maintenance of spouses after divorce is §§ 1569 to 1586b German Civil Code. For the dissolution of a registered partnership there is a similar provision in § 16 of the Law on Registered Partnerships.⁵⁰ To ensure a certain uniformity of maintenance law the Appellate Courts issue so-called guidelines (*Leitlinien* or *Richtlinien*) and tables, especially the so-called Düsseldorf table (*Düsseldorfer Tabelle*).⁵¹ These rules provide information for the calculation and the amount of maintenance granted by the courts.

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

Originally the maintenance of spouses after divorce was based on fault. According to the German Civil Code of 1896 the guilty spouse had to provide maintenance to the innocent party (§§ 1578 ff. German Civil Code). The Marriage Act of 1938 (as amended in 1946) authorized divorce on the basis of several grounds and partly changed this system.⁵² However, maintenance was still dependent on the kind of divorce obtained. In the case of marital fault the divorced spouse could

⁵⁰ Gesetz über die Eingetragene Lebenspartnerschaft (Lebenspartnerschaftsgesetz – LPartG) of 16.02.2001, *Bundesgesetzblatt* 2001 I p. 266.

⁵¹ See *FamRZ* 2001, 810 and 1512. Also published in E. Kalthoener, H. Büttner and B. Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 2002, No. 4.

⁵² Cf. H. Borth, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part. IV No. 5.

lose his or her maintenance claim (§§ 58 ff. Marriage Act). With the reform of divorce law in 1976 there was also a fundamental reform of maintenance law. Since divorce could now only be based on irretrievable breakdown, maintenance was in principle independent of fault. Despite the principle of self-responsibility a long list of grounds supporting a maintenance claim was established. Only in some situations, listed in a hardship clause in § 1579 German Civil Code, could maintenance be denied when it would be grossly inequitable to provide maintenance. In cases where the claimant cared for a common child the hardship clause could not be applied at all (§ 1579 II). The Federal Constitutional Court declared that this far-reaching protection of the maintenance claimant was unconstitutional.⁵³ In cases where the claimant him or herself had seriously broken away from the marital ties a maintenance obligation would be an unreasonable restriction of the freedom of the debtor in economic matters (Article 2 I of the Constitution). These provisions have been tightened by the Maintenance Law Amendment Act (*Unterhaltsänderungsgesetz*) of 20 February 1986.⁵⁴ Its provisions allow a loss or at least a reduction of certain maintenance claims.

East German law limited maintenance to the first two years after divorce and awarded maintenance only under restricted circumstances (§ 29 I of the Family Code of the German Democratic Republic).⁵⁵ This rule still applies to divorces decreed before the Reunification of 1990 (Article 234 § 5 Einführungsgesetz zum Bürgerliches Gesetzbuch).

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

At the moment no concrete proposals exist for a reform of the current maintenance law. There is, however, a recent parliamentary resolution criticizing current deficits and demanding a better co-ordination of the

⁵³ BVerfG 14.07.1981, *BVerfGE* 57, 361; *NJW* 1981, 1771; *FamRZ* 1981, 745.

⁵⁴ *Unterhaltsänderungsgesetz* of 20.02.1986, *BGBI.* 1986 I 301. Cf. U. Diederichsen, 'Die Änderungen des materiellen Rechts nach dem *Unterhaltsänderungsgesetz*', *NJW* 1986, 1283 ff.

⁵⁵ See Family Code of 20.12.1965 as amended by the Act of 20.07.1990, *Gesetzblatt* 1990 I No. 52.

provisions in maintenance law, social security and tax law.⁵⁶ Also a reform of the legal provisions dealing with the ranking of maintenance claims has been demanded.

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

A basic principle of maintenance law is the self-responsibility of the spouses; every divorced spouse is expected to provide for his or her own maintenance (cf. §§ 1569, 1577 I German Civil Code).⁵⁷ However, there are several instances where maintenance after divorce may be granted (§§ 1570 ff. German Civil Code). If one of the spouses is unable to provide for his or her maintenance, he or she is entitled to claim maintenance from the other spouse (§ 1569 German Civil Code). The basis of this obligation is the principle of the lasting post-divorce solidarity of the spouses (*nacheheliche Solidarität*), which is widely accepted by the courts and legal doctrine.⁵⁸ The broad interpretation of this principle is to a certain extent a contradiction to the also recognized but more restrictive principle of self-responsibility of the spouses.⁵⁹ In the legal literature the notion of a 'marriage-created need' (*ehebedingte Bedürftigkeit*) is also advocated.⁶⁰

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?*

Under German law, there exists a statutory matrimonial property regime as well as the possibility to choose between various contractual

⁵⁶ Resolution of 14.06.2000, *Bundestags-Drucksache* 14/3781.

⁵⁷ H. Borth, in: Schwab, *Handbuch des Scheidungsrechts* 4th Edition, München, 2000, Part. IV No. 143.

⁵⁸ See BVerfG 14.07.1981, *BVerfGE* 57, 361, 378 ff and *NJW* 1981, 1771; BVerfG 28.08.1992, *FamRZ* 1992, 1283, 1284 and *NJW* 1993, 455; H. Borth, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part. IV No. 6 ff.

⁵⁹ Self-responsibility is the basic principle according to H. Borth, in: Schwab (fn. 18) Part. IV No. 8. - For the equal value of both principles see G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, Introduction to § 1569 Civil Code No. 4.

⁶⁰ J. Gernhuber and D. Coester-Waltjen, *Lehrbuch des Familienrechts*, 4th Edition, München, 1994, § 30 I 2. - Cf. also T. Korenke, *Nachehelicher Unterhalt: vom Verschuldensprinzip zum Vertrauensschutzprinzip*, Neuwied, 1998.

matrimonial property regimes. The statutory matrimonial property regime is, despite its misleading designation of 'community of surplus' (*Zugewinngemeinschaft*), not a 'community', but a separation of property with an equalization of the surplus (*Zugewinnausgleich*) after the marriage has come to an end (§§ 1363 ff. German Civil Code). On the termination of the statutory matrimonial regime, the accrued gains, i.e., the additions to the assets of each of the spouses which have been achieved during marriage (*Zugewinn*), are equalized. The increase in the value of the assets acquired during the marriage is divided equally between the two spouses, since it is assumed that this surplus is due to the efforts of both spouses (§ 1378 German Civil Code). However, the handing over of a particular asset cannot generally be required either under matrimonial property law⁶¹ or under maintenance law.⁶²

A major innovation of the Marriage Law Reform of 1976 was the introduction of a special adjustment of pension rights (*Versorgungsausgleich*). This is an attempt to compensate time that has been devoted totally or substantially to childcare and housework. An equal division of all pension rights and expectancies accrued by the spouses during the marriage will take place (§§ 1587 ff. German Civil Code). Such an adjustment of pension rights, which can be excluded by agreement, is independent of the matrimonial property regime of the parties.

The rules relating to maintenance upon divorce are not directly connected with the rules relating to other post-marital financial consequences such as 'equalization of surplus' and 'pension rights adjustment'. Matrimonial property law does not fulfil a function of support. Its purpose is to equalize accrued gains and to compensate for losses due to marital arrangements, but not to satisfy the need of a spouse after divorce.

⁶¹ As to the exception of § 1383 Civil Code see G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, 2002, München, § 1383 Civil Code No. 1.

⁶² G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, 2002, München, § 1585 Civil Code No. 5.

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

In general, irrespective of the assets' origin, earnings derived from the assets of the claimant may exclude or restrict his or her maintenance claim. This is also true for earnings from an 'equalization of surplus'⁶³ (cf. Question 59). Apart from this, maintenance claims on the one side and claims under matrimonial property law on the other, may exist independently. There is also an independent system of equalization of social security claims (cf. Question 59). Provisions on the distribution of social security expectancies in general have no influence on maintenance after divorce.

