

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

RUSSIA

Dr. Masha Antokolskaia

Molengraaff Institute for Private Law, University of Utrecht

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A. GENERAL

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

The current sources of divorce law in the Russian Federation are Chapter 4 of the Russian Family Code¹ entitled 'Termination of marriage' and the Directive² of the Supreme Court of the Russian Federation 'On the Application of the Divorce Legislation the Courts When Deciding Divorce Cases'.³

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

¹ *Semeinyi Kodeks Rossiiskoi Federatsii*, adopted on 08.12.1995, in force since 01.03.1996. *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1996, No. 1, item 15. For an English translation see: W. Butler and J. Henderson, *Russian Legal Texts. The Foundation of a Rule-of-Law State and a Market Economy*, The Hague, London, Boston: Simmons and Hill Publishing Ltd, 1998, p. 517- 593.

² The attribution of the directives of the Supreme Court to the formal Russian sources of law is not without controversy. Traditionally, Soviet doctrine completely rejected the relevance of case law as a source of law. Nowadays the doctrinal attitude is changing. (See, for instance: V. Lazarev, *Theory of Law*, Moscow: Jurist, 2000, p. 192-196; R. Livshits, 'Judicial Practice As a Source of Law', 6 *Journal rossiiskogo prava*, (1997), p. 49-57.) The directives of the Supreme Court should not be confused with case law. They are abstract rules formulated by the Plenum of the Supreme Court in general terms. They are formulated on the basis of Supreme Court cases and are designed to guide the practice of the lower courts. In fact, they are de facto legal acts created by the Supreme Court without any explicit competence to do so.

³ Directive No. 15 of 05.11.1998, *Bulleten' verkhovnogo suda RF*, 1999, No. 1, item 7.

Before the Bolshevik Revolution of 1917 civil divorce did not exist.⁴ The population was subordinated to the ecclesiastical rules of different religions. As a result divorce was not open to all religious convictions. The civil divorce procedure only became possible in 1917⁵ Under the first Family Code of 1918⁶ the irretrievable breakdown of marriage became the sole ground for divorce. When both spouses mutually agreed to divorce, they could register it at the Department of Registration of Civil Acts, without bringing the case before the court. If one spouse did not consent then they had to resort to a procedure before the court.

In 1926, under the second Family Code,⁷ the divorce procedure was simplified even further. The judicial procedure was discarded. A marriage could be effectively terminated by unilateral intent. The Department of Registration of Civil Acts granted the divorce without hearing the non-applying spouse and irrespective of his or her presence. The non-applying spouse only had to be subsequently informed of the divorce by letter.⁸ In 1944, however, divorce again became very difficult.⁹ Judicial divorce was restored and the administrative procedure was abandoned. Only a second instance court could grant a final divorce order. Spouses had to present sufficient evidence of the irretrievable breakdown of their marriage. Furthermore, the court could dismiss a divorce petition even if both spouses were in favour of a divorce. These measures were intended to protect 'the stability of the family.'¹⁰

⁴ For more on this issue see: I. Zagorovski, *Handbook of Family Law, (Kurs Semeinogo prava)*, Odessa, 1909. D. Genkin e.a., *Istoria sovetskogo grazhdanskogo prava 1917-1947*, Moscow, 1949, p. 498.

⁵ *O rastorzhonii braka*, *SU SSSR*, 1918, No. 76, item 818. The Act (*Dekret*) of the All-Russian Central Executive Committee and the Council of Ministers of the RSFSR, 19.12.1917.

⁶ *Kodeks Zakonov ob Aktah Grazhdanskogo Sostoianiia, Brachnom, Semeinom i Opekynskom Prave*, Articles 85-99, 22.10.1918, *SU RSFSR*, 1918, No. 76, item 818.

⁷ *Kodeks zakonov o brake sem'e i opeke*, 19.11.1926, *SU RSFSR* 1926, No. 82, item 611.

⁸ D. Genkin e.a., *Istoria sovetskogo grazhdanskogo prava 1917-1947*, Moscow, 1949, p. 441.

⁹ *Ukas Prezidiuma Vephovnogo Soveta SSSR*, 08.07.1944, *Ved. SSSP*, 1944, No. 37.

¹⁰ P. Polianskii, 'The Current Marriage and Family Law form the Family Code of 1918 Until Nowadays', *Journal of Russian Law (Journal Rossiiskogo Prava)*, 10, 1997, p. 132.

The third Family Code of 1969¹¹ once again more made divorce readily available. The administrative procedure was restored alongside the judicial one. Although the irretrievable breakdown of a marriage remained the general ground for divorce, spouses were not obliged to present any proof of such a breakdown in the administrative procedure. Irretrievable breakdown was presupposed. In the court procedure, however, the irretrievable breakdown of a marriage still had to be proved. As was the case previously, the court could dismiss a divorce petition even against the wishes of both spouses if the judge considered the reasons for divorce to be insufficient.

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 irretrievable breakdown of marriage is still the only formal ground for a divorce. Mutual consent is not considered to be a separate ground for divorce. However, since in the Family Code of 1995 the power of the state authorities to investigate the reasons for divorce has been significantly limited in non-contested divorce proceedings, both administrative and judicial. The competent authority is effectively no longer entitled to make any inquiry as to the grounds for divorce. Therefore the marriage is presupposed to have irretrievably broken down if both spouses have agreed to a divorce. This allows for the conclusion that Russian divorce law has actually moved away from the concept of the irretrievable breakdown, and that divorce on the ground of mutual consent *de facto* exists under Russian law.¹²

¹¹ *Kodex Zakonov o Brake i Sem'ie RSFSR*, 30.07.1969, *Ved. RSFSR*, 1969, No. 32, item 1086.

¹² M. Antokolskaia, *Family Law (Semeinoe pravo)*, Moscow : Jurist, 1999, p. 137-138.

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

Since irretrievable breakdown of marriage has been formally considered to be the sole ground for divorce, no statistics on the numbers of divorces based upon different grounds have been available.

6. *How frequently are divorce applications refused?*

Under the 1995 Family Code never. Neither a judge in a judicial procedure, nor the public official at the Department for Registration of Civil Acts in an administrative procedure, has the discretionary power to refuse the dissolution of a marriage if at least one of the parties insists on a divorce.

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

The current Russian Family Code provides for two types of divorce proceedings:

- An administrative procedure before a public official of the Department for Registration of Civil Acts;
- A court procedure.
- The administrative procedure is normally applicable when two conditions are simultaneously met:
 - the spouses do not jointly have minor children;
 - both spouses have mutually agreed to a divorce (Article 19 § 1 Russian Family Code)
- and notwithstanding the above-mentioned circumstances in three exceptional cases listed in article 19 § 2 Russian Family Code:
 - a defendant spouse is declared by a court to have disappeared;
 - a defendant spouse is declared by a court to lack legal competence;
 - a defendant spouse has been sentenced to more than three years' imprisonment.

If one spouse has not consented to divorce or the parties jointly have minor children then they have to resort to court proceedings (Article 21). This can also be the case when the spouses do not have minor children and agree to a divorce, but one of them is unwilling or unable to attend the Department for Registration of Civil Acts in person in order to file the joint application which is necessary to initiate the administrative divorce procedure (Article 22 § 2 Russian Family Code, Directive of the Supreme Court of the Russian Federation 'On the Application of the Divorce Legislation the Courts When Deciding Divorce Cases', item 2). The last-mentioned rule is necessary in order to allow one of the spouses to commence a divorce procedure when the other spouse does not formally object to the divorce but nevertheless frustrates filing the joint application before the Department for Registration of Civil Acts.

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

The competent authority in an **administrative divorce procedure** is the Department for Registration of Civil Acts. The competent authority in a **judicial divorce** is normally a first instance court with general jurisdiction. If the spouses do not have a dispute with respect to their minor children they can bring their divorce case before the Justice of the Peace (Article 3 § 1 (3) Federal Act on Justices of the Peace of the Russian Federation¹³). Russia has neither specialist family courts or family judges nor a specialised registration authority.

