

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

SCOTLAND

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A. GENERAL

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

The Divorce (Scotland) Act 1976 (c.39)

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

There was no divorce *a vinculo* in Scotland until the religious Reformation, which occurred in 1560. From that date the courts began to grant divorces for adultery at common law, basing themselves on Biblical texts. In 1573, desertion became a ground of divorce by statute.¹ In 1938 the Divorce (Scotland) Act added cruelty, incurable insanity, sodomy and bestiality. The whole law was reformed and restated in the Divorce (Scotland) Act 1976, which purported to abolish all previous grounds of divorce and to replace them with the single ground of irretrievable breakdown of marriage. However it also provided that irretrievable breakdown could be established only by proving one of five sets of circumstances, which for practical purposes are treated as separate grounds of divorce. These are adultery, intolerable behaviour, desertion, two years' non-cohabitation plus the defender's consent, and five years' non-cohabitation even without that consent. Effectively this added two 'separation' grounds to the three fault-based grounds.

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

¹ 1573 c.55.

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Yes. Consultation by the Scottish Law Commission has revealed considerable dissatisfaction with the present grounds of divorce, principally because of the length of the periods of separation required, which has led to what can be regarded as abuse of the fault grounds. The Commission recommended a reduction of the separation periods to one year and two years (instead of two and five years) but this has not yet been implemented. More radical proposals are being considered, including a single ground consisting of one year's separation and divorce on demand after a short waiting period.

B. GROUNDS FOR DIVORCE

I. General

4. What are the grounds for divorce?

The 1976 Act provides that the court may grant decree of divorce if, but only if, it is established in accordance with the provisions of the Act that the marriage has broken down irretrievably. These provisions are;

- (a) since the date of the marriage the defender has committed adultery
- (b) since the date of the marriage the defender has at any time behavedin such a way that the pursuer cannot reasonably be expected to cohabit with the defender
- (c) the defender has wilfully and without reasonable cause deserted the pursuer for a continuous period of two years, during which there has been no cohabitation and the pursuer has not refused a genuine offer by the defender to adhere.
- (d) no cohabitation for a continuous period of two years immediately preceding the raising of the action and the defender consents to granting the divorce
- (e) no cohabitation for a continuous period of five years immediately before the raising of the action.

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

No answer.

6. *How frequently are divorce applications refused?*

The courts have no discretion to refuse to grant a decree of divorce in the absence of a valid defence or a failure by the pursuer to aver facts amounting to one of the grounds of divorce.

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

All divorces are obtained in a judicial process, either in the local Sheriff Courts or in the Court of Session in Edinburgh.

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

As above the courts have the sole jurisdiction.

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 fault based grounds will be raised in the form of a normal civil action, requiring the services of a lawyer. A simplified procedure exists for either of the separation grounds. Under this procedure the applicant can complete a form obtained from the clerk of court, return it with a sworn affidavit and appropriate documents, and the other spouse's signature of consent when the ground is two years' separation. This procedure can be used only if there are no children of the marriage under the age of 16 years, neither party seeks any order for financial provision and neither suffers from mental disorder.

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

The marriage is dissolved immediately the court decree has been granted, but is suspended if an appeal against the decision is lodged within the appropriate short periods for appeal.

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

III. Multiple grounds for divorce

Although Scots law purports to make irretrievable breakdown the only ground for divorce, breakdown can be established only by demonstrating one of five grounds. This report proceeds on the basis of multiple grounds and continues with Part III.

1. Divorce by consent

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

There is no separate ground of divorce by consent. Consent is relevant only in the case of irretrievable breakdown established by separation for two years, which requires the consent of both spouses.

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?*

In a case based on separation for two years, one spouse will apply to the court (usually on the simplified form) and the other will sign to demonstrate consent. There is no formal basis for both spouses to apply for a divorce together.

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

The only ground in which consent is relevant is separation for two years.

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

The marriage must obviously have lasted for at least two years before there can have been separation for that period.

