

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

**PORTUGAL**

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**A. GENERAL**

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

Portuguese Civil Code – Decree No. 47344, of 25 November 1966, including the amendments introduced by the 1977 Reform (Decree-law No. 496/ 77, of 25 November 1977 - Articles 1773 to 1795-D).

Subsequent amendments concerning these matters:

- Decree Law No. 131 / 95, of 6 June 1995;
- Decree Law No. 329-A / 95, of 12 December 1995;
- Law No. 47 / 98, of 10 August 1998;
- Decree Law No. 272/ 2001, of 13 October 2001 (coming into effect on 1 January 2002);
- Decree Law No. 273/ 2001, of 13 October 2001 (coming into effect on 1 January 2002).

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

In Portugal, divorce was introduced by the Decree of November 1910, 'Divorce Law', soon after the proclamation of the 3<sup>d</sup> Republic. The 'Divorce Law' included the forms of litigious divorce (based on fault/offence) and of divorce by consent (based on mutual consent). The former was based as much on subjective grounds, relating to blame (adultery, abandonment of the family home, ill-treatment, serious offences), as on objective grounds (actual separation, absence without any information as to the party's whereabouts news, incurable

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mental illness, other diseases). The system of *verification of breakdown* through divorce thus came into effect.

This system remained in force until the celebration of the Concordat between the Vatican and the Portuguese Republic of 7 May 1940. This Concordat established that Catholic marriages could not be dissolved by divorce. Concerning civil marriages the previous system was retained.

*The Portuguese Civil Code of 1966* maintained the system established by the Concordat regarding Catholic marriages. However, this legislation hindered the dissolution of civil marriages by divorce: it eliminated the *objective grounds* for divorce, it required that *divorce by mutual consent* should be preceded by a judicial process of separation between the spouses and property, and it enabled the judge to deny the divorce request and to order a separation although divorce had actually been requested, when the circumstances of the case would so require.

On 15 February 1975, the Portuguese State, together with the Vatican, celebrated the *Additional Protocol to the 1940 Concordat*, responding to the popular criticism against the insolubility of Catholic marriages, which was strongly expressed in our country after the Revolution of 1974. A mere *duty of conscience* on the part of those people married according to Catholic principles not to request a divorce in the civil courts was the result of the celebration of this Protocol.

The most significant amendment to the system of divorce introduced by the *1977 Reform* was to replace the *mandatory enumeration* of divorce grounds for the violation of matrimonial duties with the general clause of Article 1779, n. 1 Portuguese Civil Code; and the recognition of *other grounds for divorce when there has been breakdown of matrimonial life*.

Later on, the alterations introduced by DecreeLaw No. 131/95, of 6 June 1995 (which enacted the new Civil Registry Code) assumed particular relevance: it provided for the spouses' possibility to request, at *the Civil Registry*, a divorce and a judicial separation between the spouses and property by mutual consent, when the couple have no minor children; or, if they do have such children, when custody has been judicially resolved.

It should be noted that the Portuguese legislator has tended to facilitate divorce, especially by accepting a request for divorce on the ground of mutual consent *at any time*; permitting *shorter terms* for requesting a litigious divorce on the ground of the breakdown of *matrimonial life*; and eliminating the judge's authority not to allow the divorce when it is based on changes in the other spouse's mental faculties (Law No. 47/98 of 10 August 1998). The above-mentioned trend is also visible in DecreeLaw No. 272/2001 of 13 October 2001, which ascribes *exclusive competence* for *separation and divorce on the ground of mutual consent to the Director of the Civil Registry Office*, even when minor children are involved and custody has not yet been judicially determined. Divorce proceedings have become simpler in the case of divorce by mutual consent. The procedure now consists of one single hearing where the spouses submit the three agreements required by law: the agreement on maintenance to be granted to the spouse who requires it, the agreement on the custody of any minor children, and the agreement on the family's place of residence. It is the Attorney General who determines the adequacy of the agreement on the custody of a minor. When the Attorney General deems the agreement not to be in the minor's interest, there are two possibilities: either the parents modify the agreement or they do not adhere to the suggestions made by the Attorney General. In this latter case, the application will then be forwarded to the competent County Court.

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

As stated above, the most recent proposals to amend the legal system of divorce have been transposed into DecreeLaw No. 272/2001 of 13 October 2001. This new law ascribes *exclusive competence* for *separation and divorce on the ground of mutual consent to the Director of the Civil Registry Office*, even when there are minor children and custody has not yet been judicially decided. In this way, divorce proceedings have become simpler in a request for divorce by mutual consent, reflecting a new trend that desires a less dramatic end to a marriage.

**B. GROUNDS FOR DIVORCE**

## I. General

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

The Portuguese legal system recognises two methods of divorce: *litigious divorce* and *divorce on the ground of mutual consent*.

The first of these methods may be based on either *subjective or objective grounds*.

*Subjective grounds are the following*: a culpable violation of matrimonial duties jeopardising, by its gravity or repetition, the possibility of matrimonial life (Article 1779, n. 1 Portuguese Civil Code). The Portuguese legal system contains some leftovers from the divorce sanction system, under which the divorce is considered to be punishment for culpable behaviour. Article 1672 (Portuguese Civil Code) refers to the duties which are incumbent upon both spouses ; duties of respect, fidelity, cohabitation, co-operation and assistance. Legal literature has discussed whether this Article provides an exhaustive list of duties or whether there are also other duties, the so-called implicit duties. Pereira Coelho and Guilherme de Oliveira<sup>1</sup> defend the theory that it might be considered that there are other duties in addition to those in Article 1676, such as, for instance, the duty of absolute life in common, from Article 1672. Nevertheless, these authors consider that every duty can be interpreted so as to fit within the duties under Article 1672. They further argue that none of these duties can be excluded by convention. However, there might be different ways to fulfil them and therefore these different forms of behaviour do not feature some kind of violation of matrimonial duties. For instance, the duty of cohabitation is rather flexible. Finally, we must bear in mind that there are not peremptory causes and therefore a violation of matrimonial duties does not immediately lead to divorce. The judge must evaluate each case within its context, particularly the petitioner's fault, his/her educational level and moral responsibility (Article 1779, n. 2 Portuguese Civil Code). In conclusion, a particular form of behaviour may or may not be a violation of

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<sup>1</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 351-2.

matrimonial duties, depending on the way in which the spouses understand their particular relationship.

What is the content of the mentioned duties?

- The duty of respect (Article 1672 Portuguese Civil Code) only applies when the behaviour of the spouses does not fit within any of the other duties. It is both a duty of *facere* and *non facere*. As a duty of *non facere*, it requires that none of the spouses offends the other's physical and moral integrity. Furthermore, it requires that the spouses lead honourable lives so as to reflect the social image of the couple. As a duty of *facere*, it states that there must be some kind of interest in relation to the spouse and family life.
- The duty of fidelity (Article 1672 Portuguese Civil Code) is a pure *non facere* duty. It requires that none of the spouses commit adultery.
- The duty of cohabitation (Articles 1672 and 1673 Portuguese Civil Code) includes three aspects: first, the duty to maintain a sexual relationship with the spouse; second, the duty to live in one joint economic unit; third, the duty to live in the common residence of the family (Article 1673 Portuguese Civil Code).
- The duty of co-operation (Articles 1672 and 1674 Portuguese Civil Code) requires that the spouses assist each other in accomplishing their common responsibilities.

Finally, the duty of assistance (Articles 1672 and 1675 Portuguese Civil Code) includes the duty to maintain and the duty to contribute to the expenses related to the family life.