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

The **administrative divorce** procedure available to spouses without minor children is initiated by a joint petition by the spouses (Articles 31 (2) and 33 § 2 Civil Acts Registration Act¹⁴). Normally the spouses have to appear before the Department for Registration of Civil Acts in

¹³ Adopted on 17.12.1998, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1998, No. 51, item 6270.

¹⁴ Adopted on 15.11.1997, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1997, No. 47, item 5340.

person. If one of the spouses is unable to attend the Department, he or she can present a separate application for divorce in writing, which requires authentication by a notary. The administrative divorce procedure in exceptional cases, listed in article 19 § 2 Russian Family Code, is initiated by a sole petition by the applicant, accompanied by an authorised copy of a court decision, under which the other spouse is declared to have disappeared, to lack legal competence or to have been sentenced to more than three years's imprisonment.

The **judicial procedure** is initiated by a joint or sole petition on the part the spouse(s) (Article 126 Civil Procedure Code¹⁵). The parties can represent themselves in both the administrative and judicial procedures. Legal representation is therefore not obligatory. One or both spouses may be represented in court by an attorney if she or he so wish(es). No legal aid is available for such representation.

10. When does the divorce finally dissolve the marriage?

In the case of administrative divorce the marriage is finally dissolved at the moment of the registration of the divorce in the Civil Acts Register (Article 25 § 1 Russian Family Code). In the case of judicial divorce, if the court decision has been delivered after 1 May 1996 (the date when Article 25 Russian Family Code entered into force¹⁶) the marriage is finally dissolved once the court decision has become final (Article 25 § 2 Russian Family Code). If the court decision has been delivered before 1 May 1996, the marriage is considered to be finally dissolved only after the court decision was registered in the Civil Acts Register (Directive of the Supreme Court of the Russian Federation 'On the Application of the Divorce Legislation the Courts When Deciding Divorce Cases', item 21). However, under the provisions of article 25 Russian Family Code, the registration of the divorce in the Civil Acts Register is still required (Article 25 § 2 Russian Family Code). This registration has no influence on finalising the divorce, but

¹⁵ Adopted on 11.06.1964, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1964, No. 24, item 407.

¹⁶ According to Article 168 Russian Family Code, Article 25 came into force not on 01.03.1996 which applied to the remainder of the Code, but subsequently: on 01.05.1996.

without such registration the spouses are unable to remarry (Article 25 § 2 (3) Russian Family Code).

If under your system the sole ground of divorce is 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?

In the **administrative divorce** procedure the Department for Registration of Civil Acts merely issues a divorce certificate after the expiry of a period of one month after the application for divorce (Article 20, 3 Russian Family Code). It has no discretion to investigate the grounds for divorce. The irretrievable breakdown of marriage is presupposed on the sole ground of the mutual application by the spouses.

The **court procedure** differs significantly regarding contested and non-contested divorce. In the case of a *non-contested divorce* a judge is obliged, according to Article 23 § 1 Russian Family Code, to 'dissolve the marriage without disclosing the reasons for divorce'. This makes the function of a judge in respect of the dissolution of a marriage merely the same as the function of a public official at the Department for Registration of Civil Acts in the administrative procedure: the judge in fact only has to register the divorce and has no power to dismiss a petition or even to suspend the decision. The irretrievable breakdown follows from the mutual intention of the spouses to dissolve their marriage.

In the case of a *contested divorce* a judge grants a divorce order if he or she is convinced that 'the future family life of the spouses and the preservation of their family are no longer possible' (Article 22 § 1 Russian Family Code). The interpretation of this provision of article 22 has led to disagreement among Russian scholars. Some of them presume that in order to establish an irretrievable breakdown of marriage a judge is entitled to ask the spouses to disclose the reasons

for divorce.¹⁷ The same position was taken by the Russian Supreme Court in its Directive of 1998 'On the Application of the Divorce Legislation the Courts When Deciding Divorce Cases'. Others advocate that the current law provides the judge with no authority to order the disclosure of the reasons for divorce.¹⁸ This is because substantive family law does not provide for any sanction against the spouses if they refuse a request for such disclosure. All the judge can do is to order reconciliation measures and/or to order a stay in the proceedings for up to 3 months (Article 22, § 2 (1) Russian Family Code). According to the law (Article 22, § 2 (2) Russian Family Code) a judge has to grant the divorce after a period of three months has elapsed and the reconciliation measures have failed, even if the spouses consistently refuse to divulge the reasons for their divorce. This allows the conclusion to be drawn that the intention of the legislature was to limit the discretion of the judge: if after the three-month stay one of the spouses still insists on a divorce, the judge is obliged to grant it, whether or not he/she is convinced that the marriage has irretrievably broken down. Therefore the persistent intention of one of the spouses to dissolve the marriage constitutes sufficient evidence of an irretrievable breakdown in such cases. However, the Supreme Court has opted for a contra-legal interpretation of Article 22 and has created a procedural sanction against any refusal to reveal the reasons for the divorce. In item 7 of its Directive of 1998 'On the Application of the Divorce Legislation the Courts When Deciding Divorce Cases' the Supreme Court lists the duty of the spouses to divulge the reasons for divorce in contested divorce cases among the formal requirements for the divorce petition. That means that if the reasons for divorce are not disclosed the court could order a stay in the divorce procedure based on the formal procedural ground under Article 26 of the Procedural Code: non-compliance with the requirements for the divorce petition. This stay is has no time-limit and only ends when the parties fulfil all the procedural requirements. Therefore the court will not hear the case before the plaintiff reveals the reasons why he or she wishes to dissolve the marriage. The opponents of this point of view maintain

¹⁷ A. Netchaeva, *Family Law (Semeinoe pravo)*, Moscow: Jurist, 1998, p. 107; L. Pchelintzeva, *Family Law (Semeinoe pravo)*, Moscow: Norma-Infra M, 1999, p. 154-156.

¹⁸ M. Antokolskaia, *Family Law (Semeinoe pravo)*, Moscow: Jurist, 1999, p. 132-133.

that this interpretation is not only contrary to the initial objective of Article 22, but is also pointless. Whatever the reasons disclosed by the plaintiff, the judge has no authority to evaluate them, because after the period of three months has elapsed the court must grant the divorce order if the plaintiff still insists on a divorce.¹⁹

One may notice that under Russian Law the differentiation in the complexity of the procedure and the amount of discretion which a judge has is merely dependent on whether or not the divorce is contested. That was a deliberate choice on the part of the legislator²⁰ who wanted to give the judge the power to control the arrangements concerning children but not the power to interfere in the decision of the spouses concerning the dissolution of their marriage. Although statistical data demonstrate the persistent tendency for an increasing number of divorces during the last two decades,²¹ the drafters of the 1995 Family Code generally did not believe in the possibility of influencing the stability of marriage by making divorce more difficult to attain.²² The choice was also influenced by the rather negative experience concerning the application of the previous Family Code of 1969, which did not differentiate between the court procedure for contested and non-contested divorces involving spouses with minor

¹⁹ M. Antokolskaia, *Family Law (Semeinoe pravo)*, Moscow: Jurist, 1999, p. 132-133.

²⁰ The author of this report was one of the six members of the Commission that had drafted the Russian Family Code of 1995 and which was commissioned by the State Duma of the Russian Federation (The Lower Chamber of the Russian Parliament).

²¹ The number of divorces per thousand of the population increased by 11% during the period 1985-95. See *Living Standards of the Population. A Collection of Statistical Reports, (Uroven' zhizni naselenia. Statisticheskii sbornik)*, Moscow, 1996, p. 11.