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

There is no minimum age for divorce, but the minimum age for marriage is 16, with the result that 18 is the minimum age for consent after two years' separation.

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

There is no automatic requirement for mediation. There is however provision for mediation by accredited mediators. With limited exceptions, no evidence of what occurred in family mediation is admissible in civil proceedings. If children are involved, the court may refer the case to family mediators.

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

In divorces based on two years' separation with consent where the simplified form is available, there will be no need for the spouses to appear before the court at all. If there are financial claims which have not been agreed or if young children exist, the procedure will be a normal court action, at which the spouses would normally appear only at the hearing of evidence.

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?

If the simplified form is used, the court will be informed that there are no financial claims to be decided and will do nothing other than grant the divorce. If there is consent to divorce after two year's separation, but the financial arrangements are disputed, the court will have to determine the consequences of the divorce after hearing evidence.

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?

Not applicable.

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

When consent is relevant, the court will confine itself to ensuring that the evidence that the consent is genuine is examined.

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

If there has in fact been separation for the appropriate period, it would be possible to convert proceedings based on, say, adultery, into an action based on two years' separation with consent of both parties. This does fairly often happen in a contested divorce when the parties reach some agreement, usually over finance or the custody of children. The converse would also be possible.

2. Divorce on the ground of fault/ matrimonial offence

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

Adultery. Intolerable behaviour. Desertion for two years.

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

Voluntary sexual intercourse between a married person and a person of the opposite sex, who is not the marriage partner. This does not include artificial insemination with the semen of a man other than the husband, even if the husband does not consent (although this might amount to intolerable behaviour). There must be penetration of the vagina by the penis, but ejaculation is not required.

A woman who has been raped does not commit adultery, but there is doubt whether it would be a good defence if she was so drunk or stupefied as to be incapable of consent, especially if the drunkenness was voluntary. It does however amount to adultery if there is sexual intercourse with a third party even if there is a genuine belief that the other spouse is dead or that a divorce has occurred.

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

This could give rise to divorce on the ground of irretrievable breakdown established by intolerable behaviour, of which the statutory definition is,

since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender.

36. *Is an intentional fault required?*

Intentional fault is not necessarily required. There can be adultery in the good faith belief that the marriage no longer exists. The intolerable behaviour ground can be established even although the defender is mentally abnormal. However the normal situation does involve intentional fault.

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 mere fact that divorce proceedings have begun indicates that the fault is offensive to the other spouse, but this is particularly obvious in the behaviour ground, which concentrates on the effect of the behaviour on the other spouse. It must be such as to make it unreasonable to expect that spouse to continue to cohabit with the defender.

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

There is no minimum duration of the marriage.

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

Section 1(3) of the Divorce (Scotland) Act 1976 provides that adultery is condoned, and thus cannot thereafter be used to establish irretrievable breakdown, if the pursuer has cohabited with the defender in the knowledge or belief that the defender has committed the adultery. There is however a three month period of grace in which cohabitation in an attempted reconciliation will not amount to condonation. This is designed to avoid deterring the other spouse from attempting reconciliation. There is a similar period of three months' grace so that attempted reconciliation after desertion will not interrupt the running of the two year period.

40. *How is the fault proved?*

If the fault is disputed, proof will be by evidence led in the appropriate court as in a normal civil action. It is however not uncommon for the fault (adultery, intolerable behaviour or desertion) to be admitted, and further proof would not be required. In such cases the dispute may be over financial arrangements.

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

The position is the same as in Question 27 relating to consent.

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?*

When the divorce action is solely on the basis of separation for five years, without the consent of the other spouse, the court has a discretion not to grant decree if the result of the decree would be grave financial hardship for the defender. This hardship can include the loss of the chance of acquiring any benefit. It can be doubted whether this discretionary bar to divorce is necessary in Scotland, given that accrued pension rights are treated in Scotland (unlike England) as a form of savings taken into account in assessing fair division of assets.