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?*

There is no separate compensation claim related to the dissolution of marriage. The basis of a maintenance claim after divorce is not tortious liability but the ongoing responsibility of the former spouses (cf. Question 58). Additional damage claims can only arise when a party violates his or her duties in relation to an existing maintenance obligation (cf. Question 63). However, maintenance can to a certain extent also fulfil the function of compensation in respect of losses due to the fulfilment of family obligations during the marriage (cf. Question 64).

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

Since German law follows the doctrine of irretrievable breakdown, there is only one ground for divorce based on the 'failure' of a marriage (§ 1565 German Civil Code). The consequences of divorce are, in principle, always the same. Therefore there is no distinction

⁶³ H. Büttner, in: Johannsen and Henrich, *Eherecht*, 3rd Edition, München, 1998, § 1577 Civil Code No. 9, 12.

between claims based on fault and claims based on other grounds. One of the principles of German maintenance law is that marital fault on the part of the housekeeping spouse - usually the maintenance claimant - as such shall not entail the loss of a maintenance claim.⁶⁴ However, there exist seven cases of grossly inequitable maintenance claims (§ 1579 German Civil Code). Some of these cases concern the behaviour of the claiming party and can lead to a total or partial loss of maintenance. Their effect is that in some cases the innocent party can refuse to pay maintenance (cf. Questions 98 - 100).

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?*

Divorced spouses are obliged to provide information to each other on their income and assets (§ 1580 German Civil Code). The parties are mutually obliged to furnish information in respect of their income and wealth, to the extent that this is necessary for the determination of a maintenance claim or a maintenance obligation (§ 1605 I 1 German Civil Code). This right to information is enforceable by an action by stages, i.e., the amount of the claim will be based on the information received during the proceedings⁶⁵ (§ 254 German Civil Code). The making of a declaration in lieu of an oath can be required (§ 261 German Civil Code). It is also possible that the court follows unilateral statements by the maintenance claimant.⁶⁶

One consequence of a spouse's refusal to provide such information can be a claim in the form of damages by the other spouse based on delay (§ 280 German Civil Code) and/or tort law (§ 826 German Civil Code).⁶⁷ If the maintenance claimant does not provide information this can also be a serious intentional offence against the debtor and therefore the payment of maintenance can be grossly inequitable so

⁶⁴ Cf. H. Borth, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part. IV No. 7.

⁶⁵ Cf. Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 2002, No. 611.

⁶⁶ Kalthoener/Büttner/Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 2002, No. 610, 613a.

⁶⁷ BGH 30.11.1983, *FamRZ*1984, 163, 164; BGH 24.10.1984, *FamRZ* 1985, 155, 157.

that he or she loses his or her maintenance claim (cf. § 1579 no. 2 German Civil Code).⁶⁸

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.*

The general conditions such as lack of means on the part of the claimant (§ 1577 German Civil Code) and ability to pay on the part of the debtor (§ 1581 German Civil Code) always form the basis for a successful maintenance claim. The first stage of the existence of a maintenance obligation is always that the claimant is not able to maintain himself or herself. It is also necessary that the debtor is able to provide maintenance. However, another important precondition is that the conditions of one of the legal provisions in §§ 1570 to 1576 German Civil Code are fulfilled. In these provisions the German Civil Code lists a number of situations, which justify the granting of maintenance (the principle of enumeration). Each of them provides an independent basis for maintenance.⁶⁹ The basic idea of the German approach to maintenance after divorce is that the spouse clinging to marriage cannot successfully prevent a divorce but shall be comprehensively protected in respect of the economic consequences of the divorce.⁷⁰

The most important claim in practice and also privileged by law is maintenance based on the care of a child (§ 1570 German Civil Code). A divorced spouse may demand maintenance from the other as long and to the extent that he or she cannot be expected to pursue gainful employment by reason of having to care for or to educate a child which is common to both. Under certain circumstances there can be an obligation to seek one's own gainful employment despite caring for a

⁶⁸ See G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1579 Civil Code No. 14.

⁶⁹ H. Borth, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part. IV No. 146.

⁷⁰ Cf. H. Borth, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part. IV No. 6.

child and this obligation excludes need. According to the courts it depends on the age and the number of children, the situation on the labour market and the possibilities of childcare when the claimant will be obliged to work. If there is only one child the Federal Supreme Court recognized that the caring spouse is not obliged to work before the child starts school.⁷¹ Even when elementary school has started there is no general obligation to work. For children between eight and eleven years there is no general rule.⁷² In respect of a child between 11 and 15 years part-time work by the claimant is reasonable.⁷³ These age limits are sometimes criticized for being too low and the fact that the obligation to gainful employment is being extended.⁷⁴ If gainful employment is expected the income from part-time employment will be taken into account according to the rule under § 1577 I German Civil Code and will reduce the maintenance claim. However, when no gainful employment is expected but the claimant nevertheless works, his or her income will only be taken into account according to the more favourable rule of § 1577 II German Civil Code⁷⁵ (cf. no. 86).

There is also a maintenance claim for aged spouses. A divorced spouse can demand maintenance from the other insofar as he or she cannot be gainfully employed on account of his or her age (§ 1571 German Civil Code). This situation must be present at the date of the divorce (No. 1), the completion of the care or education of a common child (No. 2) or the cessation of the conditions for a maintenance claim pursuant to §§ 1572 to 1573 German Civil Code (No. 3). 'Age' means in principle the normal age limit when old-age social security pensions start,⁷⁶ although there is no fixed age limit.⁷⁷

Maintenance can also be claimed in the case of the sickness or infirmity of the divorced spouse (§ 1572 German Civil Code). This will be taken

⁷¹ BGH 30.11.1994, *FamRZ* 1995, 291 and *NJW* 1995, 1148.

⁷² BGH 21.12.1988, *FamRZ* 1989, 487 and *NJW* 1989, 1083.

⁷³ BGH 12.03.1997, *FamRZ* 1997, 671, 673 and *NJW* 1997, 1851.

⁷⁴ Cf. H. Borth, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part. IV No. 160 ff.; Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 2002, No. 402 ff.

⁷⁵ For more details see D. Schwab, *Familienrecht*, 11th Edition, München, 2001, No. 343.

⁷⁶ See BGH 03.02.1999, *FamRZ* 1999, 708, 709: 65 years, also for a woman.

⁷⁷ H. Borth, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part. IV No. 189.

into consideration if such a state of health prevents gainful employment on the date of the divorce (No. 1), the completion of the care or education of a common child (No. 2), the completion of the education, continuing education or retraining of the claimant (No. 3) or the cessation of the conditions of a maintenance claim pursuant to § 1573 German Civil Code (unemployment, No. 4). It is not important whether the illness is a consequence of the marriage. A maintenance claim is not excluded where the illness already existed at the time of the celebration of the marriage and this was known or unknown to the parties.⁷⁸

Maintenance can also be claimed until appropriate employment is found (§ 1573 German Civil Code). If the income from a suitable gainful employment is not sufficient for full support in the sense of § 1578 German Civil Code, the claimant can, insofar as he or she is not already entitled to a maintenance claim under §§ 1570 - 1572 German Civil Code, demand the difference between his or her own income and the full maintenance (*Aufstockungsunterhalt*, § 1573 II German Civil Code). This maintenance claim is generally of a subsidiary nature and may be limited in time (cf. § 1573 V German Civil Code).