²² The history of Russian divorce legislation provides a good illustration of this belief. Civil divorce was introduced in Russia in 1917. The irrevocable breakdown of marriage was the ground therefore. When both spouses mutually agreed to divorce, they could register it in the Department of Registration of Civil Acts. Otherwise they had to go to court. In 1926 the divorce procedure was simplified even further. In 1944, however, Stalin made divorce very complicated. Only a court of second instance could, after a waiting period, grant a divorce if a judge was convinced that the marriage had irrevocably broken down. It is notable that in spite of all the dramatic changes which took place in Russian divorce legislation, the available data on the number of divorces shows almost no fluctuations. The divorce rate in 1938-39 was 4.8 per thousand. Not only did this rate not decrease while the Ukase of 1944 was in force, but it actually increased to 5.3 per thousand in 1958-59. F. Willekens, S. Scherbov, 'Demographic Trends in Russia in Population and Family', in: H. Van Den Brekel, F. Deven, (eds.) *The Low Countries 1994. Selected Current Issues, European Studies of Population*, Vol. 2, The Hague: NIDI, 1995, p. 199.

children. The 1969 Code (Article 33) entitled a judge not only to investigate the reasons for divorce, to order reconciliation measures or a stay in the divorce procedure, but even to dismiss the divorce petition. Spouses with minor children, who had agreed to divorce and either did not want their private lives to be discussed in court or feared that their actual reasons for divorce would not be considered by a judge as being sufficient, usually presented fictitious reasons in order to avoid problems and to speed up the process. The most popular reasons were 'the creation of a new family with another person' by one or both of the spouses or 'living apart for a significant period of time without the intention to continue cohabitation'. The change in legislation made such untruths unnecessary.

The new Family Code rejects the paternalistic view that a judge can decide better than the spouses themselves what reasons are sufficient for dissolving the marriage. Moreover, the new Code seeks to diminish State intervention in the private lives of spouses as far as possible.

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

Fault has no influence on divorce as such, but could be of some importance for ancillary matters, like maintenance claims. Matrimonial misconduct (but not adultery per se) could be therefore relevant.

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

No. The only limitation in time concerning the instigation of the divorce procedure is to be found in Article 17 Russian Family Code. According to this provision a husband is not allowed to apply for divorce without the consent of his wife during her pregnancy and within one year after she has given birth to a child. This rule has been persevered in the 1995 Family Code in order to give the wife additional protection during the most vulnerable period of her life, when the stress generated by divorce could harm to physical and psychological health of both the mother and the unborn/newborn child. This rule should be considered as a positive discrimination measure.

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/she does not? Are there other exceptions?

No.

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

No.

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

(a) Which circumstances suspend the term of separation?

None.

(b) Does the separation need to be intentional?

No.

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

No.

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

Only in the case of a contested divorce can the judge order reconciliation measures to be taken (Article 22, § 2 (1) Russian Family Code). As Russia does not have a mediation system, this mostly means a reconciliation period(s) of up to three months in total.

18. Is a period for reflection and consideration required?

An administrative divorce cannot not be granted before one month after filing the petition (Article 18 § 3 Russian Family Code).

A judicial non-contested divorce cannot be granted before one month after filing the petition (Article 23 § 2 Russian Family Code). No reconciliation period can be ordered in such a case.

Both the above-mentioned periods are considered to be a kind of ‘cool off’ period in order to prevent ‘knee-jerk’ divorces immediately following a quarrel.

In the case of a **contested divorce** a judge may order a reconciliation period of up to three months (Article 22 § 2). More than one reconciliation periods may be ordered, provided that the total duration of these periods does not exceed three months (Supreme Court Directive of 1998 ‘On the Application of the Divorce Legislation the Courts When Deciding Divorce Cases’ (item 10). A judge normally makes use of this possibility when her or she him/herself is not convinced that the marriage has irretrievably broken down, or when the contesting spouse so requires.²³

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?

The spouses do not need to reach any agreement in order to obtain a divorce. The spouses may reach certain agreements concerning child residence; child visitation rights; child maintenance; the division of the matrimonial property and maintenance for one of the spouses. The consequences of not reaching such agreements may differ significantly.

In a standard case of **administrative divorce** the spouses do not have any minor children. Therefore they can only reach an agreement concerning the division of the matrimonial property and spousal maintenance. These agreements are not subject to any administrative or judicial control. The Department for Registration of Civil Acts is not entitled to take any steps in order to control the arrangements entered into by the spouses. If the spouses cannot reach an agreement on these

²³ U. Koroliov, Commentary to Article 22 Russian Family Code in: *Commentary on the Family Code of Russian Federation*, M. Antokolskaia, I. Kuznetzova, (eds.), Moscow: BEK, 1996, p. 199-201.

matters, they can bring their disputes before the court after the marriage has been dissolved at the Department for Registration of Civil Acts. This will then be dealt with in the similar way as disputes concerning child residence, visitation rights and maintenance when they are brought before the court in the case of an administrative divorce in two of the three exceptional cases listed in Article 19 § 2 Russian Family Code²⁴. The underlying notion behind these exceptions is that in the above-mentioned cases no disputes concerning children normally arise because one of the spouses cannot exercise his or her parental rights, as he or she is unable to raise a child due to a mental disorder or imprisonment. If disputes do occur, they mostly only appear after the spouse in question has recovered from a mental illness or has been released from prison.

The court will hear all the disputes mentioned in the previous paragraph, independently of the dissolution of the marriage at the Department for Registration of Civil Acts (Article 20 Russian Family Code). This provision is a novelty of the Family Code of 1995. Its objective is to separate property and maintenance settlements upon divorce from the divorce itself. Before 1995, if spouses had any property or maintenance disputes they had to bring the whole divorce issue before the court. That meant that they were not able to obtain a final divorce and remarry before the court could settle all the ancillary matters. The proceedings in respect of ancillary matters could remain on the cause list for a number of years in complicated cases. The impossibility of obtaining a final divorce and remarrying during this period led to the appearance of new de facto marriages which could not be legalised, problems with establishing paternity, problems in determining matrimonial property and other unnecessary complications. Therefore a non-contested divorce between a couple without minor children was distinguished from ancillary matters. Under the new law the spouses can obtain a divorce within one month at the Department for Registration of Civil Acts and thereafter can immediately remarry, subsequently leaving them free to litigate (for years if necessary) concerning maintenance and the division of property.

²⁴ If a defendant spouse is declared by court to lack legal competence or has been sentenced to more than three years' imprisonment.

In the case of a **judicial divorce** the spouses may request the court to approve their agreements in respect of child residence, child visitation rights; child maintenance, maintenance on behalf of a needy spouse, who is lacking labour capacity, and an agreement with respect to the division of matrimonial property (Article 23 § 1 and 24 Russian Family Code).

If no agreement in respect of spousal maintenance or the division of property has been reached, and none of the spouses raises the issue before the court, the court is not entitled to deal with these matters of its own volition. If the spouses have minor children and they have failed to reach an agreement with respect to such a child or children, or if such an agreement is not approved by the court, the court should then decide of its own volition on the child's residence, visitation rights and maintenance (Supreme Court Directive of 1998 'On the Application of the Legislation by Dissolving Cases Relating to the Education and Care of Children' (item 4)²⁵).

The sole reason why the Russian legislature chose court proceedings for non-contested divorces was the concern for the protection of children. The Department for Registration of Civil Acts is not entitled to take any steps (and has no means and staff to do so) in order to oversee the arrangements which the spouses have made in respect of their children. A judge, on the contrary, possesses a whole range of possibilities for ensuring the protection of children. The spouses are strongly encouraged to enter into an agreement, which will be accepted by a judge without alteration, because in this case they can be certain that a divorce order will be granted after one month (Article 23 (2)) without any further problems and costs. If no agreement has been reached or a judge is not satisfied with an agreement, then a rather complicated procedure, with the participation of a special child-protection body: the Guardianship and Curatorship Department, will be commenced.

There are no special requirements in respect of the time when such agreements could be presented to the court. Therefore such

²⁵ Directive No. 10 of 27.05.1998, *Bulleten' verhovnogo suda RF*, 1998, No. 7.

agreements could be presented at any time before the court has reached its final deliberation stage.

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

The judicial discretion to scrutinize the agreement varies significantly depending on the nature of the agreement reached by the spouses. In this respect the extent of the judicial discretion relating to each agreement will be looked at below.

(a) As to child residence and visitation agreements

The 1995 Code follows the Soviet tradition by granting both parents joint custody, whether or not they are divorced. Neither the parents nor the judge can alter or dispense with joint custody, unless a separate procedure relating to the deprivation or restriction of parental rights is instigated against one or both the parents (Article 69, 73 Russian Family Code). The parental responsibility of divorced spouses, at least on paper, remains equal, whether or not a parent resides with the child. Therefore the parents can only determine with whom the child will have to be residing, and then agree on the visitation rights of the other parent.