If there are children of the marriage aged under 16, the Children (Scotland) Act 1995 (section 12) requires the court to consider the arrangements proposed to be made for the upbringing of the child in determining whether to exercise specific powers to determine matters relating to the child's welfare, but has no power to insist on being satisfied about the arrangements before granting the divorce.

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

No.

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?

Breakdown can at the moment be established only by proving one of the five grounds of divorce. See Question 4.

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

Three of the situations (adultery, intolerable behaviour and desertion) which establish irretrievable breakdown are in fact fault-based grounds of divorce.

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

No. Although desertion must be for two years, and the separation grounds involve either two or five years' separation.

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

Two years if the other spouse consents or five years if there is no consent.

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

Yes.

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

(a) Which circumstances suspend the term of separation?

In determining whether cohabitation has been continuous for the two or five years required, no account is taken of any period or periods not exceeding a total of six months during which the parties cohabited with each other. Such cohabitation does not interrupt the running of the periods, but also does not count as part of the separation. Any other cohabitation will require the period of separation to begin again.

(b) Does the separation need to be intentional?

In England it has been held that spouses are not living apart unless at least one of them has decided that the marriage is at an end. This appears not to be true in Scotland. The wording of the relevant statutes is different and section 13(2) of the Divorce (Scotland) Act 1976 defines cohabitation as existing only when the spouses are 'in fact living together as man and wife'. Thus it is thought that if one is in prison for the requisite period, the separation would be such as to amount to irretrievable breakdown and thus to permit divorce. It appears therefore that the separation does not in Scotland require to be intentional.

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

It is not necessary to have separate homes, as there can still be separation while living under the same roof. This may be difficult to distinguish from living together on bad terms, but if the spouses live what are in fact separate lives under the same roof, this can qualify as separation for the purposes of divorce.

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

No. See Question 27.

51. Is a period for reflection and consideration required?

No.

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

No. See Question 29.

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

As in Question 31.

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. Although desertion must be for two years, and the separation grounds involve either two or five years' separation.

C. SPOUSAL MAINTENANCE AFTER DIVORCE

I. General

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

The Family Law (Scotland) Act 1985 (c.37).

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

From the introduction of divorce in 1560 until the Succession (Scotland) Act 1964 came into force on 10but September 1964 (apart

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from cases based on incurable insanity) the innocent spouse immediately became entitled to the legal rights of *jus relictæ*, terce and courtesy and any marriage contract provisions as if the other spouse had died at the date of the court decree. Terce and courtesy were income rights, but of little practical importance in most cases. Otherwise there was provision only for a capital payment. The 1964 Act gave the court a discretionary power to award a periodical allowance or a capital sum or both to the pursuer, having regard to the means of the parties and 'all the circumstances of the case'. The Divorce (Scotland) Act 1976 continued the same system, but enabled the court to make an award of financial provision to either spouse.

This proved to be too vague and unpredictable, and after detailed consultation by the Scottish Law Commission the Family Law (Scotland) Act 1985 introduced the present position. This permits orders for payment of a capital sum, for transfer of property, for a periodical allowance, for sharing in pension benefits, and also incidental orders such as occupancy of the matrimonial home etc. Principles for the exercise of the discretion (e.g. equal sharing of matrimonial property) are set out in section 9 of the Act and the order must be reasonable having regard to the resources of the parties.

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

There are no current proposals to alter the law relating to maintenance.

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

Divorce terminates the obligation of support between spouses, but the court has the power to make orders for payment of a capital sum, for transfer of property from one to the other, for a periodical allowance although only for a limited period, for division of pension benefits and various ancillary orders. Obviously, there are numerous cases in which the assets are so low that there is no point in making any order for financial provision. Any order, even if the divorce is not defended, must conform to the principles set out in section 9 of the Family Law (Scotland) Act 1985.