There is another maintenance claim for the education, further education or retraining of the divorced spouse (§ 1575 German Civil Code). This applies to cases where the claimant in the expectation of marriage or during the marriage omitted to acquire or interrupted formal education or occupational training. This right continues only during the period which is customary for the completion of such education (§ 1573 I German Civil Code). There is also a maintenance claim if the divorced spouse undertakes further education or retraining for the elimination of disadvantages which have arisen by reason of the marriage (§ 1573 II German Civil Code).

Maintenance can also be claimed on the ground of equity (§ 1576 German Civil Code). Serious reasons may not be taken into account merely because they result in the failure of the marriage. A situation where a denial of maintenance would be grossly inequitable, is e.g.,

⁷⁸ BGH 23.09.1981, *FamRZ* 1981, 1163, 1164 ff and *NJW* 1982, 40 (multiple sclerosis); BGH 09.02.1994, *FamRZ* 1994, 566 and *NJW* 1994, 1286 (mental disorder); BGH 25.01.1995 *FamRZ* 1995, 1405 (morbus Crohn and depression).

where the claimant cared for a disabled stepchild, i.e., a child of the maintenance debtor during the marriage.⁷⁹

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

Marital fault as such plays no role in the availability of a divorce (cf. Question 12). Also a maintenance claim after divorce is independent from the behaviour or the fault of the debtor during the marriage (cf. Question 64). In respect of maintenance on the ground of equity serious reasons may not be taken into account merely because they have resulted in the failure of the marriage (§ 1576 sentence 2 German Civil Code); marital fault as such is not a sufficient ground for a maintenance claim.⁸⁰ The behaviour of the debtor may, however, have an influence insofar as it created reasonable expectations on the part of the claimant which were later not fulfilled.

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 or her work during the marriage)?*

In respect of need itself it is irrelevant whether the lack of means has been caused by the marriage. However, with respect to several bases for maintenance (cf. Question 64) this is important. The fact that one of the spouses has given up his or her work during the marriage is a precondition for a maintenance claim for education, further education or retraining (§ 1575 German Civil Code).⁸¹ Disadvantages, which arose by reason of the marriage, are also taken into account with respect to the general obligation (*Obliegenheit*) of the claimant to engage in gainful employment,⁸² with regard to a maintenance claim on the ground of equity (§ 1576 German Civil Code)⁸³ and a limitation

⁷⁹ Cf. H. Büttner, in: Johannsen and Henrich, *Eherecht*, 3^d Edition, München, 1998, § 1576 Civil Code No. 7.

⁸⁰ D. Schwab, *Familienrecht*, 11th Edition, München, 2001, No. 346.

⁸¹ For more details see Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 1994, No. 447.

⁸² Cf. Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 1994, No. 389 ff.

⁸³ Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 1994, No. 457 f.

as to time (§ 1573 V German Civil Code).⁸⁴ There is, however, no general rule that only need which has been caused by the marriage can lead to a maintenance claim.⁸⁵

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

Since German law enumerates a couple of situations where maintenance can be claimed, one has to make a distinction. Some provisions expressly mention the decisive moment when the precondition, e.g. age or sickness, must be fulfilled and the maintenance claim can start (*Einsatzzeitpunkt*). This is especially the date of the divorce and the completion of the care or education of a common child, but also the cessation of the conditions for a certain maintenance claim (cf. §§ 1571, 1572 German Civil Code). In this respect a chain of maintenance claims is possible.⁸⁶ On the other hand, a later change of circumstances, e.g. the loss of the claimant's own assets, cannot lead to a maintenance obligation.⁸⁷ However, in respect of need the claimant's lack of means must exist during the period for which maintenance is claimed. There is, however, controversy as to whether a maintenance claim, which was based on age or sickness (§§ 1571, 1572 German Civil Code) can revive if the need did not exist at the decisive moment for the hypothetical start of the maintenance claim but occurs later, e.g. on the ground of unemployment, and all the other preconditions are still fulfilled⁸⁸

III. Content and extent of the maintenance claim

⁸⁴ Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts* 8th Edition, München, 1994, No. 1035.

⁸⁵ BGH 09.09.1980, *NJW* 1980, 2247; BGH 23.09.1981, *NJW* 1982, 40; BGH 11.05.1983, *FamRZ* 1983, 800; G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1569 Civil Code No. 3.

⁸⁶ Cf. G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1569 Civil Code No. 4.

⁸⁷ J. Gernhuber and D. Coester-Waltjen, *Lehrbuch des Familienrechts*, 4th Edition, München, 1994, § 30 VIII 6.

⁸⁸ In the affirmative sense OLG München 28.09.1992, *FamRZ* 1993, 564; H. Borth, in: Schwab, *Handbuch des Familienrechts*, 4th Edition, München, 2000, Part. IV No. 384. Contrast Kalthoener/Büttner/Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 2002, No. 415.

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?*

Maintenance cannot only be claimed for a limited period of time but may exist for a longer period of time. According to the Federal Supreme Court maintenance may be awarded lifelong. In the Court's view, a lifelong obligation is even – the need of the claimant and the debtor's ability to pay presupposed – the general rule. A loss of the claim according to §§ 1573 V, 1578 I 2 and 1579 2 German Civil Code is an exception to the rule.⁸⁹

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

The amount of the maintenance awarded is determined according to the so-called 'marital circumstances' (*eheliche Lebensverhältnisse*, § 1578 I 1 German Civil Code). This has a certain relationship to the standard of living during the marriage, which shall be granted as far as possible.⁹⁰ The 'marital circumstances' are, however, determined not so much by the individual spending habits of the divorced couple, but rather by the actual and available income of the spouses.⁹¹ The decisive moment is, in general, the date of the divorce⁹² (cf. Question 79). In relation to higher incomes the courts take into account that a part of the income will usually be invested.

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?*

There is no specific model for calculating maintenance prescribed by law and no general minimum amount of maintenance.⁹³ Instead maintenance is calculated according to so-called guidelines and tables

⁸⁹ BGH 27.01.1999, *NJW* 1999, 1630, 1631.

⁹⁰ Cf. H. Büttner, in: Johannsen and Henrich, *Eherecht*, 3rd Edition, München, 1998, § 1578 Civil Code No. 2.

⁹¹ BGH 29.01.1986, *FamRZ* 1986, 437; BGH 18.03.1992, *FamRZ* 1992, 1045.

⁹² BGH 24.11.1993, *FamRZ* 1994, 228.

⁹³ BGH 11.01.1995, *FamRZ* 1995, 346 and *NJW* 1995, 963.

established by different Appellate Courts and accepted by the Federal Supreme Court. Among these the most influential is the so-called Düsseldorf table (*Düsseldorfer Tabelle*; cf. Question 55). As a rule the courts assume, according to the principle of 'equal division of income' (*Halbteilungsgrundsatz*), that both parties have an equal right to half of the available income that determined the matrimonial standard of living.⁹⁴ It is, however, widely accepted that, if only the debtor is employed, he or she is accorded a certain bonus in the form of a higher quota.⁹⁵ According to the Düsseldorf table the maintenance claim of a claimant with no income against a debtor who is gainfully employed is 3/7 of the income of the debtor emanating from gainful employment plus half of any other income. It is limited by 'full maintenance' according to the marital circumstances.⁹⁶

Where the claimant also has income and both spouses are gainfully employed, the claim is 3/7 of the difference between the respective incomes of the spouses. The claim is limited by the full marital standard of living. For other income the principle of equal division applies.⁹⁷ Where only one spouse is gainfully employed the claim is the difference between the full marital standard of living and the income of the claimant. The income from gainful employment will be reduced by 1/7. Where the claimant is gainfully employed although he or she is not obliged to be engaged in such employment the maintenance calculation follows § 1577 II German Civil Code (cf. Question 86).