Article 65(2) provides that the parents should decide where a child will reside 'according to its best interests and taking into consideration the wishes of the child'. The judge is also guided when scrutinizing the agreement of the parents by the provisions of article 65(3). The starting point for a judge is also the best interests of the child and the child's wishes. Russian law prescribes that the judge must treat both parents equally in respect of the options for the child's residence after divorce. In reality, however, in more than 90% of all cases a child is placed with its mother after divorce.²⁶ When examining the agreement the judge has to 'take into account the attachment of the child to each of the parents, brothers and sisters, the age of the child, the moral and other personal qualities of the parents, the relations existing between each of the parents and the child, and the possibility of creating the best

²⁶ A. Panasiuk, 'Komu peredat' na vospitanie rebenka?', *Rossiyskaia Justitziia*, (1996), No. 9, p. 53-54.

conditions for nurturing the child and for its development (the nature of the activity of the parents, the parent's working regime, material and family status of the parents and other factors)'(Article 65 § 3 Russian Family Code). The judge's most important source of information concerning such matters is the report by the Department of Guardianship and Curatorship (Article 78 Russian Family Code). An inspector from the Department of Guardianship and Curatorship makes inquiries concerning the above criteria, questioning and conversing with the child and, if necessary, also with the child's relatives and teachers. In difficult cases an expert psychologist may be involved. On the basis of this information the Department of Guardianship and Curatorship draws up an advisory report for the judge. The judge, of course, is not bound by this advisory report, but he or she has to provide the pertinent grounds if he/she comes to a different decision.

The judge is also formally obliged to examine whether or not the child's right to be heard has not been violated by the parents while reaching the agreement. The Russian legislation follows the UN Convention by granting the child the right to express its opinion, irrespective of its age. Therefore, a Russian child has the right to express its opinion with regard to any decision made by its parents which affects that child's interests as soon as it is able to formulate such an opinion. The child has the same right in any administrative or judicial procedure. The age of the child is only relevant when it comes to the evaluation of its opinion. The Convention (Article 12) states that child's opinion should be considered in the light of that child's ability to formulate such an opinion. The Russian Supreme Court in its Directive No. 10 of 27 May 1998 obliged judges to investigate whether a child has not been unduly influenced by the litigating parties, whether it is aware of its interests and on what grounds it has reached its opinion.²⁷ A child that has not reached the age of ten must also generally be given the opportunity to be heard; however, neither the parents nor the judge are obliged to accept the child's opinion. The

²⁷ Item 20 of the Directive of the Supreme Court of the Russian Federation of 27.05.1998 No. 10 'On the Application of the Legislation When Resolving Cases Relating to the Education and Care of Children', *Bulleten' verhovnogo suda RF*, 1998, No. 7.

wishes of a child under ten years of age are in practice not really taken very seriously.

Article 57 of the Family Code provides that if a child is 10 years old or older, its opinion must be 'considered'.²⁸ If the child's opinion is not followed, those who disregard its opinion must sufficiently explain the grounds therefor. The wishes of a child of 10 years old or older can only be disregarded in special circumstances. According to Article 57, the parents and the judge are obliged to hear such a child and, if they do not agree with its view, they have to provide the grounds for their disagreement.

In spite of the far-reaching discretion granted to a judge while scrutinizing the agreements of the parents in respect of a child's residence, in practice the judges often subject parental agreements to rather marginal examination or accept them without any examination at all.

(b) As to child maintenance agreements

The Family Code of 1995 provides the possibility, and this is new under Russian family law, to conclude an enforceable maintenance agreement in respect of minor children. This agreement may also be entered into at the time of divorce.

The discretion of the parties to enter into a child maintenance agreement is restricted by law. Article 103 states that the amount of maintenance agreed upon cannot be any lower than the amount which a child would have received if the maintenance would have been determined by a court according to Article 81. Article 81 provides for the following levels of maintenance: one quarter of all the parental income for one child; one third of all the parental income for two children; one half of all the parental income for three and more children.

²⁸ Family Code 1995, Article 57. See also: A. Netchaeva, *Commentary to Article 57 Russian Family Code* in: *Commentary on the Family Code of Russian Federation*, I. Kuznetzova, (ed.), Moscow: Jurist, 2000, p. 199-201.

This means that the parties cannot enter into an agreement, which determines lower amounts of maintenance compared to the amount provided under Article 81,²⁹ but they are free to increase such an amount if they so wish. Other particulars relating to the agreements, such as the methods of payment, its frequency, the currency etc., are left to the parents. The above-mentioned restriction has been introduced because of the fear that parents would abuse their rights by placing the child maintenance agreement in one package together with their property claims against each other and that a parent with whom the child resides would more readily agree to a lower amount of child maintenance in return for concessions in the division of matrimonial property. This restriction, together with the prescribed notary authentication, means that judicial control over maintenance agreements is generally unnecessary. The notary public is obliged to check that an agreement has been concluded in conformity with the law. Therefore the role of the judge in divorce proceedings is largely reduced to controlling whether or not a maintenance agreement has been entered into, or, when this is not the case, he has to decide the issue himself.

The position of the child is strongly influenced by an important aspect of the maintenance agreement under Russian law. It is not the child's parents who are perceived in the doctrine as the parties to such an agreement, but rather the child itself, on the one side, and the maintenance-paying parent, on the other.

The practical participation of a child in the conclusion of a maintenance agreement is governed by the provisions of the Civil Code concerning dispositive civil legal capacity.³⁰ If a child is younger than 14 years of age it lacks contractual capacity³¹ and a maintenance agreement must be concluded on its behalf by the divorcing parents: the parent with whom the child resides as the legal representative of that child, on the one side, with the maintenance-paying parent, on the other.

²⁹ Such an agreement is voidable according to Article 102 of the Family Code 1995.

³⁰ Russian Civil Code Articles 26-28. *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1994, No. 32, item 3301. For an English translation see: *21 Review of Central and Eastern European Law*, 1995, No. 3/4, p. 245-430.

³¹ Russian Civil Code Article 28.

A child above the age of 14 enjoys partial dispositive civil legal capacity under Russian Civil law³² and, according to Article 99 of the Family Code 1995 and Article 26 of the Civil Code, it is personally entitled to conclude a maintenance agreement with its maintenance-paying parent. However, the consent of the parent, with whom the child resides, is also required. That means that the divorcing parents cannot simply agree on child maintenance without the active participation of the child itself. Both the child and the parent with whom it is living need each other's co-operation in order to enter into an agreement with the other parent.

(c) As to the maintenance agreement on behalf of a needy spouse, lacking labour capacity

According to the 1995 Family Code the divorcing spouses could reach an agreement on behalf of a spouse who is not lacking labour capacity and needy and therefore is not entitled to any maintenance according to the law.³³ Such agreements are of no concern to the judge and he or she has no discretion to scrutinize it. While examining the maintenance agreement on behalf of a needy spouse, lacking labour capacity, the judge should investigate whether or not the agreement worsens the position of the recipient compared to that granted to him or her by the law (Article 102 Russian Family Code). This means that the judge has to compare the amount of maintenance agreed upon by the spouses with the amount that the needy spouse would have received if the maintenance would be claimed before the court. In the latter case the judge will calculate the amount of maintenance according to the rules of Article 91 Russian Family Code. If the amount agreed upon by the spouses is lower than the amount which the recipient would receive under a court order, the judge will reject the agreement, unless special circumstances exist which would make it just to decrease the amount of the maintenance payment, as provided by Article 92 Russian Family Code. The spouses have to prove that such special circumstances exist.

³² Russian Civil Code Article 26.

³³ M. Antokolskaia, *Family Law (Semeinoe pravo)*, Moscow: Jurist, 1999, p. 235-236.

Russia

(d) As to the division of matrimonial property

The legal regime of matrimonial property in Russia is one of limited community of property.

According to Article 256 (2) of the Civil Code and Articles 33 -34 of the Family Code, property acquired by the spouses during marriage is considered to be a common asset. Property that does not fall within community property consists of pre-marital property, property acquired during marriage by donation, inheritance, or other cost-free transactions, and items of individual use (except jewellery and other luxuries).