The principles in section 9 are (a) that the net value of the matrimonial property (defined in the Act as a form of deferred community of acquests) should be shared fairly (which normally means equally) between the parties (b)that fair account should be taken of any economic advantage derived by either spouse from contributions by the other and conversely of any economic disadvantage suffered by either in the interests of the family (c) that any economic burden of caring after divorce for a child of the marriage under 16 should be shared fairly (d) that a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him or her to adjust, over a period of not more than three years from the divorce, to the loss of that support and (e) that reasonable financial provision for a reasonable period should be awarded to a spouse likely to suffer serious financial hardship.

Continuing maintenance can be provided only by a periodical allowance, and it will be noted that (d) above permits continuing periodical allowance for a maximum period of three years as an adjustment allowance. The primary purpose of the financial provisions on divorce is to achieve a clean break and to reduce the opportunities for continuing friction and disputes over non-payment or delayed payment of maintenance. In the normal case, there will be no continuing maintenance payments and any that are awarded will expire at latest after the three years have elapsed. The court is directed to have regard to the age, health and earning capacity of the party who is claiming the financial provision, the duration and extent of the dependence of that party prior to the divorce, any intention of that party to undertake a course of education or training, the needs and resources of the parties, and all the other circumstances of the case.

In the case of serious financial hardship (category (e) above), the hardship is assessed at the time of the divorce and is expressly designed not to continue a general obligation of maintenance, but it can be awarded for a period after the three years adjustment period.

59. Are the rules relating to maintenance upon divorce connected with the rules relating to other post-marital financial consequences, especially to

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the rules of matrimonial property law? To what extent do the rules of (matrimonial) property law fulfil a function of support?

The remainder of the questionnaire is of little relevance in Scotland, as there will rarely be continuing maintenance payments, and then only for a limited period.

There is no formal matrimonial property law and it is intended that the settlement on divorce should constitute the whole financial arrangements between the former spouses. It is common for the matrimonial home to be owned by both spouses, but fair division of the matrimonial assets acquired between the date of the marriage and the final separation will often mean that the house is sold and the proceeds divided. There will normally be no regular maintenance payments, other than any made during the limited periods referred to as (d) and (e) in Question 58, or payments in respect of the maintenance of children of the marriage.

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

Property and pension rights etc. are all taken into account in the settlement on divorce. They have no further significance for maintenance thereafter. Periodical allowances may not be used to give effect to the principle of sharing the value of matrimonial property.

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

No.

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.

The type of divorce has no effect on subsequent maintenance.

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

In the settlement at divorce, both spouses are required to provide full information about their assets. If continuing maintenance has been ordered, the amount may be varied by the court if there has been a material change of circumstances, of which evidence would have to be provided by the applicant. The court has power to order either spouse to provide details of his or her resources.

II. Conditions under which maintenance is paid

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

Maintenance of children under 16 is a separate issue, but may include an element of the costs incurred by the spouse who is looking after them. Any maintenance directly for the spouse has no specific conditions.

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

The court may take account of any conduct which has adversely affected the financial resources relevant to the court's decision on financial provision, or which it would be manifestly inequitable to ignore. This could therefore affect any continuing maintenance payments ordered. There is also express power in section 18 of the Family Law (Scotland) Act 1985 for the court to counteract any transaction having the effect of defeating financial claims on divorce.

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 relevance is to the capital provision made at the time of divorce.

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

At the time of divorce.

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?*

The normal maximum period is three years. In exceptional circumstances it may continue for a further specific period.²

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?*

According to the standard of living.

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 formal rules. The award is at the discretion of the court, taking account of the principles in the 1985 Act, but it will always be for a specified short period.

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?)*

The possible costs referred to will be taken into account in the capital award and will not be part of continuing maintenance.

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

No.

² See *Stott v Stott* (1987) G.W.D. 17-645

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

If ordered at all, it will cease entirely at the end of the adjustment period.

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

Any maintenance will be by periodical payments. The main settlement is by lump sum or transfers of property at the time of the divorce.

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?*

Not applicable.

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

No.