If during the marriage only one spouse was gainfully employed and the other was the housekeeper, according to prior case law the marital circumstances were exclusively determined by the income of the gainfully employed partner. If after divorce the housekeeping spouse took up gainful employment the respective income only reduced his or her lack of means and consequently his or her maintenance claim. According to a recent decision by the Federal Supreme Court, however, also childrearing and household work determined the

⁹⁴ H. Büttner, in: Johannsen/Henrich, *Eherecht*, 3^d Edition, München, 1998, § 1578 Civil Code No. 49.

⁹⁵ BGH 26.09.1990, *FamRZ* 1991, 304, 305; BGH 16.04.1997, *FamRZ* 1997, 806, 807 and *NJW* 1997, 1919.

⁹⁶ Düsseldorf table 2002 under B I 1 a.

⁹⁷ Düsseldorf table 2002 under B I 1 b.

standard of living during the marriage.⁹⁸ Now the subsequent gainful employment is considered to be equivalent to the former housework. Therefore the income obtained after divorce is only a surrogate and - according to a different method of calculation - shall not reduce the maintenance claim in the same way as previously. The details of such a calculation are, however, still debated.⁹⁹

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 are several costs other than the normal costs of life which form part of the necessities of life. They include the costs of health insurance, the expenses of education or occupational training, continuing education or re-education pursuant to §§ 1574 and 1575 German Civil Code (*Krankenvorsorgeunterhalt* according to § 1578 II German Civil Code).¹⁰⁰ If the divorced spouse is entitled to demand maintenance under §§ 1570-1573 German Civil Code (caring for a child, age, sickness or infirmity, maintenance until appropriate employment is found) or § 1576 German Civil Code (maintenance on the ground of equity) the costs of insurance for old age or disability may be demanded by the claimant (*Altersvorsorgeunterhalt* according to § 1578 III German Civil Code).¹⁰¹ With respect to the calculation of the necessary amount the courts follow special tables.¹⁰² The practical result is that there is an additional supplement to the normal maintenance payment of more than 20%.

⁹⁸ BGH 13.06.2001, *FamRZ* 2001, 986. See also BVerfG 05.02.2002, *NJW* 2002, 1185.

⁹⁹ Cf. Gerhard, 'Eheliche Lebensverhältnisse bei Kinderbetreuung und Haushaltsführung', *FamRZ* 2000, 134 ff.; H. Borth, 'Die ehelichen Lebensverhältnisse nach § 1578 Bürgerliches Gesetzbuch - ein Danaer-Geschenk des Gesetzgebers?', *FamRZ* 2001, 193 ff.

¹⁰⁰ For details see Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 2002, No. 339 ff.

¹⁰¹ Cf. Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 2002, No. 350 ff.; G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1578 Civil Code No. 70 ff. for more details.

¹⁰² See W. Gutdeutsch, 'Bremer Tabelle zur Berechnung des Altersvorsorgeunterhalts', *FamRZ* 2001, 80 ff.

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

There is no legal maximum limit to the maintenance that can be ordered. The individual circumstances of the divorced spouses are decisive in this respect.¹⁰³ However, since the purpose of maintenance is to fulfil the need of and not the creation of wealth for the claimant, in legal practice a certain 'saturation limit' (*Sättigungsgrenze*) has been discussed.¹⁰⁴ Nevertheless, the former individual marital standard of living seems to be the decisive element. Therefore in exceptional cases also the expenses for golf, tennis, security guards etc. may be included.¹⁰⁵

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

German maintenance law provides for a reduction in the level of maintenance after a 'period of grace'. The assessment of all maintenance claims according to the 'marital circumstances' may be limited in time and reduced thereafter to the reasonable necessities of life (*angemessener Lebensbedarf*), insofar as an indefinite assessment according to those circumstances would be inequitable (§ 1578 I 2 German Civil Code). However, as a rule this provision - introduced in 1986 - is not applicable if the maintenance claimant has or had the care of a common child alone or preponderantly. The assessment of an equitable limitation is a question of fact.¹⁰⁶ For this task the length of the marriage and the intensity of marital obligations are an important factor. A marriage which has lasted for more than ten years does not automatically exclude a limitation, but makes it an exception.¹⁰⁷

Another possible restriction is a limitation as to the time of the maintenance claim itself according to § 1573 V German Civil Code which, however, only applies in the case of unemployment (§ 1573 I, III, IV German Civil Code) and where there is an additional

¹⁰³ BGH 22.06.1994, *FamRZ* 1994, 1169, 1171.

¹⁰⁴ Cf. Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 2002, No. 41 ff.

¹⁰⁵ OLG Köln 13.01.1994, *FamRZ* 1994, 1323 for separated wealthy parties.

¹⁰⁶ See more in detail Kalthoener, Büttner and Niepmann, *die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 2002, No. 1028, 1035 ff.

¹⁰⁷ BGH 28.03.1990, *FamRZ* 1990, 857 and *NJW* 1990, 2810.

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maintenance claim plus the claimant's own income (§ 1573 II German Civil Code).¹⁰⁸

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

In principle maintenance after divorce is to be paid in periodical payments each month in advance (§ 1585 I 1, 2 German Civil Code). In cases of exceptional need maintenance may be paid when the need arises (§ 1585b I, III German Civil Code). If there is a serious reason therefor the maintenance claimant may demand a lump-sum payment instead of periodical payments (cf. Question 75).

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?*

There is no lump-sum payment prescribed by law. However, it can be imposed by a court order. The claimant may request a capital settlement instead of periodical payments, if there is a serious reason therefore and the debtor would not thereby be inequitably burdened (§ 1585 II German Civil Code). Circumstances which have been recognized as serious reasons are, e.g., where the claimant wants to establish his or her own business or where he or she plans to emigrate.¹⁰⁹ Cases of lump-sum payments are relatively rare. The debtor is not entitled to make a lump sum payment against the will of the person entitled to maintenance.

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

There is no automatic indexation of maintenance after divorce. However, in the field of child support a simplified procedure for the adaptation of court orders and court settlements exists (cf. § 1612a German Civil Code, §§ 655 ff. Code of Civil Procedure). The parties may also introduce into their maintenance agreement a stable value clause. Where there is no such clause the principle of *rebus sic stantibus*

¹⁰⁸ Cf. Kalthoener, Büttner and Niepmann, *die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 2002, No. 1032 ff.

¹⁰⁹ Cf. G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1585 Civil Code No. 5.

applies. The depreciation of the value of currency must be taken into account.

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

Insofar as there is no specific date as a precondition for maintenance (cf. Questions 67 and 79) a maintenance claim always reflects the actual situation of the parties. If there is a maintenance judgment either party is entitled to apply for a variation of the judgment if a substantial change has occurred in the facts on which the decision is based (§ 323 Code of Civil Procedure). The change of circumstances may result from a change with respect to the preconditions for a specific claim or an increased ability to pay or from a decreased need. The change must have taken place after the judgment sought to be modified was rendered. In principle the court is bound with respect to former findings of fact and also to conclusions of law. There is, however, some controversy as to the extent of any modification of maintenance in the new proceedings.¹¹⁰ Also a maintenance agreement in the form of a court settlement or an enforceable authentic instrument (cf. § 794 I no. 1, 5 Code of Civil Procedure) can be altered by a lawsuit for modification.¹¹¹

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?

The financial capacity of the debtor places restrictions on maintenance claims (§ 1581 German Civil Code). Full maintenance can only be claimed if the debtor's income is sufficiently high. According to § 1581 sentence 1 German Civil Code if the debtor is unable to pay maintenance to the claimant without endangering his or her own

¹¹⁰ Cf. H.-U. Maurer, in: Schwab *Handbuch des Scheidungsrechts* 4th Edition, München, 2000, Part I No. 1039 ff.