The Family Code allows spouses to create a contractual regime of marital property by concluding a pre-nuptial or ante-nuptial contract. In this way the spouses can create, with a few limitations, any matrimonial property regime they so wish.

The assets constituting community property according to the law which regulates matrimonial property, or according to the pre- or ante-nuptial contract, in the case of the contractual regime thereof, can be divided by agreement upon divorce (Article 38 § 2 Russian Family Code). In the case of division by agreement, the spouses can divide the property as they have agreed upon. The judge has no discretion to reject such an agreement, even if he or she considers it to be unfair. If the division of property upon agreement is not equal, the interests of creditors could be violated. Although the law is not explicit on this matter, one may assume that the creditors could contest such an agreement if it was subjected to judicial approval during the divorce procedure. In this case the judge has discretion to examine whether the agreement infringes the interests of creditors and, if so, he/she may reject such an agreement.

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

No. Russian family law contains no 'hardship clause'.

C. SPOUSAL MAINTENANCE AFTER DIVORCE

I. General

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

The current sources of maintenance law regarding former spouses in the Russian Federation are the Family Code's Chapter 14 on 'Maintenance obligations of spouses and former spouses', Chapter 16 on 'Maintenance contracts' and Chapter 17 on 'Procedure for Payment and Recovery of Maintenance'.

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

After the introduction of civil divorce in 1917 the maintenance arrangements were supposed to be made by the former spouses themselves. If no agreement could be reached only a wife and not a husband could seek a court maintenance order. Under the Code of 1918 both ex-spouses acquired the right to claim maintenance in the case of disability and need. If they could not reach an agreement the Social Department was responsible for dealing with the maintenance claim. The amount of maintenance depended on the person in question's ability to pay and the needs of the recipient, but could not exceed the minimum living standard. There was no time-limit for the payment.

In 1926 another Family Code restricted the period of payment to one year after divorce in order 'to make parasitisme impossible'.³⁴ The Code of 1969 provided for the possibility to claim maintenance before the court under the following circumstances:

- The persons were parties to a valid marriage;
- The recipient has become unable to work either during the marriage or within one year after divorce. The inability to work could occur because she or he has reached the age of

³⁴ Instruction of the Civil Chamber of the Supreme Court of the Russian Federation 11.06.1929, *Judicial Practice (Sudebnaia praktika)*, 1929, No 14.

retirement or because of a disability caused by an illness or a handicap. In the case of a long-lasting marriage a former spouse, who is to reach the age of retirement within five years after divorce, is entitled to maintenance thereafter;

- A wife may claim during the pregnancy and before her child has reached the age of one and a half, if the pregnancy started before the dissolution of marriage;
- The recipient cannot him/herself provide for the essentials of life.

The amount of maintenance was established by court order, consideration being given to the financial situation of the payer and the needs of the recipient. The maintenance was paid in fixed amounts, to be paid monthly. The amount of maintenance rarely exceeded the minimum living standards and was never intended to extend the lifestyle which the recipient had enjoyed before the divorce. The period of payment was not limited in time. The coming to an end of any of the above-mentioned conditions led to the termination of maintenance. The court could refuse maintenance or limit it in time in the case of a short-term marriage or unworthy behaviour on the part of the recipient.

Maintenance contracts were valid, but not legally enforceable and could be set aside by the court without having to justify such a decision.

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

No.

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

Yes. According to the law (Article 90 Russian Family Code) three categories of former spouses have a right to claim maintenance from their ex-spouse, provided that the latter has sufficient means to pay the maintenance:

- A former spouse who lacks essential means and the capability to work because of a disability which has occurred before or

within one year after the dissolution of the marriage (or, in the case of a long-term marriage, if he or she has reached the age of retirement within five years after the divorce);

- A former wife during pregnancy, if the pregnancy has commenced before the dissolution of the marriage, and thereafter until the common child has reached the age of 3 years;
- A needy former spouse, effectuating care for a disabled common child of the ex-spouses before it reaches the age of 18 years; or an adult common child of the ex-spouses with a disability of the first degree irrespective of its age.³⁵

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?

No. There is no connection between the division of property upon divorce and the right to claim maintenance. The rules on division of matrimonial property upon divorce do not fulfil any supporting functions. The legal regime of matrimonial property in Russia is one of a limited community of property. According to Article 256 (2) of the Civil Code and Articles 33 -34 of the Family Code, property acquired by the spouses during their marriage is considered to be a common asset. Property that does not fall into their community consists of pre-marital property, property acquired during marriage by donation, inheritance, or other cost-free transactions, and items of individual use (except for jewellery and other luxuries). In the division of matrimonial property upon divorce each spouse is entitled to half of the total assets (Article 39 Russian Family Code), irrespective of their contributions to increasing the property and the spousal needs of support.

³⁵ Russian social security law applies three degrees of the disability. Disability of the first degree is granted to seriously handicapped persons who are permanently in need of external care. Regulation on Establishment of Disability. Approved by the Government of the Russian Federation on 13.08.1996, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1996, No. 34, item 4127, Article 2, 3, 20.

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

The debtor is only liable for paying maintenance if he or she has sufficient means therefor (Article 91 § 1, (1)). The former spouses, with the exception of the ex-wife during her pregnancy and before the common child has reached the age of 3 years, have a right to claim maintenance only if they can be qualified as lacking essential means. Therefore the distribution of property can influence the financial conditions of both former spouses. In this way receiving or not receiving an income bringing about assets could make one of the former spouses obliged to pay, or, alternatively, eligible to claim maintenance. Article 116 § 1 Russian Family Code forbids setting off the maintenance payments against any other claims. Therefore no extra benefits by distribution of property could be set off against the maintenance payments. As to pension rights: in Russia the state pensions and the majority of the private pension schemes are strictly personal and non-transferable and are not subjected to distribution upon 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?*

Russian law has always drawn and still draws a strict distinction between maintenance payments and damages.³⁶ If one of the spouses has committed a tort against the other, the latter can claim damages in a tort action. This claim has no connection with the maintenance claims, and could be filed in addition. The only correlation between those claims is that if the debtor is liable to pay damages which reduces his financial capacity, this can render her or him financially unable to provide maintenance to the former spouse.

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*

³⁶ A. Pergament, *Maintenance obligations* (Alimentnie obiazatel'stva), Moscow: Gosjurisdat, 1952.

different nature? If there are different claims explain their bases and extent.

Russian law only provides for one type of divorce: that on the ground of the irretrievable breakdown of the marriage, and only one type of maintenance claim is possible.

63. Are the divorced spouses obliged to provide information to each other 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?

The debtor is obliged to provide information concerning his or her income or assets and concerning any changes thereto. Both obligations are enforceable by a court bailiff's order. The obligation to provide information about income is reinforced by the obligation of the debtor and the administration of all the relevant legal entities where he or she receives a salary or other income, to inform the recipient and the bailiff about any change in his or her employment (Article 109 Russian Family Code). Besides, the bailiff, on his own initiative or upon a petition by the recipient, can instigate a search for the property of the debtor and for the debtor him or herself (Article 28 Law on Executive Proceedings³⁷). The costs of such a search have to be repaid by the debtor, and the recipient does not need to make any advance payments.

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 raising of children? Please explain.

General conditions such as a lack of means on the part of the recipient and the ability to pay on the part of the debtor are, on their own, not sufficient for a general maintenance grant. As a rule only an ex-spouse who lacks the capacity to work or an ex-spouse whose earning

³⁷ Adopted on 21.07.1997, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1997, No. 30, item 3591.

capacity is reduced due to special circumstances relating to the marriage (e.g. pregnancy) is entitled to maintenance. This restriction still reflects the adage inherited from Soviet times: 'he who does not work, shall not eat'. MPs' adherence to this principle remained so strong that even the provision for maintenance for an able-to-work unemployed ex-spouse during a brief period of retraining, proposed in the Draft of the 1995 Family Code, was rejected. Also, because the great majority of Russian women have already been in full-time employment for three generations, the problem of maintaining a non-working housewife after divorce is no longer seen as pressing in Russian society.