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

This can be done by application to the court on a material change of circumstances.

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?*

No.

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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?*

During the limited period for which maintenance may have been ordered, a material change of the debtor's financial situation could be taken into account by the court.

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

Only if they amount to a material change of circumstances, and the court would be very reluctant to reduce payments if it thought that the debts had been deliberately incurred.

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?*

Moral obligations could be considered by the court as well as purely 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.

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?*

Yes.

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

This is difficult to answer in this form. Social security benefits would normally have been amended by the social security authorities to recognise the current situation of both spouses.

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?

Technically not, but if the debtor is de facto being supported by a new spouse, the debtor's own resources released by that support would be taken into account.

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

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

All the considerations set out in Questions 86 to 90 will have been taken into account by the court at the time of the financial settlement at the divorce, by establishing appropriate capital sums. They would not be relevant to any continuing maintenance for the period after the divorce.

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

All the considerations set out in Questions 86 to 90 will have been taken into account by the court at the time of the financial settlement at the divorce, by establishing appropriate capital sums. They would not be relevant to any continuing maintenance for the period after the divorce.

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

All the considerations set out in Questions 86 to 90 will have been taken into account by the court at the time of the financial settlement at the divorce, by establishing appropriate capital sums. They would not be relevant to any continuing maintenance for the period after the divorce.

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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?

All the considerations set out in Questions 86 to 90 will have been taken into account by the court at the time of the financial settlement at the divorce, by establishing appropriate capital sums. They would not be relevant to any continuing maintenance for the period after the divorce.

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 considerations set out in Questions 86 to 90 will have been taken into account by the court at the time of the financial settlement at the divorce, by establishing appropriate capital sums. They would not be relevant to any continuing maintenance for the period after the divorce.

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?

Any maintenance will take the form of an order to pay a fixed sum weekly or monthly for the period of adjustment to the new status. It is therefore a debt created by an order of the court and may be enforced by normal judicial procedures for enforcement of debts. If there has been a material change of circumstances, the court may be asked to vary the award, but otherwise the order remains in force for the period specified by the court. The intention is that there should normally be a clean break in financial terms (as well as in status) at the time of the divorce.

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

Any maintenance will take the form of an order to pay a fixed sum weekly or monthly for the period of adjustment to the new status. It is therefore a debt created by an order of the court and may be enforced by normal judicial procedures for enforcement of debts. If there has been a material change of circumstances, the court may be asked to vary the award, but otherwise the order remains in force for the period specified by the court. The intention is that there should normally be a clean break in financial terms (as well as in status) at the time of the divorce.

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?

Any maintenance will take the form of an order to pay a fixed sum weekly or monthly for the period of adjustment to the new status. It is therefore a debt created by an order of the court and may be enforced by normal judicial procedures for enforcement of debts. If there has been a material change of circumstances, the court may be asked to vary the award, but otherwise the order remains in force for the period specified by the court. The intention is that there should normally be a clean break in financial terms (as well as in status) at the time of the divorce.

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

Any maintenance will take the form of an order to pay a fixed sum weekly or monthly for the period of adjustment to the new status. It is therefore a debt created by an order of the court and may be enforced by normal judicial procedures for enforcement of debts. If there has been a material change of circumstances, the court may be asked to vary the award, but otherwise the order remains in force for the period specified by the court. The intention is that there should normally be a clean break in financial terms (as well as in status) at the time of the divorce.

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

Any maintenance will take the form of an order to pay a fixed sum weekly or monthly for the period of adjustment to the new status. It is therefore a debt created by an order of the court and may be enforced by normal judicial procedures for enforcement of debts. If there has been a material change of circumstances, the court may be asked to vary the award, but otherwise the order remains in force for the period specified by the court. The intention is that there should normally be a clean break in financial terms (as well as in status) at the time of the divorce.