¹¹¹ H.-U. Maurer, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part I No. 1023 ff.

suitable self-support, he or she is required to pay maintenance only to such an extent as is equitable considering the needs, income and financial circumstances of the divorced parties. There is some controversy as to the exact meaning and extent of this legal provision.¹¹² However, although there is no express legal provision, according to settled court practice, the debtor may always retain a certain amount for him or herself (*Selbstbehalt*) even if this means that he or she will not fully fulfil his or her maintenance obligations.¹¹³ For maintenance after divorce in West Germany generally a monthly necessary amount of €840 is conceded if the maintenance debtor is gainfully employed, and an amount of €730 if he or she is not gainfully employed.¹¹⁴ The East German amounts are lower, however.¹¹⁵

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?*

Here, has to make a distinction. As a general rule the 'marital circumstances' (cf. Question 69) at the time of the divorce is the decisive standard for a claim (§ 1578 I 1 German Civil Code). Changes will only be taken into account if there was a high probability that they would occur. In other words, there was already a basis for an increase in the debtor's income during the marriage itself,¹¹⁶ e.g., when an army captain is promoted to the rank of major,¹¹⁷ but not when a sales manager of a small firm is appointed to the position of 'senior manager' of a multinational enterprise.¹¹⁸ Changes since the separation are generally taken into account insofar as they are the result of a 'normal development'.¹¹⁹ With respect to the debtor's ability to pay the

¹¹² Cf. Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 2002, No. 50 f.

¹¹³ Cf. D. Martiny, *Unterhaltsrang und -rückgriff*, Tübingen, 2000, I 146 ff.

¹¹⁴ Düsseldorf table 2002 under B IV.

¹¹⁵ Cf. Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts*, 8th Edition, München, 2002, No. 52.

¹¹⁶ Cf. G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1578 Civil Code No. 20 ff.

¹¹⁷ Cf. BGH 21.04.1982, *FamRZ* 1982, 684.

¹¹⁸ OLG Hamm 08.10.1993, *FamRZ* 1994, 515.

¹¹⁹ Cf. G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1578 Civil Code No. 14 ff.

period for which maintenance is sought is decisive.¹²⁰ This is insofar as an increase in his or her income since the divorce is taken into account when calculating maintenance.

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

Debts of the spouses can affect the marital living standard if they already existed at the time when the spouses lived together since they were a factor for the 'marital circumstances'.¹²¹ Debts also influence the debtor's ability to pay, which is a precondition for his maintenance obligation (§ 1581 German Civil Code). One has to distinguish, however, between different situations.

A statutory maintenance obligation in relation to a third person can only affect the debtor's ability to pay if this obligation is considered to be of equal rank. With respect to other debts it must be determined whether the obligations can be considered to be reasonable. Debts are in principle recognized as deductible expenses. There is no general priority of maintenance obligations.¹²² However, the courts distinguish between obligations which are taken into account, and those which are not. According to case law a comprehensive assessment of the debts is necessary in respect of the interests of the claimant, the debtor and third parties.¹²³

There is a tendency to recognize debts when they were already created as a result of the common lifestyle of the spouses.¹²⁴ Debts which are the result of irresponsible behaviour will not be recognized. Another distinction is made between the creation of a debt and its financial consequences. There is a greater willingness to accept the

¹²⁰ Cf. G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1581 Civil Code No. 14.

¹²¹ Cf. G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1361 Civil Code No. 49.

¹²² BGH 09.05.1984, *FamRZ* 1984, 657, 658 and *NJW* 1984, 2351.

¹²³ BGH 11.12.1985, *FamRZ* 1986, 254, 257. See in more detail H. Borth, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part. IV No. 1120.

¹²⁴ BGH 07.04.1982, *FamRZ* 1982, 678, 679 and *NJW* 1982, 1641.

consequences as long as a reasonable plan exists for the payment of the debts.¹²⁵

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?*

The debtor cannot rely on his or her moral obligations in respect of other persons. Since there is no maintenance obligation in respect of a de facto partner the maintenance debtor cannot rely on his payments to his or her new partner.¹²⁶ Under German law there is also no legal maintenance obligation in respect of a stepchild.¹²⁷ Also payments for the child of a de facto partner do not reduce the maintenance obligation of the debtor. Therefore the obliged spouse may only rely on his or her legal obligations.

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

The debtor can be asked to use the income of his or her capital assets in order to fulfil his or her maintenance obligations.¹²⁸ However, in respect of the assets themselves there are restrictions. He or she is not required to realise assets, insofar as their realisation would be uneconomical or inequitable in view of the financial circumstances of both parties (§ 1581 sentence 1 German Civil Code).

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?*

In establishing the debtor's ability to pay, also income which can reasonably be expected is taken into account. Should a spouse culpably not realise income this will (fictitiously) be accounted to him

¹²⁵ See H. Borth, in: Schwab, *Handbuch des Scheidungsrechts* 4th Edition, München, 2000, Part. IV No. 1128.

¹²⁶ Cf. D. Martiny, *Unterhaltsrang und -rückgriff*, Tübingen, 2000, I 679 f.

¹²⁷ Cf. Martiny, 'Unterhaltsrecht in sozialen Familien in der Europäischen Union', *FPR* 2000, 146 ff., 175 ff.

¹²⁸ Cf. G. Bruder Müller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1581 Civil Code No. 11.

or her.¹²⁹ A 'fictional' income is taken into account especially where the debtor refuses possible and reasonable gainful employment.¹³⁰ The same is true where he or she has deliberately given up such employment.¹³¹ There is, however, extensive case law dealing with situations where the behaviour of the debtor is not considered to be irresponsible. For instance, a student may pursue his or her university education if this is his or her first opportunity to pursue such education.¹³²

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?*

The debtor's social security benefits, which he or she receives, have to be used for the performance of his or her maintenance obligation when they are regarded as income. For example, the debtor has to use what he or she receives by virtue of his or her redundancy payment (*Arbeitslosengeld*) for the performance of his or her maintenance obligation.¹³³ The same is true for social security insurance payments.¹³⁴ On the other hand, social assistance (*Sozialhilfe*) payments to the debtor are generally not considered to be income; their purpose is only to relieve his or her own needs.¹³⁵

¹²⁹ Cf. BGH 08.04.1981, *FamRZ* 1981, 539, 540.

¹³⁰ Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts* 8th Edition, München, 2002, No. 630 ff.

¹³¹ Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts* 8th Edition, München, 2002, No. 640 ff.; D. Luthin, in: Luthin, *Handbuch des Unterhaltsrechts*, 9th Edition, 2002, No. 2224.

¹³² Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts* 8th Edition, München, 2002, No. 652.

¹³³ Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts* 8th Edition, München, 2002, No. 797 ff.

¹³⁴ Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts* 8th Edition, München, 2002, No. 800 ff.

¹³⁵ Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Unterhalts* 8th Edition, München, 2002, No. 849; D. Martiny, *Unterhaltsrang und - rückgriff*, Tübingen, 2000, II 1153 f.