*Objective grounds, that is, independent of fault are the following: de facto separation for three consecutive years; de facto separation for one year, if the divorce is requested by one of the spouses without the opposition of the other spouse; changes to the mental faculties of the other spouse; and absence without any information as to the respondent's whereabouts for no fewer than two years (Article 1781 Portuguese Civil Code). The divorceremedy system as well as the system of the verification of the breakdown of the marriage were thus confirmed.*

In the first two cases, this rule allows any of the spouses to request the conversion of *de facto* separation into divorce. The law considers that divorce is a preferable situation when compared to *de facto* separation. The critics state that this rule allows a spouse to repudiate the other. Pereira Coelho and Guilherme de Oliveira<sup>2</sup> recognize that such a repudiation indeed exists and, thus, the law must accept it and protect the interests of the other spouse and children, accordingly. The concept of *de facto* separation is composed of two elements: an objective element and a subjective one. The first is very flexible. The rule is that the spouses must live in different residences. Nevertheless, there may be common life, without common residence. That is why the subjective element has been added. This is the inner intention of not residing as a married couple in the future (Article 1782 n. 1 Portuguese Civil Code). This separation must last for three years, without any interruption (Article 1781 a) Portuguese Civil Code) or for one year, if the other spouse consents (Article 1781 b) Portuguese Civil Code). This ground is bilateral. That means that both spouses, either the one considered to be the guilty party or the other party, may invoke it.

The third case is mental illness on the part of the other spouse for longer than three years and which, due to its seriousness, has compromised common life. Even though the legislator has protected absolute life in common, it considers that mental illness, being serious, may destroy this possibility. Nevertheless, the mentally ill spouse is protected after divorce. Although no guilt can be attached to the plaintiff, he/she may still be obliged to maintain (Article 2016 Portuguese Civil Code) and to pay compensation in the form of non-patrimonial damages (Article 1792 Portuguese Civil Code).

Finally, there is absence without any information as, to the respondent's whereabouts for over two years.

In the second of the above-mentioned methods, the divorce on the ground of mutual consent (Articles 1775 - 1778 Portuguese Civil Code), the divorce will be requested by both spouses without the ground therefor having to be stated. That does not mean that there are

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<sup>2</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 629.

no grounds for divorce. It simply means that such grounds are not disclosed. Thus, the legislator has taken a positive step to avoid some of the dramatic consequences of the divorce that would emanate from making the grounds public.

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

According to the data supplied by the National Institute of Statistics for the year 2000, of all the applications for divorce 6% were based on the irretrievable breakdown of the marriage, 9% on a culpable violation of matrimonial duties, while 71% were divorces by mutual consent. The remaining 14% were in fact not granted.

6. *How frequently are divorce applications refused?*

As stated above, according to data supplied by the National Institute of Statistics for the year 2000, 14 per cent of divorce applications were refused. See Question 5.

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

A litigious divorce takes place in a judicial court: the Family Court of the petitioner's place of residence, or the County Court in those Counties where there is no Family Court (Article 75 of the Civil Procedure Code and Article 8 Law 3/99 of 13 January). In contrast, divorce by mutual consent takes place at the administrative level: in the Civil Registry Office (Article 12 n. 1 b), as laid down in Decree Law No. 272/2001 of 13 October 2001).

A divorce by mutual consent may also be granted by the Court when it results from an agreement reached within a separation process or one of litigious divorce (Article 12 n. 1 b) under Decree Law No. 272/2001 of 13 October 2001, or even in the exceptional case mentioned in n. 3, final part.

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

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In a litigious divorce, the competent authority is the Judge of the Family Court or the County Court where no such specialist court exists. In divorce by mutual consent, the competent authority is the Director of the Civil Registry Office.

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?)*

A litigious divorce will be requested by one of the spouses against the other by means of the special proceedings for litigious divorce. The petitioner will have to submit a declaration containing the grounds for divorce to the 'Family Court' (Article 81 Law 3/99). Where this Court does not exist, the court is the County Court of his or her place of residence. (Articles 75, 1407 and 1408 of the Civil Procedure Code). The cause of action is made up of the facts that provide the ground for divorce (Articles 467 n. 1 d) and 498 n. 4 Civil Procedure Code).

The parties have to be represented by a lawyer (Articles 32 n. 1 a), 678, n. 1 and 312 of the Civil Procedure Code).

A divorce by mutual consent is initiated by both spouses by means of a petition submitted to the Civil Registry Office (Article 14 n. 1 of Decree.Law No. 272/2001 of 13 October 2001). Together with the petition, the spouses must enclose a specified list of common property and three agreements concerning the custody of any minor children, maintenance and the future family residence.

Given that these proceedings are voluntary, the parties are not obliged to resort to a lawyer, except during the review phase (Article 1409 n. 4 Portuguese Civil Procedure Code).

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

The dissolution of the marriage becomes effective when, the decision granting the divorce becomes final (Article 667 Portuguese Civil Procedure Code). However, there are exceptions. Its effects are considered to be retroactive from the time of the proposal for the action concerning the assets of both spouses (Article 1789 n. 1



Portuguese Civil Procedure Code). This exception only concerns assets, however, not any personal relations. If, for instance, before the decision has become in *rem judicatam*, one of the spouses remarries, that marriage is voidable, according to Articles 1601 c) and 1631 a) Portuguese Civil Code. In contrast, when the regime is a community of property regime, if one of the spouses inherits property before the decision becomes final, this exception prevents the other party from receiving part of the inheritance. We must bear in mind that this exception exclusively concerns the relations between the spouses. All those matters that concern third parties are subject to the general rule (Article 1789 n. 3 Portuguese Civil Code). The second exception is when the non-cohabitation of the spouses is proved in the proceedings. In this case, either one of them may request that the effects of the divorce are retroactive from the time, to be determined by the decision, when cohabitation ceased due to the exclusive or predominant fault of the other spouse (Article 1789 n. 2 Portuguese Civil Procedure Code). Proving a lack of cohabitation will take place when the grounds for divorce are either *de facto* separation (Article 1781 a) and b) Portuguese Civil Code) or a violation of the duty of cohabitation (1672 and 1779 n. 1 Portuguese Civil Code). Thus, the abandoned spouse may prevent the other from receiving any part of any inheritance or donation that he/she has become entitled to after the separation. Pereira Coelho and Guilherme de Oliveira<sup>3</sup> consider that this exception may also be applied when the ground for divorce is a ground other than separation, for instance, a violation of the duty of fidelity.

*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.*

Questions 11-21 are not relevant.

### **III. Multiple grounds for divorce**

#### **1. Divorce by consent**

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<sup>3</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>d</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 657.

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

Yes, divorce by consent exists as an autonomous ground for divorce; the spouses do not have to state either the reason for their disagreement (Article 1775 n. 2 Portuguese Civil Code) or the existence of an irretrievable breakdown. That does not mean that there are no grounds for the divorce. It simply means that they do not have to be disclosed. This type of divorce avoids some of the negative consequences which result from making the grounds public. Pereira Coelho and Guilherme de Oliveira<sup>4</sup> discuss whether the law always bears a cause in mind (that would fit within Articles 1779 and 1781 Portuguese Civil Code), even if it is not divulged, or whether the divorce can have no cause at all, and is simply based on the common will of the spouses to bring it to an end, according to the general law of contracts (Article 406 n. 1 Portuguese Civil Code).

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

Both spouses who are in agreement request that a divorce be granted (Article 1773 n. 2 Portuguese Civil Code).

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

No, it is not.

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

Nowadays the spouses may apply for divorce by mutual consent at any point in time (Article 1775 n. 1 Portuguese Civil Code). However, before this new law (Law 47/98 of 10 August) it was required that the marriage was of a certain duration (firstly, more than five years and, after the 1977 Reform, more than three years). The legislator aimed to protect the spouses from their own frivolity or hasty decisions.

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<sup>4</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 597.