- A former spouse, who lacks essential means, has a right to claim only if he or she also lacks the capacity to work. Such a disability could arise from reaching the age of retirement (55 for women and 60 for men) or from an illness or handicap. In the latter case the disability has to be established by a special entity charged with this purpose: the Socio-Medical Expert Commission.³⁸ The person in question will be graded by this entity in one of the three degrees of disability.³⁹ According to the degree of disability he or she will be awarded a different level of state pension for persons lacking the capacity to work. Invalids of the first and second degree are always eligible for maintenance, as they cannot work and are not allowed to work. Invalids of the third degree can work but only under special working conditions, defined by the Socio-Medical Expert Commission in each particular case. They are eligible to maintenance only if they can prove that they are unable to find work according to these conditions.⁴⁰

³⁸ Regulation on the Establishment of Disability. Approved by the Government of the Russian Federation on 13.08.1996, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1996, No. 34, item 4127.

³⁹ Regulation on the Establishment of Disability. Approved by the Government of the Russian Federation on 13.08.1996, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1996, No. 34, item 4127, p. 3, 14, 20.

⁴⁰ E. Getman, Commentary to Article 89 Russian Family Code in: *Commentary on the Family Code of the Russian Federation*, P. Krashennnikove, P. Sedugina (eds.), Moscow: Norma, 1997, p. 187.

The disability of the claimant has to occur before or within one year after the dissolution of the marriage. In the case of a long-term marriage⁴¹ the claimant is also eligible for maintenance if he or she reaches the age of retirement within five years after the divorce. This rule does not presuppose that the disability has any relationship with the marriage in the sense of being caused by pregnancy, childbirth, or the behaviour of the other spouse. It only has to be connected with the former marriage in the sense of proximity in time. The underlying reasoning is that the spouses are under a moral and legal duty to take care of each other during the marriage. After divorce they, as a rule, become alien to each other, and it is desirable that any legal obligations among them would cease to exist as soon as this is possible. At the same time the existence of a previous marriage, especially a long-lasting one, justifies retaining the duty to provide financial care if disability is closely related in time to that former marriage.⁴²

- A former wife during pregnancy, if the pregnancy has started before the dissolution of the marriage, and thereafter before the common child has reached the age of 3 years, has a right to maintenance irrespective of her disability and lack of means. The background to this provision is that a woman has extra expenses during the period of pregnancy and breast-feeding (special clothes, food, medical care). Only women can benefit from this provision, because only a woman can carry the child, and breast-feed it, but also because in more than 90% of all cases a child is placed with its mother after divorce and

⁴¹ The law contains no definition of a long-term marriage. This has to be defined by the judge considering all the particularities of the case: such as the ages of the spouses or cohabitation before marriage. As a rule a long-term marriage is one which has lasted no less than 10 years. M. Antokolskaia, Commentary to Article 90 Russian Family Code in: *Commentary on the Family Code of the Russian Federation*, I. Kuznetzova, (ed.), Moscow: Jurist, 2000, p. 199-201.

⁴² For more on this matter see: M. Antokolskaia, *Family Law* ('Semeinoe pravo'), Moscow: Jurist, 1999, p. 268-269.

not with its father.⁴³ Therefore, an ex-wife has to invest more time in caring for a baby and these investments have to be compensated by her former husband by paying her a special 'mother's' maintenance in addition to the child maintenance that he has to pay for a child. The rationale of this provision brings about that this special kind of maintenance is paid to the ex-wife, notwithstanding her ability to work and financial needs. She is entitled to this maintenance, even if she does not make use of parental leave and does not suffer any loss of income. However, the needs of the ex-wife are relevant for the calculation of the amount of maintenance. If she also lacks essential means, she has to be granted sufficient maintenance to provide her with the means equivalent to the minimum living standard,⁴⁴ and on top of that, with additional means for the extra costs relating to pregnancy and child care. If she has a personal income which exceeds the minimum living standard, she is only entitled to an amount which compensates these extra costs.⁴⁵

- A former spouses, effectuating care for a disabled common child of the ex-spouses before it reaches the age of 18 years, or a common adult child with a disability of the first degree. This provision is a novelty of the Family Code of 1995. The rationale thereof is that both ex-spouses have to bear the negative consequences of having a handicapped child either in terms of time or in terms of money. The spouse who cares for a handicapped child on a daily basis often has to work part time, sacrifice his or her career, or to employ paid help, and these losses and expenses have to be compensated by the other ex-spouse. The right to maintenance exists notwithstanding the

⁴³ A. Panasiuk, 'Komu peredat'na vospitanie rebenka?', *Rossiyskaia Justitziia*, 1996, No. 9, p. 53-54.

⁴⁴ The minimum living standard is defined in the Law on Minimum Living Standards. Adopted on 24.10.1997, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1997, No. 43, item 4904.

⁴⁵ M. Antokolskaia, Commentary to Article 89 Russian Family Code in: *Commentary on the Family Code of the Russian Federation*, I. Kuznetzova, (ed.), Moscow: Jurist, 2000, p. 304.

ability to work of the ex-spouse who cares for the disabled child.

The handicapped child has to be the child of both spouses. The adult child has to have a first-degree disability. As degrees of disability are only applicable to adults, for the minor child it is sufficient if the Socio-Medical Expert Commission has identified it as a 'handicapped child'.⁴⁶

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

This has no influence.

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)?*

No.

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

The claimant's lack of means has to exist at the moment when maintenance is claimed and during the whole maintenance period. A former spouse could claim maintenance notwithstanding the time that has elapsed after the dissolution of the marriage, as no time-limit is applicable to maintenance claims (Article 107 § 1 Russian Family Code).

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?*

⁴⁶ Regulation on the Establishment of Disability. Approved by the Government of the Russian Federation on 13.08.1996, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1996, No. 34, item 4127, Articles 2, 3, 20.

The maintenance obligation continues, as a rule, as long as the conditions therefore continue to exist: lack of sufficient means and lacking the capacity to work on the part of the claimant and financial ability to pay maintenance on the part of the payer (see Question 64). The maintenance for a former wife during pregnancy, and thereafter until the child of the ex-spouses has reached the age of 3 years, can by definition only be claimed for the duration of the pregnancy and until the child reaches 3 years of age. The maintenance obligation in respect of a former spouse, effectuating care for a disabled common child of the ex-spouses before it reaches the age of 18 years, or a common adult child with a disability of the first degree, exists as long as the child's disability continues and the child remains in the daily care of the claimant.

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 law does not provide a clear answer to this question. The starting point in the legal literature is that the amount of maintenance for a former spouse should be granted according to essential needs, and that the living standard enjoyed before divorce should not be taken into consideration.⁴⁷ The underlying reasoning is that spouses have a right to share each other's wealth during the marriage, but not after divorce. This vision is connected to the fact that maintenance is generally seen in Russian doctrine not as compensation for the marriage-related income losses, but merely as the survival, after divorce, of a duty of the spouses to support each other in times of need. There are, however, some differences in approach as regards the various maintenance obligations of the former spouses:

- The amount of maintenance for a former spouse who lacks essential means and labor capacity, is normally granted according to essential needs.
- No exception is formally made for a former wife during the pregnancy, and thereafter before the common child has

⁴⁷ M. Antokolskaia, *Maintenance Obligations* (dissertation) (*Alimentnie obiazatel'stva*), Moscow: VUZI, 1988, p. 100-102. For the opposite view see: B. Maslov, *Patrimonial Relations in the Family* (*Imyschstvennii otnishenia v sem'e*), Kharhov: University Press, 1974, p. 115.

reached the age of 3 years. If she also lacks essential means and labor capacity, the amount of maintenance is granted according to essential needs (see Question 64). However, there are no rules for calculating the additional costs related to pregnancy and caring for a baby. By mean of granting additional costs the judge could, when reasonable, partly retain the same living standards that the ex-wife has enjoyed before the divorce.

- There are no special rules concerning the calculation of the amount of maintenance for a former spouse, effectuating care for a common disabled child before it reaches the age of 18 years, or a common adult child with a disability of the first degree. However, it is reasonable to suggest that the rationale of this new rule, namely that the payer has to compensate the claimant for the losses resulting from caring for a common handicapped child, calls for different criteria. As in this case the financial disadvantages are clearly related to the former marriage, the judge could grant the claimant an amount of maintenance which partly or fully compensates him/her according to the living standards enjoyed before the divorce.