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?*

The financial position of a new spouse of the debtor can decrease or increase his or her ability to pay. In principle only the debtor is obliged to pay and there is no indirect obligation on the part of his or her new spouse to support the former spouse. However, there is a tendency of the courts to consider the income of the new spouse in assessing the debtor's ability to pay.¹³⁶ The income and, more generally, the means of a de facto partner are often taken into account. This can occur with the assumption of the debtor's increased ability to pay or at least to pay a lower amount for his or her necessary self-support.¹³⁷

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?*

Generally the claimant's own income reduces his or her need and can therefore also reduce his or her maintenance claim. It is, however, relevant whether the income is derived from employment which can be reasonably expected. In this case a reduction or extinction of the maintenance claim will take place (cf. § 1577 I German Civil Code).¹³⁸ However, even when income cannot reasonably be expected the question of a deduction arises. Such income will not be deducted to the extent that the maintenance to be paid by the debtor and the income to be considered (out of expected work) together does not amount to full maintenance (§ 1577 II 1 German Civil Code). 'Full maintenance' is maintenance according to the marital living standard (cf. Question 69). Income, which exceeds full maintenance, shall be taken into account only to the extent that it is deemed equitable

¹³⁶ OLG Bamberg 29.07.1982, *FamRZ* 1983, 75; OLG Stuttgart 07.09.1982, *FamRZ* 1983, 185, 186. - Cf. D. Martiny, *Unterhaltsrang und - rückgriff* Tübingen, 2000, I 597.

¹³⁷ D. Martiny, *Unterhaltsrang und - rückgriff*, Tübingen, 2000, I 679 f.

¹³⁸ H.-U. Graba, in: Johannsen and Henrich, *Eherecht*, 3rd Edition, München, 1998, § 1577 Civil Code No. 3 ff.

considering the mutual financial circumstances of the parties (§ 1577 II 2 German Civil Code).

The income of the claimant means that his or her necessary expenses, e.g. for childcare, can be recognized.¹³⁹ There is no uniform quota for the deduction of income from the maintenance.¹⁴⁰

There is also a special provision for maintenance until appropriate employment is found (cf. Question 64). In these cases the divorced spouse has income of his or her own, but not sufficient for full support. He or she may demand the difference between that income and full maintenance (§ 1573 II German Civil Code).

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

According to the principle of self-responsibility maintenance may not be demanded for as long as and to such an extent that the claimant is able to support him or herself from his or her own income (§ 1577 I German Civil Code). Therefore the claimant can be asked to seek gainful employment before he or she may claim maintenance from the divorced spouse. However, the divorced spouse is not required to engage in any gainful employment unless it is suitable (§§ 1573 I, 1574 I German Civil Code). A gainful employment is only suitable if it is appropriate to the ability, age, and health of the divorced spouse and also to his or her marital living standard. In considering the marital living standard, the length of the marriage and the time required for bringing up or educating a common child shall be taken into account (§ 1574 II German Civil Code). Therefore only after an evaluation of all the circumstances of the case can it be determined whether employment may be demanded.

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

¹³⁹ H. Büttner, in: Johannsen and Henrich, *Eherecht*, 3rd Edition, München, 1998, § 1577 Civil Code No. 26 with references.

¹⁴⁰ For details see H. Büttner in: Johannsen and Henrich, *Eherecht*, 3rd Edition, München, 1998, § 1577 Civil Code No. 29.

Maintenance may not be demanded for as long as and to such an extent that the claimant is able to support him or herself from his or her income and assets (§ 1577 I German Civil Code) Therefore the claimant can be asked to use his or her capital assets, before he or she may claim maintenance from the divorced spouse. This is not restricted to the earnings from assets but applies equally to the substance of the assets.¹⁴¹ There is, however, an important restriction. The claimant is not required to convert his or her assets, to the extent that such a conversion would be uneconomical or inequitable considering the mutual circumstances of the parties (§ 1577 III German Civil Code). The sale of an asset is uneconomical if there is no reasonable proportion between the profit from such a transaction and the value of the asset.¹⁴²

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?*

When calculating the claimant's income and assets, in principle only his or her own situation is taken into account. There is no indirect maintenance obligation on the part of the debtor in respect to other persons.¹⁴³ Therefore the legal maintenance obligations of the claimant in relation to third persons do not create need and are not taken into account. This is also true in respect of a maintenance obligation in relation to a child from an earlier marriage or relationship.¹⁴⁴

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?*

¹⁴¹ H. Borth, in: Schwab, *Handbuch des Scheidungsrechts* 4th Edition, München, 2000, Part. IV No. 848.

¹⁴² H. Borth, in: Schwab, *Handbuch des Scheidungsrechts* 4th Edition, München, 2000, Part. IV No. 1031.

¹⁴³ D. Martiny, *Unterhaltsrang und - rückgriff*, Tübingen, 2000, II 582 ff.

¹⁴⁴ OLG Stuttgart 19.02.1987, *FamRZ* 1987, 1030, 1031; H. Borth, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part. IV No. 850.

The decisive test is whether the benefits received by the claimant are considered to be income in the sense of maintenance law. It is possible that social security benefits, which the claimant receives, may exclude his or her need. This depends, however, on the legal nature of the benefits. The general welfare scheme of 'social assistance' (*Sozialhilfe*) follows the principle of subsidiarity (§ 2 II *Bundesozialhilfegesetz* Federal Act on Social Assistance). Therefore the receipt of such benefits does not exclude need and the divorced spouse's duty to maintain in general has priority in relation to the possibility for the claimant to seek social security benefits.¹⁴⁵ The special child-raising benefit (*Erziehungsgeld*), a periodical payment to non-working parents of small children, can be deducted by the debtor if the maintenance claimant only has a reduced maintenance claim under § 1579 German Civil Code.¹⁴⁶ On the other hand, social insurance pensions are the spouse's own income and thereby reduce his or her need.¹⁴⁷

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?*

In German maintenance law there exist several rules on the priority of maintenance claims (§§ 1582, 1609 German Civil Code) and the priority of maintenance obligations (§§ 1584, 1606 German Civil Code). The effect of priority is that the full maintenance of the claimant with the higher priority must be covered first before the lower-ranking claimant can obtain maintenance.¹⁴⁸ This is important because the debtor can rely on an amount for his or her own support (*Selbstbehalt*). There is a legal order of priority according to which certain

¹⁴⁵ BGH 27.09.1989, *FamRZ* 1989, 1279, 1280 f and *NJW* 1990, 253; BGH 01.10.1991, *BGHZ* 115, 228, 231 f and *FamRZ* 1992, 41; Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Familienrechts*, 3rd Edition, München, 1998, No. 563; D. Martiny (fn.114) II 1153.

¹⁴⁶ See § 9 Federal Child-Raising Benefit Act (*Bundeserziehungsgeldgesetz*) of 07.12.2001, *BGBI* 2001 I 3358; Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Familienrechts*, 3rd Edition, München, 1998, No. 559.

¹⁴⁷ Kalthoener, Büttner and Niepmann, *Die Rechtsprechung zur Höhe des Familienrechts*, 3rd Edition, München, 1998, No. 531 ff.

¹⁴⁸ BGH 23.04.1986, *FamRZ* 1986, 790, 792; BGH 13.04.1988, *FamRZ* 1988, 705, 707. Cf. H. Hübner, *Interdependenzen zwischen konkurrierenden Unterhaltsansprüchen*, Berlin, 1984.

claims/obligations rank ahead of others. In principle there are four ranks of maintenance claimants:¹⁴⁹

1. Generally, under-age children or young persons under 21 years and still at school, the spouse and a divorced spouse are on an equal footing (§ 1609 II German Civil Code).
2. A second group of maintenance claimants consists of other children and an unmarried mother of a child (§ 1615 I II sent. 3 German Civil Code).
3. Grandchildren (§ 1609 I German Civil Code).
4. Parents and grandparents (ascendants) of the debtor (§ 1609 I German Civil Code).