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?*

Any maintenance will take the form of an order to pay a fixed sum weekly or monthly for the period of adjustment to the new status. It is therefore a debt created by an order of the court and may be enforced by normal judicial procedures for enforcement of debts. If there has been a material change of circumstances, the court may be asked to vary the award, but otherwise the order remains in force for the period specified by the court. The intention is that there should normally be a clean break in financial terms (as well as in status) at the time of the divorce.

VII. Limitations and end of the maintenance obligation

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

The maintenance claim exists only for the limited period specified by the court at the time of the divorce. Remarriage during that period would be a change of circumstances which the court would be entitled to take into account, but it does not automatically terminate the maintenance. There is no provision for registered partnerships. There are no specific rules about informal partnerships, but factors such as the short duration of a marriage or conduct during the marriage

would be part of the factors taken into account by the court in fixing the amount of the award for the adjustment period. Death of the debtor, or remarriage, would be a material change of circumstances which could be considered by the court but does not automatically terminate the obligation of maintenance.

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?

The maintenance claim exists only for the limited period specified by the court at the time of the divorce. Remarriage during that period would be a change of circumstances which the court would be entitled to take into account, but it does not automatically terminate the maintenance. There is no provision for registered partnerships. There are no specific rules about informal partnerships, but factors such as the short duration of a marriage or conduct during the marriage would be part of the factors taken into account by the court in fixing the amount of the award for the adjustment period. Death of the debtor, or remarriage, would be a material change of circumstances which could be considered by the court but does not automatically terminate the obligation of maintenance.

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

The maintenance claim exists only for the limited period specified by the court at the time of the divorce. Remarriage during that period would be a change of circumstances which the court would be entitled to take into account, but it does not automatically terminate the maintenance. There is no provision for registered partnerships. There are no specific rules about informal partnerships, but factors such as the short duration of a marriage or conduct during the marriage would be part of the factors taken into account by the court in fixing the amount of the award for the adjustment period. Death of the debtor, or remarriage, would be a material change of circumstances which could be considered by the court but does not automatically terminate the obligation of maintenance.

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

The maintenance claim exists only for the limited period specified by the court at the time of the divorce. Remarriage during that period would be a change of circumstances which the court would be entitled to take into account, but it does not automatically terminate the maintenance. There is no provision for registered partnerships. There are no specific rules about informal partnerships, but factors such as the short duration of a marriage or conduct during the marriage would be part of the factors taken into account by the court in fixing the amount of the award for the adjustment period. Death of the debtor, or remarriage, would be a material change of circumstances which could be considered by the court but does not automatically terminate the obligation of maintenance.

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

The maintenance claim exists only for the limited period specified by the court at the time of the divorce. Remarriage during that period would be a change of circumstances which the court would be entitled to take into account, but it does not automatically terminate the maintenance. There is no provision for registered partnerships. There are no specific rules about informal partnerships, but factors such as the short duration of a marriage or conduct during the marriage would be part of the factors taken into account by the court in fixing the amount of the award for the adjustment period. Death of the debtor, or remarriage, would be a material change of circumstances which could be considered by the court but does not automatically terminate the obligation of maintenance.

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?

There is nothing to prevent spouses from entering into binding agreements on maintenance in the event of a divorce, and the general

policy would be to encourage parties to settle financial provisions between themselves. Such agreements are very common.

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

It is possible to renounce a future right to maintenance, and there are no limits on the validity of such renunciations (other than challenges based on fraud or deception etc.). However the court has power at the time of the divorce (not later) to set aside any existing agreement if it was not fair or reasonable at the time it was entered into.³

104. Is there a prescribed form for such agreements?

There is no prescribed form, but any such agreements would normally be prepared by a lawyer.

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

Any such agreement does not require the sanction of a court or other competent authority. It is a normal private contract. However the court may be asked to interpose its authority to a joint minute of agreement presented to it by the parties. If this is done, and the court then grants decree accordingly, the agreement becomes a court decree enforceable in the normal way.

³ Section 16(1) of the Family Law (Scotland) Act 1985.