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

The minimum age of both spouses in order to be able to apply for divorce by mutual consent was eliminated by the 1977 Reform. Previously, the spouses could not be under 25 years of age. This limit was eliminated in the 1977 Reform because it was considered that, since the law grants an individual the capacity to enter into a marriage, there is no reason to deny the capacity to become divorced, since this act does not demand any more responsibility than marriage itself. See also the answer to the Question 28.

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

If a divorce by consent has been applied for, the Director of the Civil Registry Office summons the spouses for a meeting where he will attempt conciliation between them (Article 14, No. 3, Decree law 272/2001 of October 13, 2001). No other mediation or informative meetings are prescribed by law. Mediation – fostered by the local authorities and private associations – is not mandatory and is still only in its infancy.

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

Both spouses must apply for divorce at the Civil Registry Office and there they must submit the application together with the three agreements required by law: on custody, on the future family residence and on maintenance for the spouse who may require it (Article 1775 n. 2 Portuguese Civil Code, and Article 14 n. 1 and 2, Decree Law No. 272/2001 of 13 October 2001).

Once the application has been accepted, the Director will summon the spouses for a meeting where he will attempt conciliation. If the spouses persist in their intention to divorce, the divorce will be granted and the respective registration will ensue (Article 14 n. 3 Decree Law No. 272/2001 of 13 October 2001).

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*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?*

With the application for divorce by mutual consent the spouses must also submit the three agreements mentioned above.

At the meeting, the competent authority (the Director of the Civil Registry Office) will scrutinise the agreements on the future family residence and on maintenance, as well as their conformity to the spouses' interests.

Concerning custody, it is the Attorney General's task to assess whether the spouses' agreement conforms to the interests of minor children.

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

The agreements required focus on the custody of minor children, the future of the family's residence and maintenance for the spouse who requires it (Article 1775, No. 2, CC, and Article 14, No. 1 and 2, Decree law 271/2001 of 13 October 2001). Concerning the agreement regarding the custody of minor children, the spouses must choose between several possibilities. They should decide whether the parental responsibility should be exercised by one or both parents. They should also agree on post-divorce visitation.

With regard to the maintenance of the other spouse, the legislator has taken into account the fact that one of the spouses commonly finds him/herself in a difficult economic situation after the divorce. Article 2016, n.1, c), Civil Code, states that both spouses may be the creditor or the debtor of the maintenance obligation that this agreement will regulate. Finally, the spouses must agree on the future of the family's residence. Several questions arise concerning this subject. As a matter of fact, the spouses may own the family residence, either only one of them or both; both or only one of the spouses may be usufructuary or usuary of the house; both of the spouses or one of them may have leased or loaned the house. The agreement will have to deal with these different situations: if the house is common property it may be

arranged that one of the spouses shall live there; if only one owns it, the agreement may establish that the other spouse shall live there under a lease or loan agreement; if one of the spouses is the lessee, the other may take over his/her position (Article 84, Urban Lease Regime Act). It is noticeable that the spouses do not need to agree on future division of property. This problem was discussed during the 1977 Reform. The legislator has considered that it would be very difficult to reach such an agreement and therefore also very difficult to bring consensual divorce to an amicable conclusion. However, the Civil Procedure Code (Article 1419, n.1) requires the spouses to reach an agreement regulating their common assets. Legal literature is currently discussing what the consequences of a lack of such an agreement actually are. These agreements must be submitted at the same time as the petition for divorce by mutual consent to the Civil Registry Office.

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

Regarding the agreements on the future family residence and on maintenance for the spouse who requires it, the Director ratifies the agreements when he deems them to be in the spouses' interest; otherwise, he will ask the spouses to alter them (Article 1776 n. 2 Portuguese Civil Code).

Concerning the agreement as to custody, if the Attorney General deems it not to be in the minor children's best interests, he will ask the applicants to modify it or submit a new agreement to the Attorney General's Office. If the applicants do not agree to the modifications proposed by the Attorney General, the proceedings will be forwarded to the County Court to which the Civil Registry Office belongs (Article 14, n. 2,4,5,6,7, Decree Law No. 272/2001 of 13 October 2001). The proceedings will then fall under the court's jurisdiction in all aspects.

If the authorities do not ratify any of the agreements, the application for divorce will not be granted.

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

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

Once the spouses have initiated proceedings for a litigious divorce, the judge summons them for an attempt at conciliation. If this attempt proves to be unsuccessful, the judge will try to obtain the spouses' agreement to convert litigious divorce proceedings into divorce proceedings on the ground of mutual consent (Article 1774 n. 2 Portuguese Civil Code).

For many years, in such cases the court would terminate the litigious divorce proceedings and the spouses had to initiate new divorce proceedings on the ground of mutual consent. However, in recent years, divorce proceedings have been converted taking advantage of already existing procedural acts within litigious divorce proceedings and dispensing with other procedural acts concerning divorce proceedings on the ground of mutual consent.

Our law does not cover the possibility of converting divorce proceedings on the ground of mutual consent into divorce proceedings on any other grounds. The spouses may, however, terminate the divorce proceedings on the ground of mutual consent and initiate entirely new proceedings on another ground.

Portuguese law clearly prefers divorce by consent rather than a litigious divorce. Therefore, it is stated in the Civil Procedure Code (Article 1407 n. 3) that litigious divorce may be converted into divorce on the ground of mutual consent at any moment during the procedure. Teixeira de Sousa<sup>5</sup> contends that 'at any moment during the procedure' means that the agreement may be introduced even when the case has been subjected to an appeal in a superior court.

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

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

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<sup>5</sup> M.T. de Sousa, *O Regime Jurídico do Divórcio*, Coimbra: Almedina, 1991, p. 101.

Unlike under the Divorce Law of 1910 and the Portuguese Civil Code of 1966, the current Portuguese Civil Code does not enumerate a mandatory list of culpable violations matrimonial duties on which divorce on the ground of fault or an offence may be based. Instead, it introduces a general clause to which one must refer the culpable conduct of the spouses which is likely to be ground for divorce: 'either spouse may request divorce if the other spouse culpably violates matrimonial duties, when the violation, by its gravity or repetition, jeopardises matrimonial life' (Article 1779 n. 1 Portuguese Civil Code). That is why Pereira Coelho and Guilherme de Oliveira<sup>6</sup> classify our system as a *compromise system*. It is mainly a system of *verification of breakdown through divorce*; however there are some clues that fault does indeed play a role. The Portuguese Civil Code (Article 1779) states that a culpable violation of matrimonial duties is a ground for divorce. However, it cannot stand as a ground by itself. There must be the necessary element of 'jeopardising matrimonial life'.

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

Adultery is a ground for divorce insofar as it constitutes a culpable violation of one of the matrimonial duties (the duty of fidelity – Article 1672 Portuguese Civil Code) which the law prescribes as part of the matrimonial relationship. Adultery is sexual intercourse with a third party, while other expressions of sexuality may also be relevant as breaches of fidelity. Legal literature adds another requirement. It is not only necessary that there is sexual intercourse with a third party, but there must also be intent. Therefore, sexual intercourse with a third party due to coercion or error does not amount to adultery because of the lack of intent. In a 1996 Supreme Court decision (26 December 1996), however although adultery was considered to be the only material infidelity, it was conceded that there may be violations of this duty of fidelity in cases of moral infidelity (sentimental or platonic liaisons). The Évora Court of Appeals argued in 1999 (11 March 1999) that there is no proven adultery when the only evidence is that the defendant lives with another woman, as there is no proof that they live as husband and wife.

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<sup>6</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 609.

35. *In what circumstances can injury or false accusation give grounds for divorce?*

Injury and false accusation are only grounds for litigious divorce insofar as they constitute a culpable violation of one of the matrimonial duties (the duty of respect – Article 1672 Civil Code), when they are grave or repeated, and which jeopardise matrimonial life. These violations offend the other spouse's moral integrity, his/her honour – either his/her honour in general or the special kind of honour that is related to the marriage – or his/her reputation and social standing (Abel Delgado).<sup>7</sup> The Supreme Court (19 February 1963) has considered that attention always has to be paid to the time and the place of the acts complained of in order to determine the significance of the words in question. According to Abel Delgado,<sup>8</sup> this culpable violation of the duty of respect does not demand *animus injuriandi*.