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

Where the debtor remarries there can be a conflict between his continuing and his new maintenance obligations. As a rule the divorced spouse takes precedence over the new spouse (§ 1582 I 1 German Civil Code.). The order of priority, however, depends on the reason on which each claim is based. When the amount of maintenance due to the divorced spouse is ascertained in a case under § 1581 German Civil Code (lack of means of the debtor) then the divorced spouse has, under certain conditions, precedence over the new spouse. There is no priority of the former spouse where the new spouse would be entitled to maintenance by an analogous application of §§ 1569 to 1574, 1576 and 1577 I German Civil Code (e.g. caring for a child, age, sickness or infirmity, maintenance on the ground of equity, maintenance until appropriate employment is found). If, for example, there are young children only in the new marriage no priority of the former spouse exists and both claims are on an equal footing. However, the former spouse nevertheless has precedence if he or she is entitled to maintenance under § 1570 German Civil Code (caring for a child) or 1576 German Civil Code (maintenance on the ground of equity) or if the marriage with the divorced spouse was of long duration (§ 1582 I 2 German Civil Code). Giving priority to the claim of the former spouse in cases of childcare, to the detriment of the second family, is questionable, but the Federal Constitutional Court

¹⁴⁹ Cf. H. Borth, in: Schwab, *Handbuch des Scheidungsrechts*, 4th Edition, München, 2000, Part. IV No. 1086; D. Martiny, *Unterhaltsrang und -rückgriff*, Tübingen, 2000, I 427 ff.

has nevertheless upheld this.¹⁵⁰ Since this may result in the discrimination of children of the second marriage, reform has sometimes been demanded.¹⁵¹

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?*

A 'spouse' is regarded as equal to the unmarried children under age (§ 1609 II German Civil Code). The same is true for children under the age of 21 living together with one parent and still at school. This also applies to the maintenance claim of a divorced spouse.¹⁵² Therefore between the former and the new spouse, on the one hand, and the children, on the other, there is an equality of rank whereas between the former and the new spouse there is a priority of the former spouse (§ 1582 German Civil Code). This so-called 'relative priority' between the spouses leads to contradictory results since equality of rank and priority at the same time is logically impossible. According to the Federal Supreme Court the children have the same rank as the divorced parent; they have priority, however, with respect to the new spouse of the maintenance debtor.¹⁵³ So, finally, the priority of the maintenance claims of under-age children and the former spouse prevails.

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

If the child has reached the age of majority then the divorced spouse takes precedence over the child and the other relatives (§ 1609 II 1 German Civil Code).

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

¹⁵⁰ BVerfG 10.01.1984, *BVerfGE* 66, 84 and *NJW* 1984, 1523. - Cf. M. Schmitt, *Der 'Rang' des Geschiedenenunterhalts*, Berlin 1985; D. Martiny, *Unterhaltsrang und - rückgriff*, Tübingen, 2000, I 525 ff.

¹⁵¹ Cf. L. M. Peschel-Gutzeit, 'Das Rangverhältnis im Unterhaltsrecht - Ein gerechtes System?', *FPR* 2002, 169 ff.

¹⁵² D. Martiny, *Unterhaltsrang und - rückgriff*, Tübingen, 2000, I 480.

¹⁵³ BGH 13.08.1988, *BGHZ* 104, 158 and *FamRZ* 1988, 705, 707.

According to § 1609 II 1 German Civil Code the spouse - and also a former spouse - takes precedence over the remainder of the relatives. Therefore the divorced spouse's claim for maintenance ranks ahead of the claims of other relatives (e.g. the parents) of the debtor.¹⁵⁴

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?*

According to the priority of obligations a divorced spouse who is obliged to pay maintenance to a former spouse is liable ahead of the relatives of the claimant, e.g. his or her parents or children (§ 1584 1 German Civil Code).¹⁵⁵ However, so far as the obligee is unable to pay and his own support is in danger, the relatives of the divorced spouse are liable ahead of the obligee (§ 1584 sentence 2 German Civil Code).

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?*

The maintenance claim of a divorced spouse terminates upon the claimant's remarriage or entering into a registered homosexual partnership (§ 1586 I German Civil Code). In principle, the termination of the maintenance obligation is final. However, a maintenance claim can revive if a divorced spouse enters into a new marriage and this marriage is also dissolved. Then he or she may demand maintenance from the previous spouse under § 1570 German Civil Code (caring for a common child) if he or she is charged with the care or the upbringing of a child from the previous marriage (§ 1586a I German Civil Code).

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?*

¹⁵⁴ Cf. D. Martiny, *Unterhaltsrang und - rückgriff*, Tübingen, 2000, I 479 f.

¹⁵⁵ OLG Hamm 04.07.1996, *FamRZ* 1996, 116; D. Martiny, *Unterhaltsrang und - rückgriff*, Tübingen, 2000, I 205 f.

There is no express legal rule according to which maintenance may be denied if the claimant enters into an informal long-term relationship. However, the payment of maintenance may be grossly inequitable if there is some 'other serious ground' which is as grave as the grounds mentioned in § 1579 nos. 1 to 6 German Civil Code (§ 1579 no. 7 German Civil Code). This legal provision is the basis for a denial of maintenance in the case of the cohabitation of the claimant. Since what constitutes cohabitation is difficult to define exactly and sometimes there are also difficulties concerning proof, according to the Federal Supreme Court, several situations have to be distinguished.¹⁵⁶ The courts deny maintenance claims if the claimant cohabits with a new partner after the divorce and a new marriage is intentionally not entered into in order to sustain the original maintenance claim. Also if the claimant lives in a 'maintenance community' (*Unterhaltsgemeinschaft*) with a new partner and this new partner obviously has financial capacity, no maintenance will be granted.¹⁵⁷ In other cases the loss of the claim has been based on a 'stable social relationship' (*verfestigte Verbindung*)¹⁵⁸ or the established 'external appearance of the new partnership' (*Erscheinungsbild in der Öffentlichkeit*), which has made the further existence of a maintenance claim grossly inequitable. According to the circumstances, a loss of the maintenance claim under § 1579 no. 7 German Civil Code may only be partial and/or of a temporary nature. The claim may revive if the new partnership ends;¹⁵⁹ the courts decide on a case-to-case basis whether the revival of the maintenance obligation is 'acceptable' (*zumutbar*) for the former maintenance debtor.

Even if the maintenance claim is not extinguished the cohabitation of the claimant with a new partner may have consequences with respect

¹⁵⁶ BGH 21.12.1988, *FamRZ* 1989, 487, 490 and *NJW* 1989, 1083. Cf. K. Nehlsen -von Stryk, 'Zur unterhaltsrechtlichen Relevanz des auf Dauer angelegten Verhältnisses', *FamRZ* 1990, 109 ff.; D. Martiny, *Unterhaltsrang und - rückgriff*, Tübingen, 2000, I 661 ff.

¹⁵⁷ But see BGH 24.10.2001, *FamRZ* 2002, 23 Annot. Schwab, 92.

¹⁵⁸ It is not convincing, however, that the Federal Supreme Court did not take into account cohabitation with a homosexual partner, cf. BGH 14.12.1994, *NJW* 1995, 655. Contrast also: G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1579 Civil Code No. 38.