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 are no set standards for calculating maintenance for an ex-spouse. The amount of maintenance is to be calculated by a judge considering the financial and family status of the plaintiff and the defendant and taking into consideration the other pertinent interests of the parties (Article 91 Russian Family Code).

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?)

- A former spouse who lacks essential means and the capacity to work, has the right to claim the normal costs of life within the margin of the minimum living standards as established by the Law on Minimum Living Standards In The Russian

Federation.⁴⁸ In addition, she or he has a right to claim maintenance in order to compensate the extra medical costs and, in the case of a first-degree disability,⁴⁹ the costs of external care. Medical insurance costs are not specified. All Russian citizens are entitled to free state medical insurance, which provides the basic level of medical care. Therefore the costs of private medical insurance, which provides for more luxurious and speedy care, might only be taken into consideration in very exceptional cases (for instance, when the duration of the marriage and the financial position of the payer justify such payments). Investments for private pension schemes are not taken in consideration when calculating maintenance.

- A former wife during her pregnancy, and thereafter before the child of the ex-spouses has reached the age of 3 years, also has a right to claim the normal costs of life (see Question 64) if she lacks essential means. In addition, she is entitled to additional means to compensate for the extra costs relating to the pregnancy and caring for the baby. If she has personal means which exceed the minimum living standard, she is only entitled to an amount compensating the additional costs. These extra costs could include: the costs of special feeding, clothing, medical care and insurance (also private ones, when the income of the payer is sufficient).
- A former spouse, effectuating care for a disabled common child of the ex-spouses before it reaches the age of 18 years, or a common adult child, with a disability of the first degree, has a right to claim normal living costs. Neither statutory law nor case law provide a guideline concerning the possibility to claim private medical or pension insurances. However, the answer could be derived from the rationale of the rule just discussed: the payer has to compensate the claimant for the losses resulting from caring for a common handicapped child. Therefore, it would be reasonable that

⁴⁸ Adopted on 24.10.1997, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1997, No. 43, item 4904.

⁴⁹ See: note 35.

the payer would fully or partly compensate the above-mentioned costs if his or her financial position allows this.

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

No.

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

There is no automatic reduction of maintenance after a certain time.

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

The standard means of payment is by way of a fixed monetary amount subject to monthly payments (Article 91 Russian Family Code).

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?*

The fixed monetary amount subject to monthly payments is prescribed by law (Article 91). If the maintenance is claimed in court the claimant cannot avoid it. If maintenance is paid on the ground of a maintenance agreement other ways of payment could be negotiated. If the maintenance is claimed in court, a lump sum can only be granted when the payer is going to take up residence in a foreign state (Article 118 Russian Family Code).

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

Article 117 Russian Family Code provides for an automatic indexation of maintenance payments. The indexation is made by the administration of the organisation at the place where the maintenance is withheld. In order to simplify the indexation in the context of high inflation, the amount of maintenance is determined by a judge not in a certain amount of money (for instance: 1000 roubles), but in an amount corresponding to the minimum wage (for instance 1/3 of the minimum wage). The minimum wage is subject to periodical indexation according to the Law on the Indexation of the Income and

Savings of the Citizens of the Russian Federation.⁵⁰ If the minimum wage increases, the amount of maintenance will also automatically increase.

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

If the financial or family status of any of the ex-spouses has changed, either of them is entitled to apply to the court for the amount of the maintenance to be adjusted according to the new situation (Article 119 Russian Family Code).

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?*

Article 90 § 1 Russian Family Code provides that an ex-spouse is obliged to pay maintenance to his or her former spouse, only if the payer possesses the necessary financial means for this purpose. The notion of necessary means is not determined by law. Basically, a former spouse is considered to possess the necessary means if, after the maintenance to his former spouse has been paid, he is left with an income that is not less than the minimum living standard.⁵¹ However, the judge has a discretion to determine that the payer does not possess the necessary means, even if the aforementioned condition has been met. That could be the case, for instance, if he or she, due to poor health, has to incur high cost for medical treatment or external care. When investigating whether or not the payer possesses the necessary means, the judge has to take the following into consideration:

- The income of the payer, including that from property which can bring an income;

⁵⁰ Adopted on 24.10.1991, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1991, No. 45, item 1448.

⁵¹ The minimum living standard is defined in the Law on Minimum Living Standards. Adopted on 24.10.1997, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1997, No. 43, item 4904.

- The existence of other enforceable maintenance obligations actually paid by the debtor;
- The other enforceable debts of the payer.

The payer should be able to pay of all his or her debts and maintenance for the former spouse from his or her own means and still remain with an income amounting to the minimum living standard. The fact that the payer in his or her turn could claim maintenance from his or her family members, if he or she would lack necessary means after paying maintenance to his or her former spouse, is not taken into consideration.

According to Article 138 of The Labour Code of the Russian Federation⁵² no more than 20% of a salary may be withheld. If there are more than one withholding arising from different claims, the total amount of the withholdings cannot exceed 50% of the salary. These limitations are only applicable to salaries and not to other incomes of the payer (rent, dividends, royalties etc). Therefore, they do not affect the calculation of the maintenance but only the execution of the maintenance order.

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?

If the debtor's income is increased the creditor can ask the judge to adjust the amount of maintenance in accordance with the debtor's new income (Article 119 Russian Family Code).

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

The enforceable debts of the debtor should be taken into consideration by calculating whether or not the debtor possesses the necessary means to pay maintenance to his former spouse.

⁵² Adopted on 30.12.2001, in force since 1.02.2002. *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 2002, No. 1, item 3.

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

Only enforceable (legal) obligations can be taken into consideration. Moral (natural) obligations are not taken into consideration by calculating whether or not the debtor possesses the necessary means for paying maintenance to his former spouse.

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

Capital assets as such are not taken into consideration in calculating whether or not the debtor possesses the necessary means to pay maintenance to his former spouse. If these assets can bring an income, then this income will be taken into consideration. This means that if a debtor has an apartment where he or she lives with the family, this asset will not be taken into consideration. If his or her apartment is rented out and brings an income, this income will be relevant for evaluating the debtor's financial status.

Once the amount of maintenance has been calculated, the capital assets can be used for paying maintenance (most often the overdue maintenance payments). Article 112 Russian Family Code provides that the maintenance claim can be levied against the debtor's property. In the first place, maintenance has to be recovered from the earnings and/or other revenues of debtor. If these means are insufficient, the maintenance has to be recovered from the monetary means situated in the bank accounts and transferred according to contract to commercial and non-commercial organisations, except for those contracts entailing the transfer of ownership. If those means are also insufficient to recover the maintenance, the execution can be levied against any property belonging to the debtor.

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?

No.

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

Social security benefits like pensions, unemployment benefits, compensation for leave and vacation, including paternity leave, and sickness benefits have to be used for the payment of the maintenance obligation.⁵³

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?*

These incomes are not relevant.

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 hand, from employment which goes beyond what is reasonably expected?*

Only a claimant who lacks labour capacity, is entitled under Russian law to claim maintenance from his or her former spouse. Therefore, the current question could only be relevant for those claimants with the third-degree disability, who can work when a job with special working conditions becomes available. The payer could theoretically free him or herself from the maintenance obligation if he or she manages to prove that the claimant has rejected employment that did meet the conditions defined by the Socio-Medical Expert Commission. This is no more than a theoretical possibility, as in practice such work is almost never available as employers are reluctant to employ

⁵³ These kinds of benefits are listed in 'The List of Payments and Incomes from which the Maintenance for Minor Children has to be withheld', which is applicable to the maintenance obligations of the former spouses by way of analogy. Adopted on 20.05.1998, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii*, 1998, No. 21, item 465.

disabled employees, and even if such work is available, it is almost impossible to prove this fact.

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

The claimants with a third-degree disability, who can work under special working conditions, as defined by the Socio-Medical Expert Commission, should first seek such employment and only then apply for maintenance. In reality a simple statement that such work is not available is sufficient.