36. *Is an intentional fault required?*

According to Portuguese law, for the violation of a matrimonial duty to be used as a ground for divorce, it must have been intentional (Article 1779 n. 1 Portuguese Civil Code), that is, the conduct is intentional or results from negligence on the part of the violating spouse. However, there is a material difference between intentional conduct or negligent conduct: the court may consider that merely negligent conduct is not as 'grave' or that it does not place 'matrimonial life' at risk.

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

The conduct which violates a matrimonial duty will usually be directed against the offended spouse. However, conduct directed against a third party and only indirectly offending the other spouse

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<sup>7</sup> A. Delgado, *O Divórcio*, 2<sup>nd</sup> Edition, Lisbon: Livraria Petrony, 1994, p. 60.

<sup>8</sup> A. Delgado, *O Divórcio*, 2<sup>nd</sup> Edition, Lisbon: Livraria Petrony, 1994, p. 67.



may be considered to be a ground for divorce – for example, committing a serious crime against a third person.

The prior fault of one spouse does not deprive the fault of the other of its illicit guilty nature. But the conduct of both spouses is material for the judge to be able to evaluate if ‘matrimonial life’ has become ‘impossible’. Since divorce is considered to be a remedy for ill-feelings within the matrimonial situation, the fact that there are faults on both sides will only make that situation worse.

Even though the prior fault of one spouse does not erase the subsequent fault of the other, it is important to present all the relevant conduct to the court. The court will evaluate the fault of each of the spouses according to Article 1787 Portuguese Civil Code.

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

No, it is not.

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

Reconciliation expresses the conviction that matrimonial life is still possible and indeed desired. This situation prevents one spouse from invoking prior facts as a ground for divorce, because the facts only constitute a ground for divorce when they place the possibility of matrimonial life at risk. In fact, Article 1780 b) Portuguese Civil Code contains an extinct cause of divorce, according to which the offended spouse cannot obtain a divorce if his/her subsequent behaviour, namely forgiveness, express or tacit, has demonstrated that he/she does not consider that the conduct of by the other spouse will impede their matrimonial life. Manuel de Andrade<sup>9</sup> considers that reconciliation is not a legal transaction, rather a mere legal act. Therefore its effects do not depend on the will of the spouses. They

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<sup>9</sup> M. de Andrade, *Algumas questões em matéria de 'injúrias graves' como fundamento de divórcio*, Coimbra, 1956 (sep. da RLJ, ano 88º), p. 62, 33; F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 637.

operate *ex lege*. Nevertheless, this is a legal fact that demands a specific element, an 'inner element', an inner will. This element is made up of the opinion of the offended spouse (that the violation of the matrimonial duty/duties will not impede their matrimonial life) and his/her disposition to continue or to re-establish common life. This 'inner element' is revealed by an exterior element – behaviour after the fact. The law does not lay down any special requirements as to the motives that lead to the reconciliation/forgiveness, although it must be conscious (a full understanding of the facts and their implications) and voluntary.<sup>10</sup>

#### 40. How is the fault proved?

A culpable violation of matrimonial duties must be proved in court. Under the legal requirements (Article 342 Portuguese Civil Code), the burden rests on the petitioner to state and prove that the respondent is guilty. Therefore, and given that the fact which constitutes a ground for divorce is the overall legal ground of the 'culpable violation of matrimonial duties which by their gravity or reiteration place the possibility of matrimonial life at risk', the burden rests on the petitioner to prove not only the facts violating the matrimonial duty but also the offending spouse's guilt. In contrast, however, the Supreme Court (17 February 1983) decided that, since marriage is a contract, the rules to determine the burden of proof under contract law should be taken into account. According to Article 799 Portuguese Civil Code, the defendant has the burden of proof. Therefore, the plaintiff would only have to invoke a violation of matrimonial duties and the defendant would have to prove that his/her conduct did not amount to fault. Pereira Coelho and Guilherme de Oliveira<sup>11</sup> oppose this theory. Marriage is indeed a contract. Nevertheless, it is a different kind of contract and therefore it is always necessary to investigate whether the general rules concerning contracts are suitable to the special nature of a marriage. And they add that the ground for divorce, as stated under the law, is not only a violation of matrimonial duties. That violation must also be a culpable one, which by its

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<sup>10</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 639.

<sup>11</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 617 ss.

repeated nature or gravity will place the possibility of matrimonial life at risk (to such an extent that it cannot be expected that the offending spouse will maintain common life). Consequently, there is an overall legal ground that contains all these elements, including fault. These authors' conclusion turns out to be the same as that in another important court decision regarding this matter. This Supreme Court decision (26 January 1994) established that, as far as Article 1779 n. 1 Portuguese Civil Code is concerned, the plaintiff has the burden of proof that the other spouse has violated, with intent, matrimonial duties.

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

In divorce proceedings on subjective grounds an attempt at conciliation by the Judge must always take place (Article 1774 n. 1 Portuguese Civil Code and Article 1407 Portuguese Civil Code). If the Judge considers that it is not possible to attain conciliation, this meeting may be used to agree on a divorce by consent. If that is also not possible, the Judge may try to settle the agreements concerning the custody of minor children, the future family residence and the maintenance of the spouses (Article 1407 n. 2).

There are no other informative or mediation meetings prescribed under the law. Mediation – fostered by the local authorities and private associations – is not mandatory and is still in its infancy.

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

No, it cannot.

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

Within divorce proceedings on the ground of a culpable violation of matrimonial duties, guilt may be attributed to both spouses, even when the respondent has produced no counterclaim (Article 1787 n. 1

and 2 Portuguese Civil Code). The judge must also state whether one of the spouses has been noticeably more to blame than the other. This declaration will be crucial in order to determine the effects of Articles 1790, 1791, 1792 and 2016 n. 1 a) Portuguese Civil Code (and Article 84 Urban Lease Regime Act).

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

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

Irretrievable breakdown is determined by proving a) *de facto* separation for a period of three consecutive years, b) *de facto* separation for one year if the respondent does not oppose the divorce application, c) mental illness on the part of the respondent for three years, making matrimonial life impossible, d) absence without any information as to the respondent's whereabouts for over two years. Any of these facts carries a *iuris et de iure* presumption of irretrievable breakdown (Article 1781 Portuguese Civil Code).

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

One can speak of a divorce without fault as the judge does not consider the aspect of fault in deciding on the divorce. The divorce may be applied for by the spouse who has committed the culpable acts, and the court will grant the divorce with the mere verification of any of the facts which point to an irretrievable breakdown.

Nevertheless, fault still has some relevance but only as far as the effects of the divorce are concerned. Thus, the spouse who is declared to be solely or mainly to blame may not receive more in the distribution of marital property than he or she would have received if the marriage had been celebrated according to the system of the community of property, which only comprises property acquired after the marriage (Article 1790 Portuguese Civil Code). 'The spouse who is declared to be solely or mainly to blame loses all benefits received or to be received from the other spouse or from a third party regarding

the marriage or the condition of being married (...) (Article 1791 n. 1). 'The spouse who is declared to be solely or mainly to blame (...) must pay compensation for the non-material damage caused to the other spouse because of the dissolution of the marriage' (Article 1792). In principle, the spouse who is solely or mainly to blame has no right to claim maintenance after divorce (Article 2016 n. 1 Portuguese Civil Code).