¹⁵⁹ BGH 06.05.1987, *FamRZ* 1987, 689, 690 and *NJW* 1987, 3129; BGH 28.11.1990, *FamRZ* 1991, 542, 543. Cf. D. Martiny, *Unterhaltsrang und - rückgriff*, Tübingen, 2000, I 676 f.

to the amount of maintenance. The courts take into account the fact that the housekeeping for a new partner has an economic value and can lead to a deduction from the maintenance claim.¹⁶⁰

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

A maintenance claim can be denied because the marriage was of short duration. Such short duration makes the payment of maintenance grossly inequitable (§ 1579 no. 1 German Civil Code). When calculating the duration of a marriage the time during which a claim could be made under § 1570 German Civil Code (care for a common child) is added to the time during which the spouses were actually married. According to court practice a marriage is short when it has lasted no more than two years.¹⁶¹ Generally, it is no longer short when a period of more than three years has elapsed between the celebration of the marriage and the application for divorce.¹⁶²

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?*

As a consequence of the principle of irretrievable breakdown the existence of a maintenance obligation is, in principle, independent of any form of behaviour. However, according to the 'negative hardship clause' (*negative Härteklause*) of § 1579 German Civil Code maintenance can be denied, reduced or granted only for a limited period if it would be grossly unfair to claim maintenance.¹⁶³ The maintenance claim can be denied or reduced because the claimant is guilty of a crime against the debtor or against a close relative of the debtor (No. 2), the claimant wilfully caused his or her own destitution (No. 3), the claimant wilfully disregarded important property interests

¹⁶⁰ Cf. BGH 08.12.1982, *FamRZ* 1983, 150, 152; BGH 28.03.1984, *FamRZ* 1984, 662; BGH 20.05.1987, *FamRZ* 1987, 1011; Schwab, *Familienrecht*, 11th Edition, München, 2001, No. 384.

¹⁶¹ BGH 07.12.1988, *FamRZ* 1989, 483.

¹⁶² BGH 27.01.1999, *NJW* 1999, 1630, 1631.

¹⁶³ For more details see F. Lübbert, *Der Ausschluss des nachehelichen Unterhalts wegen 'grober Unbilligkeit'*, Bielefeld, 1982; M.-D. Schneider, *Die negative Härteklause im nachehelichen Unterhaltsrecht*, Regensburg, 2001.

of the debtor, e.g., giving false statements and causing economic damage (No. 4), the claimant before the separation grossly violated his or her duty to contribute to the support of the family (No. 5), the claimant is solely guilty of obvious serious misconduct towards the debtor (No. 6), or there is some other serious ground, which is as grave as the grounds mentioned in § 1579 nos. 1 - 6 German Civil Code (No. 7).

Also a breach of the duty to conjugal fidelity can - based on § 1579 No. 6 German Civil Code - result in such a denial or reduction of maintenance.¹⁶⁴ A married spouse who of his or her own volition leaves his or her marital partner and starts a new relationship is therefore generally not entitled to maintenance.¹⁶⁵ Even if the spouse is caring for a joint child, the application of the hardship clause is not excluded, although the welfare of the child has to be taken into account.¹⁶⁶ However, if there was also serious misconduct on the part of the other spouse the 'negative hardship clause' will not be applied.¹⁶⁷

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

Upon the death of the debtor, the obligation to provide maintenance does not end. It passes on to his or her heirs as a liability of the estate (§ 1586b I German Civil Code). The heir is, however, not liable over and above the amount equal to the compulsory portion (*Pflichtteil*) which would be due to the person entitled had there been no divorce.

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?

The spouses are free to arrange the financial consequences of their divorce themselves. They may (before or after the divorce or during

¹⁶⁴ Cf. D. Martiny, *Unterhaltsrang und - rückgriff*, Tübingen, 2000, I 662 f.

¹⁶⁵ BGH 28.03.1984, *NJW* 1984, 2358.

¹⁶⁶ BGH 30.09.1987, *FamRZ* 1987, 1238; BGH 27.09.1989, *NJW* 1990, 253; BGH 12.03.1997, *NJW* 1997, 1851.

¹⁶⁷ For more details see Schwab, *Familienrecht*, 11th Edition, München, 2001, No. 381.

the divorce proceedings) enter into a binding agreement as to maintenance (§ 1585c German Civil Code). Such an agreement dealing with an eventual divorce is already possible as a prenuptial agreement or in connection with the celebration of marriage.¹⁶⁸

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

In general, a spouse may agree to a separation of property (§§ 1408 I, 1414 German Civil Code), to forgo any share in old-age pensions (§ 1408 II German Civil Code) and also to renounce his or her future right to maintenance after divorce. The claim may even be waived altogether as the general provision of § 1614 I German Civil Code, according to which future maintenance may not be waived, is not applicable to post-divorce maintenance. However, according to the Federal Supreme Court, under certain circumstances the debtor cannot rely on the waiver when the former spouse, who cares for the children, objects on the ground of inequity (§ 242 German Civil Code).¹⁶⁹ The result of this objection shall be that the claimant can then demand the necessary (but not the full) maintenance insofar as the childcaring spouse cannot be expected to rely on reasonable employment.¹⁷⁰ According to another view any waiving by way of agreements is limited by § 138 I German Civil Code (good morals). An agreement will be void under public policy because it is regularly to the detriment of the children.¹⁷¹ An agreement is especially contrary to good morals if the divorced spouse will depend totally on the general welfare scheme of 'social assistance' (*Sozialhilfe*) and this is known to the parties or is at least foreseeable.¹⁷²

¹⁶⁸ G. Bruder Müller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1585c Civil Code No. 2. - For more details see H. Göppinger and U. Börger, *Vereinbarungen anlässlich der Ehescheidung*, 7th Edition, München, 1998; M. Krenzler, *Vereinbarungen bei Trennung und Scheidung*, 3rd Edition, München, 2000; G. Langenfeld, *Handbuch der Eheverträge und Scheidungsvereinbarungen*, 4th Edition, München, 2000.

¹⁶⁹ BGH 24.04.1985, *FamRZ* 1985, 787, 788 and *NJW* 1985, 1835; BGH 16.04.1997, *FamRZ* 1997, 873, 874 f..

¹⁷⁰ BGH 09.07.1992, *FamRZ* 1992, 1403, 1405 and *NJW* 1992, 3164; BGH 30.11.1994; *NJW* 1995, 1148.

¹⁷¹ Schwab, *Familienrecht*, 11th Edition, München, 2001, No. 390.

¹⁷² BGH 08.12.1982, *BGHZ* 86, 82, 88 and *NJW* 1983, 1851, 1852; BGH 17.09.1986, *FamRZ* 1987, 40, 42 and *NJW* 1987, 1546. - Cf. also O. Frey, *Der Verzicht auf nachehelichen*

According to the Federal Constitutional Court in cases where the claimant cares for a child there are limits where a waiver has occurred during the pregnancy of a woman in a prenuptial agreement before the marriage. In a recent case a pregnant woman had waived all claims to maintenance in the event of divorce and had even agreed to exempt her husband to be from his child support obligation. The Constitutional Court argued that the agreement was not the result of an equal partnership but rather reflected the disadvantaged situation of an unwed mother.¹⁷³ Therefore the agreement was ineffective.

104. Is there a prescribed form for such agreements?

There is no prescribed form for maintenance agreements outside civil proceedings (cf. § 1585c German Civil Code).¹⁷⁴ This is sometimes criticized because of the need to protect and to consult the needy party.

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

No approval of the court is necessary (§ 1585c German Civil Code).

Unterhalt, Bielefeld, 1988; D. Martiny, *Unterhaltsrang und – rückgriff*, Tübingen, 2000, I 389 f.

¹⁷³ BVerfG 06.02.2001, *BVerfGE* 103, 89 and *NJW* 2001, 957; BVerfG 29.03.2001, *NJW* 2001, 2248. - Cf. G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1585c Civil Code No. 15.

¹⁷⁴ H. Luthin, in: Luthin, *Handbuch des Unterhaltsrechts*, 9th Edition, 2002, No. 2270; G. Brudermüller, in: Palandt, *Bürgerliches Gesetzbuch*, 61st Edition, München, 2002, § 1585c Civil Code No. 3.