

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

SWITZERLAND

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September 2002

A. GENERAL

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

The Swiss Code of Civil Law, Part 2: Family Law, 1st Division: Marital Law, 4th Heading: Divorce and Separation, Articles 111 – 149 of the Swiss Code of Civil Law.

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

Until the Swiss Code of Civil Law came into force on 1 January 1912 marital law was basically regulated in the cantonal legislation. As a result of difficulties in connection with divorces between spouses of different religious beliefs, however, divorce law did to some extent become subject to unification at the federal level as early as in the 19th century.¹

The Swiss Code of Civil Law of 1907 was able to carry on from where the Federal Act of 1875 regarding the Ascertainment and Certification of Marital Status and Marriage had left off. As a legacy of the Reformation, it introduced special grounds for divorce (the old Articles 137 - 141 Swiss Code of Civil Law), likewise established in foreign law, which stipulate fault on the part of the respondent or incurable insanity as a prerequisite; furthermore, it introduced the irretrievable breakdown of the marriage (old Article 142 § 1 Swiss

¹ See H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, Bern, 2000, Marginal note 01.24-01.26.

Code of Civil Law) which was not generally recognised as a ground for divorce on an international level at that time. However, if such serious breakdown was mainly to be attributed to the fault of one spouse, then only the other spouse could sue for divorce (old Article 142 § 2 Swiss Code of Civil Law).² Consequently, there was an interdependence between divorce as a sanction for a serious breach of marital duties and divorce as a result of the irreparable breakdown of the conjugal community.

Almost a century later, divorce law was the focal point of the revision of family law in the Swiss Code of Civil Law which entered into force on 1 January 2000. Apart from the new no-fault linked pension adjustment (compensation in respect of pension benefits from occupational benefit plans), the main objective was to replace divorce exclusively on the basis of a *petition by one spouse* with a concept which induces spouses whenever possible to submit a *joint application* for divorce. The new divorce law still upholds the necessity of a judicial proceeding for divorce but basically no longer wishes to attach any importance to the question of fault (i.e. apart from Articles 115 and 125 § 3 Swiss Code of Civil Law); it is intended to encourage the spouses to reach an understanding with regard to their divorce, not least with a view to protecting the children's welfare in the best possible manner.³

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

Yes. The following are pending in the Swiss National Council:

- Nabholz Parliamentary Initiative 01.408 (period of separation in the case of divorce upon a petition by one spouse)

² See Message ('Botschaft') from the Federal Council to the National Council and Council of States No. 95.079 regarding the amendment of the Swiss Code of Civil Law (marital status, marriage, divorce, children's law, obligation to support relatives, matrimonial home, guardianship and marriage settlement) of 15.11.1995, p. 17.

³ See the main aims of the amendment in: Message ('Botschaft') from the Federal Council to the National Council and Council of States No. 95.079 regarding the amendment of the Swiss Code of Civil Law (marital status, marriage, divorce, children's law, obligation to support relatives, matrimonial home, guardianship and marriage settlement) of 15.11.1995, p. 26 ff., regarding the goal of encouraging the spouses to reach an understanding with regard to divorce, in particular p. 29 f. and to protect the children's welfare in the best possible manner p. 30.

- Motion by the Swiss National Council's Committee for Legal Issues 01.3645, Thanei minority (period of separation in the case of divorce upon petition by one spouse).

The motions tend to reduce the four-year separation period which is required in order to constitute a claim for divorce by means of filing a petition in accordance with Article 114 Swiss Code of Civil Law; there will perhaps be some distinction between marriages with and those without children. These motions are due to be discussed in the autumn 2002 session of the Swiss National Council which is just commencing.

B. GROUNDS FOR DIVORCE

I. General

4. What are the grounds for divorce?

The Swiss Code of Civil Law stipulates the following grounds for divorce:

(a) Divorce upon a *joint application* with two sub-categories:

- Comprehensive agreement regarding the divorce and the ancillary consequences (mainly economic ones) in respect of which the parties may make dispositions (Article 111 Swiss Code of Civil Law);
- Partial agreement in the sense that the consent only applies to the divorce as such and a part of the ancillary consequences (Article 112 Swiss Code of Civil Law).

(b) Divorce upon a unilateral *petition* in the case of two objective elements:

- After four years of living apart (Article 114 Swiss Code of Civil Law);
- Reduction of the four-year period of separation in the event of the continuation of the marital bond being unreasonable (Article 115 Swiss Code of Civil Law).