The notion of objective causes was received very early on in our legal system. Under the 'Divorce Law 1910' (Decree of 3 November 1910) situations such as 'incurable insanity', 'contagious incurable disease', 'absence without any information as to the respondent's whereabouts for over four years' or '*de facto* separation, freely consented to, for ten consecutive years' were considered grounds for divorce. However, in 1966, the Portuguese Civil Code excluded every objective cause of divorce, according to the concept of *divorce sanction*. Nevertheless, in 1975 (Decree Law 261/75), *de facto* separation was again considered to be an objective ground for divorce. Finally, the 1977 Reform laid down a list of objective causes, that has only recently been amended by Decree Law 47/98, in order to diminish the lapse of time required by Article 1781 a), c) and d) Portuguese Civil Code, and to add another objective cause (Article 1781 b) Portuguese Civil Code).

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

No, it is not.

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

*De facto* separation constitutes a ground for litigious divorce after three consecutive years (Article 1781 a) Portuguese Civil Code); if divorce is applied for by one of the spouses without the other spouse opposing it, one year will suffice (Article 1781 b) Portuguese Civil Code). According to Pereira Coelho and Guilherme de Oliveira,<sup>12</sup> both these two periods must be consecutive, i.e. there cannot be any interruption. These authors exclude from the concept of interruption any meetings

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<sup>12</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 631.

between the spouses in order to make arrangements concerning matters relating to the family, their children or their assets. However, there is such an interruption if the spouses have made attempts to re-establish their matrimonial life. If this attempt is not successful, the previous period of separation shall not be taken into account. In contrast, Teixeira de Sousa<sup>13</sup> contend that there is no interruption due to an attempt at reconciliation. This author argues that a different solution would probably obstruct some attempts to re-establish matrimonial life and, therefore, only an effective reconciliation would result in an interruption.

So why do we have these two different periods of separation? Law n. 47/98 has reduced the term under Article 1781 a) from six to three years and has created the new term under Article 1781 c). Pereira Coelho and Guilherme de Oliveira<sup>14</sup> find that this new situation is not very clear. The fact is that when the divorce is requested by only one of the spouses, it is formally a litigious divorce, but, if there is no opposition it comes very close to a divorce by consent. In order to reach its conclusion a divorce by consent requires several agreements to have been reached on different subjects (maintenance of the other spouse, the future family residence and the custody of minor children). Now, Article 1781 c) allows the spouses to obtain a divorce without having made any of these agreements, merely by making use of this possibility: one party requests the divorce on the grounds of separation, while the other does not oppose the application.

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

No, in addition to the statement of the facts and evidence as to the objective element of *de facto* separation (the absence of a common bed, board and dwelling'), it is essential to state and prove the subjective element (the intention on the part of one or both spouses not to resume matrimonial life). If this element is lacking there is no *de facto* separation. This occurs, for instance, when one of the spouses is

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<sup>13</sup> M.T. de Sousa, *O Regime Jurídico do Divórcio*, Coimbra: Almedina, 1991, p. 76.

<sup>14</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 631.

imprisoned or is exercising any public or private service in or out of the country.

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

(a) Which circumstances suspend the term of separation?

Some think that meetings between the spouses to settle financial issues or to discuss subjects relating to minor children do not constitute a reason for suspending the period of separation. However, if the spouses attempt to resume matrimonial life, the term must be suspended. Others think that the three-year term may only be suspended by an actual reconciliation between the spouses, and not by a mere attempt at reconciliation. See Question 47.

(b) Does the separation need to be intentional?

Yes, because part of the concept of *de facto* separation has a subjective element (the intention not to resume matrimonial life), it is necessary to conclude that the separation must be intentional, at least on the part of one of the spouses.

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

Not necessarily. The objective element of *de facto* separation is very flexible, which means that there may be cases of apparent cohabitation between the spouses in the same house, without there being matrimonial life in the true sense. In such cases there is separation. The point here is that there is an absence of 'common bed, board and dwelling'.

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

Yes, in divorce proceedings on objective grounds an attempt at conciliation by the Judge will always take place (Articles 1774 n. 1 Portuguese Civil Code and 1407 Portuguese Civil Procedure Code).

*Portugal*

If the Judge considers that it is not possible to attain conciliation, this meeting may be used to agree on a divorce by consent. If that is also not possible, the Judge may try to settle agreements concerning the custody of minor children, the future family residence and the maintenance of the spouses (Article 1407 n. 2 Civil Procedure Code).

There are no other informative or mediation meetings prescribed under the law. Mediation – fostered by the local authorities and private associations - is not mandatory and is still in its infancy.

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

No, it is not.

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

The spouses do not need to reach an agreement on any subject; but the law expressly suggests agreements as to children's custody.

Whenever an agreement is lacking and any spouse request a decision as to the family's residence or on maintenance, the court is competent to decide on these matters.

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

Any agreement concerning the custody of minor children will be scrutinised by the Judge, who is to determine what is in the children's best interests. Should this agreement prove not to be in the children's best interests, the Judge will refuse to ratify it, and will decide the issue having the children's best interests in mind (Article 1905 n. 1 and 2 Portuguese Civil Code).

Agreements on maintenance and on the family residence are not subject to scrutiny.



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

No. From 1977 until 1998, the Judge could have refused the application for divorce based on mental illness on the part of the respondent when the decision might have presented a serious hazard for the mentally ill person. However, this rule has been eliminated.

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

#### **I. General**

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

The Portuguese Civil Code (Articles 2003 to 2020 Portuguese Civil Code).

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

Under the *1867 Code*, the *Seabra Code*, the law regulating maintenance was not separated from the law on minors. The duty of maintenance between the spouses was only explicitly and autonomously regulated under the 1966 Portuguese Civil Code.

In the original version of the *1966 Code*, the legal system of maintenance between the spouses was closely related to subjective fault in divorce. Hence, there were three major consequences concerning the beneficiary of maintenance: a) the claimant entitled to maintenance would be the spouse not at fault, if the separation or divorce had been granted due to the exclusive fault of one of them; b) the claimant entitled to maintenance would be the spouse not deemed to be the main party at fault when both were to blame for the divorce; c) the claimant entitled to maintenance would be either spouse, when both were equally at fault or when simple separation based on mutual consent had taken place.

The *1977 Reform* retained the general traits of the previous system. There was, however, an *exception* enshrined in that Reform which was translated into Article 2016 n. 2 of the Portuguese Civil Code: 'Exceptionally, and for reasons of equity, the Court may grant maintenance to the spouse who in principle would not be generally entitled to it, as prescribed in the previous number, taking into special consideration the duration of the marriage and the contribution made by that spouse to the matrimonial economic situation.'

Another noticeable alteration which was introduced was a new rule regulating the *manner* in which *the needs of the spouse entitled to maintenance* should be assessed (Article 2016 n. 3 Portuguese Civil Code).

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

I have no knowledge of any such proposals.

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

Yes, the Portuguese Civil Code, in Article 2015 and subsequent Articles, grants maintenance upon divorce to the former spouse. The roots of this obligation may be found in the principle of family solidarity, which means prolonging the duty to maintain the other spouse. Socially, its justification may be found in the historical position of the husband as the family bread winner and in the difficult situation that would result for the innocent spouse, more often than not the wife, when after divorce she would have no means of maintenance.

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?*

The rules relating to maintenance upon divorce are not directly connected with other financial consequences of the marriage, namely with the rules on matrimonial property law. The rules on matrimonial property law do not fulfil a function of support, because they are

confined to the distribution of the spouses' property among the different assets (common property and personal property). Each spouse is certain to receive his or her own personal property and half of the community property.

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

Yes, they do, insofar as they have an influence on the creditor's needs and the debtor's possibilities (see Article 2004 n. 1 Portuguese Civil Code, which states that maintenance will be proportional to the means of the debtor and the needs of the creditor).