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

Capital assets as such are not taken into consideration. If a claimant owns real property he or she is not supposed to sell it in order to maintain him or herself. If the assets could bring an income, such income will be taken into consideration in evaluating the needs of the claimant.

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?

The family status of the claimant is one of the relevant factors in calculating the amount of maintenance (Article 91 Russian Family Code). Parents are obliged to maintain their children irrespective of their own financial position. This means that even if a parent him/herself lacks essential means he or she still has to provide maintenance for his or her children. Therefore the judge in determining the amount of maintenance, has to take into consideration the fact that the claimant is obliged to pay maintenance to the minor children. The weight which the judge will attribute to this fact is left to his or her discretion.

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?

All the income that the claimant receives (including all kinds of social security benefits) are calculated in order to discover whether or not he or she lacks essential means and is therefore eligible for maintenance. An important peculiarity of the Russian system is that the claimant is primarily eligible for social security benefits and only secondarily eligible for maintenance from the ex-spouse and the family members. The claimant first has to claim all the social security benefits to which he/she is entitled (the possibility to claim maintenance is not taken into consideration in granting the benefits). After this has been done the claimant can then request maintenance.

VI. Questions of priority of maintenance claims

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

Russian law provides for two grades of maintenance claims: first grade and second grade. First-grade maintenance claims are claims by children (minor and adult who lack the capacity to work and essential means) against their parents; claims by parents who lack the capacity to work and essential means against their adult children, and claims by present and former spouses against each other. Second-grade claims are maintenance claims by grandchildren against grandparents and vice versa, brothers and sisters towards each other; foster parents against foster children, and step-parents against stepchildren.⁵⁴ Second-grade claims are only awarded if there is no possibility to receive maintenance from those family members obliged to pay maintenance in the first instance.

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

No, these claims are equal.

⁵⁴ Only minor children and adults who lack the capacity to work and essential means, can claim maintenance under Russian Law.

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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?*

No, both belong to the same (first) grade.

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

The claim by an adult child who lacks the capacity to work and essentials means, is of the same degree as that of the former spouse.

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

The claims of the parents of the debtor are of the same grade. The claims of other family members eligible for maintenance (see Question 89) have a lower degree of priority.

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

If the claimant has parents or adult children, who are able to provide maintenance, his former spouse could request the judge to take this fact into consideration by determining the amount of maintenance. For instance, if a former spouse claiming maintenance from his former spouse has two adult children and a father, the possibility to claim maintenance from them has to be considered by the judge, even if no maintenance claims have been filed against these persons by the plaintiff.

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?*

If the claimant has entered into a new marriage, the maintenance claim of his or her former spouse ceases to exist (Article 120 § 2 (5)). Such a claim does not revive upon the divorce or death of the new spouse of the claimant. The annulment of the marriage, on the other hand, does revive such claim.

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?*

Entering into an informal marriage-like relationship officially does not influence the maintenance obligations of the former spouse. However, there have been suggestions in the legal literature that, if the former spouse intentionally abstains from registering the marriage in order to carry on receiving maintenance, then Article 120 § 2 (5) should be applied by way of analogy.⁵⁵

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

Yes. Article 92 (3) provides for a possibility to deny a maintenance claim or to limit the duration of the maintenance to a certain period in the case of a short-term marriage.

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 ?*

Article 119 Russian Family Code contains a general provision allowing the judge to reject a maintenance claim from any person who has attained the age of majority and has dispositive civil legal capacity, if the claimant has committed an intentional crime with respect to the defendant, or in the event of unworthy behaviour of the claimant within the family. This rule is also applicable to ex-spouses. Besides, there is a special Article 92 Russian Family Code, which provides that the judge can reject the maintenance claim by an ex-spouse or to limit the duration of a maintenance obligation to a determined term, if the claimant's lack of working capacity has ensued as a result of alcohol or drugs abuse or as a result of the commission of an intentional crime. Having same effect is the unworthy behaviour of the claimant within the family (Article 92 (4) Russian Family Code). Articles 119 and 92

⁵⁵ M. Antokolskaia, 'Commentary to Article 120 Russian Family Code', in: *Commentary on the Family Code of the Russian Federation*, I. Kuznetzova, (ed.), Moscow: Jurist, 2000, p. 349.

relate to each other as *lex generalis* (Article 119 Russian Family Code) and *lex specialis* (Article 92). However, these two articles merely complement each other. Both articles include a reference to the unworthy behaviour of the claimant within the family.

The law does not provide any definition of unworthy behaviour. This is a kind of 'open norm', which has to be applied and interpreted according to the circumstances of each particular case. The Supreme Court does give some guidelines for such an application, referring to certain examples of unworthy behaviour, such as, for instance, alcohol and drug abuse or cruelty in respect of family members.⁵⁶ Article 119 provides for a possibility to deny a maintenance claim if the claimant has committed an intentional crime *against the defendant*, while Article 92 allows the maintenance claim to be refused, if the claimant became lacks the capacity to work because of having committed an intentional crime *against any person*. Drug and alcohol abuse as well as committing intentional crimes fall under unworthy behaviour. They are relevant for eligibility for maintenance from the ex-spouses when they have an impact on the family (alcohol abuse during marriage, intentional crime against the former spouse), or have caused the disability. A serious neglect of family duties and child abuse could serve as other examples of unworthy behaviour within the family.

It is worth noting that neither the law, nor the Supreme Court refer to adultery per se as unworthy behaviour within the family.⁵⁷ This illustrates that marital infidelity as such is not generally considered to be immoral in Russian society. Only aggravated cases thereof, e.g. promiscuity or prostitution are considered to be immoral. In the legal literature it has been suggested that although marital infidelity per se is neither immoral nor reproachable, it may still justify the failure of a maintenance claim.⁵⁸

⁵⁶ Item 20 of the Directive of the Supreme Court of the Russian Federation of 25.10.1996, No. 9 'On the Application of the Family Code by the Courts in Deciding Paternity and Maintenance Cases', *Bullenen' verhovnogo suda RF*, 1996, No. 9.

⁵⁷ Eventually this has been the case in academic writing. See: A. Netchaeva, *Family Law (Semeinoe pravo)*, Moscow: Jurist, 1998, p. 258; L. Pchelintzeva, *Family Law (Semeinoe pravo)*, Moscow: Norma-Infra M, 1999, p. 393.

⁵⁸ According to this view, infidelity means a deliberate termination of a personal commitment, existing between spouses during the marriage, comparable to remarriage or entering into an informal relationship after divorce. It would

The abovementioned behaviour could occur before, during and after the marriage. However, the judge may assume that the defendant spouse 'has forgiven' the claimant, if the claimant's unworthy behaviour, criminal actions or alcohol or drug abuse took place before or during the marriage, provided that the defendant spouse was aware of such behaviour and continued married life with the claimant.

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

Yes.

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 1995 Family Code (Chapter 16) for the first time provides a possibility to enter into a binding maintenance agreement. Such an agreement can be concluded before, during and after the dissolution of the marriage.

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

The maintenance agreement could be entered into not only on behalf of a former spouse who is entitled to claim maintenance according to the law, but also on behalf of a former spouse who does not qualify therefore.

The possibility to renounce a maintenance right by agreement differs depending on whether or not the claimant is entitled to claim maintenance according to the law. A spouse who is not entitled to claim maintenance according to the law, is free to dispose of his or her right to maintenance as he or she wishes. In respect of the former

therefore be unfair to accept unfaithful spouse who could say: 'I reject you, but I still want your money'. M. Antokolskaia, *Family Law (Semeinoe pravo)*, Moscow: Jurist, 1999, p. 271.

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spouse entitled to maintenance according to the law, the law does contain limitations aimed at protecting the needy disabled claimant. According to Article 102 Russian Family Code, the maintenance agreement that infringes the rights of a former spouse who lacks the capacity to work and essential means, is voidable upon the claim of that spouse. Therefore any agreement, by which a spouse renounces his or her present or future right to maintenance when he or she will lack the capacity to work and essential means, is voidable. The same applies to any agreement reducing the amount of maintenance far below the amount that could be claimed before the court.

104. Is there a prescribed form for such agreement?

The maintenance agreement has to be in written form, with notarial authentication (Article 100 Russian Family Code).

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

No.