*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?*

Compensation may be claimed in addition to maintenance payments. According to Article 1792 Portuguese Civil Code, the spouse considered mainly or exclusively at fault or the spouse who has requested a divorce on the ground of Article 1781 c) Portuguese Civil Code (mental illness of the respondent) must compensate the other spouse for non-patrimonial damage caused by the dissolution of the marriage (the social repercussions of the divorce, the grief resulting from the dissolution of the marriage ...). All damages not related to the dissolution of marriage, must be claimed in a different action, within the general rules of civil liability. All damages considered to be patrimonial may be taken into account in the determination of maintenance payments (Article 2016 n. 3 Portuguese Civil Code).

In a divorce on the ground of fault, maintenance fulfils a compensatory function in that, in principle, only the non-guilty spouse may claim maintenance from the guilty party.

*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.*

There is only one maintenance claim after divorce, regardless of the type of divorce (e.g. fault, irretrievable breakdown). Article 2016 Portuguese Civil Code refers simply to divorce, any type of divorce.

*63. Are the divorced spouses obliged to provide information to the 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?*

Both spouses must co-operate with the court in assessing their capacity to pay maintenance (Article 519 n. 1 Civil Procedure Code, Duty of Co-operation in the Discovery of Truth). If such co-operation is refused, the court may ask third parties for additional information, but it cannot overcome banking secrecy. In extreme cases the spouse at fault may be fined (Article 519 n. 2 Civil Procedure Code).

## **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 marriage and the raising of children? Please explain.*

When determining maintenance, the court takes into consideration the means of the debtor and the needs of the creditor. It also assesses the creditor's capacity to provide for himself or herself. This is the general rule. However, the law adds some illustrative criteria (Article 2016 n. 3 Portuguese Civil Code):

- the age and health of the spouses;
- their professional qualifications and employment possibilities;
- the time dedicated to the upbringing of common children;
- their income and assets;
- all the circumstances which have a bearing on the creditor's needs and on the debtor's possibilities to pay;
- a widely discussed question concerns the matter of including non-profitable assets and the possibility of selling them to fulfil the obligation or to acquire other assets that would

produce an income. Antunes Varela<sup>15</sup> considers that the Judge must decide on this subject in each particular case.

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

Either of the spouses has the right to claim maintenance in the case of divorce by mutual consent or when, in the case of litigious divorce, both spouses were equally to blame or no blame could be attached to either of them (Article 2016 n. 1 c) Portuguese Civil Code). Nevertheless, if only one of the spouses was to blame or if one of them was manifestly more to blame than the other, only the innocent spouse or the less guilty one has the right to claim maintenance (Article 2016 n. 1 a) Portuguese Civil Code). In the case of a divorce granted on the ground of mental illness, the right to claim maintenance belongs exclusively to the respondent (Article 2016 n. 1 b) Portuguese Civil Code). However, exceptionally and for reasons of equity, the court may grant maintenance to the spouse who would normally not have a right to it, taking into consideration the duration of the marriage and the contribution made by that spouse to the couple's economy (Article 2016 n. 2 Portuguese Civil Code). Indeed, one can imagine the situation where the spouse whose behaviour was the sole cause of the divorce, has for many years respected all the matrimonial duties and has regularly contributed to the costs of family life and, suddenly, after the divorce he/she finds him/herself in a situation of unexpected need that can easily be avoided by the other spouse.

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

The lack of means caused by the marriage may be relevant in determining maintenance. The Judge may take into consideration the contribution made by the spouses to the couple's economic situation and all the other circumstances that have a bearing on the needs of the creditor and on the debtor's possibilities to pay (Article 2016 n. 3 Portuguese Civil Code).

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<sup>15</sup> J.M.A. Varela, *Código Civil Anotado*, 1<sup>st</sup> Edition, vol. V, Coimbra: Coimbra Editora, 1995, p. 581.

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

The need for maintenance must exist when the claim is made, either at the moment of divorce or at a later time. Teixeira de Sousa<sup>16</sup> considers that after the divorce the former spouse in need of maintenance may request a provisional remedy to obtain maintenance *pendente lite*, if he/she has instigated a principal action.

### **III. Content and extent of the maintenance claim**

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

Maintenance may be a lifelong claim. However, it must cease as soon as the debtor is no longer in a position to pay or when the claimant is no longer in need of maintenance. The criteria that terminate the maintenance claim in general terms are listed in Article 2013 Portuguese Civil Code. That which is of specific concern to former spouses is addressed in Article 2019 Portuguese Civil Code. On the one hand, in the first list we may refer to the death of the creditor or the debtor (Article 2016 a)), the lack of any need on the part of the creditor or the debtor's inability to pay the maintenance (Article 2016 b) Portuguese Civil Code). However, the criteria presented in Article 2016 c) Portuguese Civil Code that refer to the violation of duties on the part of the creditor, are considered to be excluded from the criteria that enable this obligation to terminate, since there is not a strong relationship which binds former spouses and which would require such duties.<sup>17</sup> Going one step further, the Portuguese Supreme Court (22 June 1995) terminated a maintenance obligation, justifying its decision by the fact that after the distribution of the couple's assets, one of the spouses (the wife in this case) no longer required maintenance. On the other hand, Article 2019 Portuguese Civil Code, refers to two other such criteria: if the creditor remarries, the matrimonial solidarity that was linked to the previous marriage comes to an end and the new spouse shall have to fulfil the duty of

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<sup>16</sup> M.T. de Sousa, *O Regime Jurídico do Divórcio*, Coimbra: Almedina, 1991, p. 115.

<sup>17</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 687.

maintenance; if the moral behaviour of the creditor makes him/her unworthy to receive such a benefit, that obligation may also cease. According to Pereira Coelho and Guilherme de Oliveira,<sup>18</sup> the vagueness of this latter formula requires additional criteria. Antunes Varela<sup>19</sup> suggests that one such criterion might be the fact that the moral behaviour of the creditor would be such that it would extinguish the debtor's obligation 'according to the criterion of objective reasonableness'.

The Portuguese Supreme Court (29 April 1997) decided a case where all the circumstances alleged by the creditor had occurred before the court decision that established the duty of maintenance. The Supreme Court considered, however, that the facts constituting unworthy behaviour must have occurred after that decision. Another important question arises when we consider the issue of a *de facto* union. Indeed, this is not a new marriage as such and therefore there is no new duty of assistance towards a new spouse. Nevertheless, because of the new situation the situation of necessity may have disappeared and therefore the obligation to maintain may have ceased. J. Vaz Tomé<sup>20</sup> adds that, although not expressly stated under the law, this new situation may extinguish this obligation depending on how long this new relationship has lasted and the degree of certainty that it will continue.

*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?*

Under the law, the amount of maintenance corresponds to all that is necessary in the way of nourishment, housing, and clothing (Article 2003 n. 1 Portuguese Civil Code). Besides these elements, the Supreme Court (4 December 1997) has considered that everything which is indispensable to health care and travelling costs also has to be included.

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<sup>18</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 687-688.

<sup>19</sup> J.M.A. Varela, *Código Civil Anotado*, 1<sup>st</sup> Edition, vol. V, Coimbra: Coimbra Editora, 1995, p. 618.

<sup>20</sup> M.J.V. Tomé, *Sobre a Negociabilidade das Modalidades de Cumprimento da Obrigação de Alimentos como Efeito do Divórcio*, Porto: Juris et De Jure, 1998, p. 220.

However, maintenance may cover more than that which is indispensable. Although it may not maintain the former spouse's standard of living during the marriage, maintenance may at least place him or her above the poverty line. Nevertheless, this point is the subject of discussion. According to those who defend a restrictive position, this obligation should be understood in terms of providing only for essential needs and not for maintaining the other spouse as if the parties were still married. On the other hand, Abel Delgado<sup>21</sup> considers that the amount of maintenance should be sufficient to maintain the standard of living which the former spouse enjoyed during the marriage. This author adds strength to his argument when he mentions the situation of the creditor as the innocent or the less guilty spouse since he/she has already been the victim in the marriage's dissolution. Some decisions of the Supreme Court have also decided along these lines (25 January 1979; 16 February 1993). Another Portuguese author, M.N. Lobato de Guimarães<sup>22</sup> adopts a mitigated position: the amount of maintenance may be above the minimum necessary for survival, and it may be sufficient to support the former spouse according to a reasonable standard of living. Pereira Coelho and Guilherme de Oliveira<sup>23</sup> are also in favour of this position, arguing that it reconciles the ideal of solidarity among those who have already cohabited within a marriage with the idea of individual responsibility for those who have taken the step towards autonomy. Furthermore, whatever the cause of the divorce and whoever has been the guilty spouse, a marriage should not be considered to be a guarantee against impoverishment. These authors add that a single person, living alone, will incur additional expenses in maintaining the same standard of living. Therefore, it is unlikely that one spouse will be in a position to maintain him/herself and the other spouse at the same level as during the marriage.

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<sup>21</sup> A. Delgado, *O Divórcio*, 2<sup>nd</sup> Edition, Lisbon: Livraria Petrony, 1994, p. 168-170.

<sup>22</sup> M.N.L. de Guimarães, 'Alimentos', in: *Reforma do Código Civil*, Lisbon: Petrony, 1980, p. 210-211.

<sup>23</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 678.



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?*

Maintenance is determined as a concrete amount. The main rule leads the court to consider the claimant's needs and the debtor's possibilities, as well as the creditor's possibilities to sustain an independent existence. There is no model prescribed by law or recommended by any competent authority. Nevertheless, in order to determine the debtor's possibilities, the Court must consider whether a surplus exists. This surplus can be defined as the difference between the debtor's income and his/her necessary expenses. The court must accept all means of proof in order to determine the creditor's needs and the debtor's means. Article 2016 n. 3 Portuguese Civil Code states that the Judge, in order to calculate the amount of maintenance, must consider the spouse's age, health, professional skills, employment possibilities and the time that shall be spent caring for their children, their income and all other circumstances that may influence both the needs of the creditor and the means of the debtor.

Concerning maintenance *pendente lite*, the Civil Procedure Code (Article 399) determines that its amount should only be that which is necessary for basic subsistence, housing and clothing and to cover the necessary legal costs when the petitioner does not receive legal aid.

As for set maintenance, the general rules of the Portuguese Civil Code are applicable: Article 2001 Portuguese Civil Code also includes all that is necessary for basic subsistence, housing and clothing.

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?)*

Under the law, maintenance is everything which is indispensable to basic subsistence, housing and clothing (Article 2002 Portuguese Civil Code). As mentioned above (see Question 69), maintenance may also be in excess of that which is strictly necessary for basic subsistence, housing and clothing. It may in fact approach the level which is necessary to maintain the former spouse's standard of living which

was enjoyed during the marriage. Between the minimum and the maximum limits, other costs may be included when calculating maintenance. It has already been mentioned that the Portuguese Supreme Court also considers health care costs and travelling expenses to be a necessity.

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

No, there is not. There is no legal reference to such a limit and the legal literature has discussed this matter when referring to the relationship between the amount of the maintenance and the standard of living during the marriage. However, in the past, the 1910 'Divorce Law' stated that the amount of maintenance could not exceed one-third of the net income of the debtor.

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

No, it does not. However, even though not related to any lapse of time, an alteration may be considered to be appropriate, including a reduction, in the level of the maintenance. Article 2012 Portuguese Civil Code states that if the particular circumstances which originally determined the amount of maintenance have changed, a reduction (or an increase) might be appropriate.

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

Maintenance is determined in periodical payments. However, other methods of fulfilling this obligation may be allowed if they are based on an agreement between the two parties or on legal stipulations or exceptional circumstances (Article 2005 n. 1 Portuguese Civil Code). M.J. Vaz Tomé<sup>24</sup> considers the possibility of paying maintenance by means of creating a usufruct right or a contract for a life interest with a third party. Another way of paying maintenance may be by means of a *una tantum* payment (lump sum). In this way both parties would be able to definitively put an end to their economic relationship en to

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<sup>24</sup> M.J.V. Tomé, *Sobre a Negociabilidade das Modalidades de Cumprimento da Obrigação de Alimentos como Efeito do Divórcio*, Porto: Juris et De Jure, 1998, p. 212.

attain a *clean break*. The total amount of the maintenance is calculated by taking into consideration the traditional criteria and the predictable length of time during which the creditor will require maintenance. The whole payment could thus be paid by means of one lump-sum payment. This possibility may be allowed when there is agreement between the parties under Article 2005 n. 1 Portuguese Civil Code.

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

Payment by means of a lump sum is not prescribed by Portuguese law. Nevertheless, this form of payment may be allowed by means of an agreement between the claimant and the debtor (Article 2001 n. 1 Portuguese Civil Code). M.J. Vaz Tomé<sup>25</sup> considers that a *una tantum* payment would not be acceptable if it is a definitive transaction (Articles 1248 and 1249 Portuguese Civil Code). It may however be accepted if it is considered to be a legal transaction concerning the method of payment. Therefore, even once the total amount is paid, it does not extinguish the obligation. Although some authors agree with the idea that a *una tantum* payment will put an end to the right to maintenance, due to the notion of a voluntary agreement, M.J. Vaz Tomé argues that this payment is only an amount which is calculated at a certain time, under certain circumstances and, therefore, is a right that does not allow the transaction to be settled.

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

No, indexation is usually determined by the court, but it is not automatic. In 1987, the Portuguese Supreme Court (16 December 1987) decided that there should not be any automatic indexation of maintenance determined by the court, because such indexation could raise the amount to a level which is above the means of the debtor. According to this decision only the parties, by means of an agreement, and not the court, may choose this form of payment. Pereira Coelho and Guilherme de Oliveira<sup>26</sup> do not agree with this position.

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<sup>25</sup> M.J.V. Tomé, *Sobre a Negociabilidade das Modalidades de Cumprimento da Obrigação de Alimentos como Efeito do Divórcio*, Porto: Juris et De Jure, 1998, p. 203

<sup>26</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 683.

According to them, unfair consequences could also result either from a court decision or from the parties' agreement and they add that it would be more reasonable in terms of procedural economy if the court would decide on (automatic) indexation instead of having to revise an agreement *a posteriori*.

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

The circumstances under which maintenance is determined by the court or by an agreement reached between the two parties may change. In that case, the amount of maintenance may be adjusted to the new situation by a court order, after a claim by the creditor, or by a new agreement between the parties. This process is a probate jurisdiction process, and decisions may therefore be amended based on a change in circumstances (Articles 1411 and 2012 Civil Procedure Code). The Portuguese Civil Code (Article 2012) has also considered this possibility. When the changed circumstances are due to a change in the value of currency, the amount of maintenance will be amended based on those new values. The Supreme Court (19 May 1994) has decided that the amount of maintenance may be increased or diminished if there is a change in the current purchasing power. Previously, this same Court (13 January 1989) argued that inflation, being such a well-known economic factor, did not need to be proved.

M.J. Vaz Tomé<sup>27</sup> considers that instead of an *a posteriori* modification by means of a court order, there should be a preventive mechanism, through a *rebus sic standibus* clause.

#### **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?*

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<sup>27</sup> M.J.V. Tomé, *Sobre a Negociabilidade das Modalidades de Cumprimento da Obrigação de Alimentos como Efeito do Divórcio*, Porto: Juris et De Jure, 1998, p. 216.

Yes. The Portuguese Civil Procedure Code (Article 824) stipulates that certain assets may only be partially pledged. This is the case with salaries or wages earned by the debtor, periodical age-related insurance payments or any other kind of similar insurance (health, mortgage, etc.). In such cases, the part to be pledged may not be in excess of one-third of the income mentioned; however, the Judge may determine that it should be one-third or one-sixth of the income or even exempt it from pledge, taking into consideration the nature of the debt and the financial situation of the debtor and of his or her household.

*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?*

When assessing the maintenance claim, the debtor's capacity to pay is taken into account at the moment when the claim is made. If there is an increase in the debtor's income, then an increase in the maintenance payments may be requested when the claimant's needs so justify. The justification may be found in Article 2004 n. 1 Portuguese Civil Code. According to this Article, the amount of maintenance is calculated taking into account both the needs of the debtor and the means of the creditor.

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

The debts of the person who has to pay the maintenance may affect his or her liability to pay maintenance. If the obligor's debts correspond to a credit which takes priority over the maintenance claim, the debtor may find himself or herself in a position where he or she will be incapable of meeting the payments (because he/she has 'no means' – Article 2004, n.1, Portuguese Civil Code). Nevertheless, the debtor cannot place him/herself in a situation that will prevent him/her from actually paying the maintenance. Indeed, the Judge must scrutinize whether his/her debts are normal and necessary or superfluous in any given situation.

Portugal

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 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?*

Yes, he/she can. But this is a controversial issue. According to Abel Belgado,<sup>28</sup> the debtor may, as and when this is reasonable, be obliged to sacrifice his/her capital assets in order to fulfil his/her maintenance obligations. It also raises the question whether the debtor may have to alienate non-profitable assets in order to pay the maintenance on account of the capital or to acquire new assets that produce income. Antunes Varela<sup>29</sup> considers that the Judge should be the one who decides on this matter.

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

No, it cannot.

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

Yes, any kind of benefit may be used.

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?*

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<sup>28</sup> A. Delgado, *O Divórcio*, 2<sup>nd</sup> Edition, Lisbon: Livraria Petrony, 1994, p. 167.

<sup>29</sup> J.M.A. Varela, *Código Civil Anotado*, 1<sup>st</sup> Edition, vol. V, Coimbra: Coimbra Editora, 1995, p. 581.

No, it does not. The new spouse or partner is a different individual, a different legal entity and is therefore not bound by the duty of maintenance.

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

*86. In what way will the claimant's own income reduce his 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 hand from employment which goes beyond what is reasonably expected?*

The claimant's own income affects the maintenance claim in that it reduces the claimant's needs (Article 2004 n. 1 Portuguese Civil Code). The kind of income or from where it is derived is irrelevant.

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

Under the law, the professional qualifications and job opportunities of the claimant are relevant (Article 2016 n. 3 Portuguese Civil Code). Thus, the Judge may attempt to persuade the claimant to seek employment. Abel Delgado<sup>30</sup> considers that as long as any of the spouses is able to provide for him/herself, he/she should be obliged to do it.

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

This issue has not been legally resolved. Nevertheless, it may be expected that the claimant who owns capital assets will find it difficult to prove the need for maintenance in court.

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

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<sup>30</sup> A. Delgado, *O Divórcio*, 2<sup>nd</sup> Edition, Lisbon: Livraria Petrony, 1994, p. 167.

Portugal

When calculating the maintenance claim, all the circumstances affecting the claimant's needs must be taken into consideration. These include the claimant's obligations in relation to third persons.

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

If any social security benefits received by the claimant place him or her in a position of not requiring maintenance, the maintenance obligation will cease to exist (Article 2013 n. 1. b) Portuguese Civil Code)

The law does not prescribe the subsidiarity of maintenance in relation to social security benefits; however, the court must take into consideration the possibility for the former spouse to apply for such benefits.

## **VI. Questions of priority of maintenance claims**

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

Each person, in the case of need, may claim maintenance from, successively, the spouse or former-spouse, the descendants, the ascendants, the brothers and sisters, the uncles and aunts (during the creditor's minority), and finally from the stepfather and the stepmother (concerning any minor stepchildren who are or were being supported by the spouse at the moment of his or her death) – Article 2009 n. 1 Portuguese Civil Code.

There are no other rules on the priority of claims.

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

There are no rules on the priority of claims between former spouses and spouses. The registered partner has no right to maintenance.



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's claim?*

There are no rules of priority between those two claims.

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

There are no rules of priority between those two claims.

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

No, it does not.

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?*

For each claimant, his or her spouse or former spouse are the first debtors; the other relatives are only obliged to pay maintenance if the first debtors cannot fulfil that obligation (see Article 2009 n. 1 and 3 Portuguese 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 duty to maintain ceases when the claimant remarries (Article 2019 1<sup>st</sup> part, Portuguese Civil Code).

The law does not prescribe the same effect in the case of a *de facto* union; the claimant does not benefit from a new maintenance duty on the part of his or her partner. In special cases, maintenance may be extinguished because of undignified conduct on the part of the claimant (Article 2019 2<sup>nd</sup> part Portuguese Civil Code).

The claim may revive if general legal conditions are again fulfilled.

Portugal

*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?*

No, the mere fact that the claimant enters into a *de facto* union with a third person does not constitute a reason to deny or to reduce the maintenance claim. However, it is conceivable that the needs of the creditor no longer justify the claim.

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

No, it cannot.

*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 divorce ground?*

The facts prior to the divorce are only material because the spouse who was found to be the sole or main guilty party has no right, in principle, to maintenance. According to Article 2016 n. 1 Portuguese Civil Code, as a general rule, the spouse entitled to maintenance is the innocent spouse or, if both of them are guilty, the least guilty spouse. Therefore, the claimant's conduct during the marriage is essential to determine whether he/she may have this right to maintenance. However, exceptionally, the Court, based on equity, may grant maintenance to the spouse that would not be entitled to receive it, taking into consideration the duration of the marriage and his/her contribution to the economic situation of the couple. Furthermore, if the ground for divorce is the mental illness of the spouse, the mentally ill party shall always have the right to maintenance.

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

Yes, it does (Article 2013 Portuguese Civil Code), since it is not reasonable to transfer this personal obligation to the heirs.

### **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?*

Yes, they may (see Article 2012 and 1775 n. 2 Portuguese Civil Code). Maintenance may result from an agreement between the former spouses (respecting the general rules and Article 2014 Portuguese Civil Code); it may also result from an agreement between former spouses, in the context of a divorce by consent, according to Article 14 n. 2 Decree Law 272/2001 and Article 272 n. 1 d) Civil Register Code); finally, in the case of a litigious divorce, there may be an agreement suggested by the Judge (1407 n. 2 Civil Procedure Code).

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

The right to maintenance may not be renounced or assigned to another person (Articles 2008 n. 1 and 577 n. 1 Portuguese Civil Code). Concerning the prohibition of assignment to another person, we must consider that the right to maintenance is intimately linked to the personal needs of the creditor and therefore he/she is the only one who will ever be entitled to receive maintenance. As for the prohibition on renouncing such a right, another justification may also be added – in the context of modern welfare states, if the relative/debtor does not fulfil his /her obligation, ultimately the state will provide assistance. However, if the creditor does not claim his/her right, he/she cannot be prevented from taking this course of action – there is no public interest that would justify such a move.<sup>31</sup>

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

No, there is no prescribed form for such agreements.

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<sup>31</sup> F.P. Coelho and G. de Oliveira, *Curso de Direito da Família*, vol. I, 2<sup>nd</sup> Edition, Coimbra: Coimbra Editora, 2001, p. 683.

*Portugal*

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

In the case of divorce by mutual consent, the authority granting the divorce has to ratify a prior agreement between the spouses (Articles 14, n. 3 and 12, n. 5, Decree- Law No. 272/2001); in the case of divorce on the ground of fault, there is no specific requirement of that approval.

If the agreement is subsequent to the divorce, it will need no ratification.