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

The following statistics are available:

Year	Provision	Percentage
2000	Articles 111 and 112 Swiss Code of Civil Law	85%
	Article 114 Swiss Code of Civil Law	9%
	Article 115 Swiss Code of Civil Law	2% ⁴
2001	Article 111 Swiss Code of Civil Law	93.5%
	Article 112 Swiss Code of Civil Law	3.1% ⁵

6. How frequently are divorce applications refused?

There are (currently) no sufficiently sound statistics concerning divorce applications which are refused after the filing of a joint or unilateral application for divorce. It is probable that only a very few cases exist in which proceedings have come to this type of conclusion.

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

Divorce may only be granted after judicial proceedings resulting in a judicial decision; however, in the case of Article 111 Swiss Code of Civil Law which is of key significance, these are so-called *non-contentious* proceedings.

⁴ Press release of the Swiss Federal Office of Statistics No. 0350-0106-80 of July 2001.

⁵ Press release of the Swiss Federal Office of Statistics No. 0350-0206-50 of 20.06.2002.

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

The jurisdiction of the lower courts is subject to the respective cantonal introductory law in respect of the Swiss Civil Code and the individual cantons' court organisation law and code of civil procedure. As a rule, there are divisions within the civil jurisdiction with regard to their competence in specific areas of the law, such as family law procedure. Nevertheless, special family courts – governed by federal law – were rejected in the reform of the divorce law.

At the Swiss Federal Supreme Court the jurisdiction of the divisions is governed by the Regulations for the Swiss Federal Supreme Court. The Second Civil Division has basic jurisdiction over proceedings concerning family law (Article 6 Section 1 Regulations).

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

Divorce proceedings are initiated by a *joint application* by the spouses (Articles 111 and 112 Swiss Code of Civil Law) or by a *petition* filed by one spouse (Articles 114 and 115 Swiss Code of Civil Law). This must be effected in writing. On the other hand, it is not obligatory to consult a legal advisor (in particular an attorney-at-law).

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

On the date when the decree of divorce *becomes final and absolute* in accordance with the cantonal law of procedure that is applicable in a given case.

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

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?*

A joint application by both spouses does not suffice on its own to constitute a ground for divorce, this is just one of several objective elements which are required in connection with Articles 111 and 112 of the Swiss Code of Civil Law. The option of a divorce by consent does not exist *per se*.⁶ In fact, proof of the irretrievable breakdown must be provided after a joint application for divorce, adhering to the mandatory procedure as stipulated under the law, i.e. in a formalised manner in terms of procedure.⁷ To all intents and purposes, however, this is tantamount to a divorce by consent.

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?*

Within the framework of a *joint application for divorce* (Articles 111 and 112 Swiss Code of Civil Law) both spouses need to apply for a divorce together.

However, this is subject to *Article 116 Swiss Code of Civil Law*. In such cases, if one spouse requests a divorce on his or her own after living apart or citing unreasonableness and the other spouse explicitly consents or files a counter petition, the provisions pertaining to a divorce upon a joint application likewise apply by analogy.

Depending on whether Article 111 or Article 112 Swiss Code of Civil Law is cited as the ground for divorce, there are differences in how the proceedings are conducted.

If a joint application for divorce is filed with a *comprehensive agreement* regarding the (economic) ancillary consequences in respect of which

⁶ See Message ('Botschaft') from the Federal Council to the National Council and Council of States No. 95.079 regarding the amendment of the Swiss Code of Civil Law (marital status, marriage, divorce, children's law, obligation to support relatives, matrimonial home, guardianship and marriage settlement) of 15.11.1995, p. 27.

⁷ H. Hausheer, 'The main changes in the new divorce law', *ZBJV* 135, 1999, p. 7.

the parties may make dispositions (Article 111 Swiss Code of Civil Law), the procedure ordinarily takes the following form: a joint and separate hearing with the spouses, setting a two-month period for consideration, written confirmation by the spouses, and, finally, the granting of a divorce decree.

In the case of a joint application for divorce with only a *partial agreement* regarding the consequences (Article 112 Swiss Code of Civil Law), as a rule the proceedings are structured as follows: a hearing with the spouses with regard to the application for divorce and the statement that they wish the court to issue a judicial decision regarding the disputed ancillary consequences, and subsequently – similar to non-contentious proceedings pursuant to Article 111 Swiss Code of Civil Law – a two-month period for consideration, written confirmation, a decision with respect to the disputed points in adversary proceedings, and an overall judgment (Article 112 § 3 Swiss Code of Civil Law).

As regards the case defined in Article 116 Swiss Code of Civil Law, Article 112 Swiss Code of Civil Law will as a general rule be the basis for the divorce since under these circumstances it is hardly possible to reach full agreement regarding the consequences of the divorce (Article 111 Swiss Code of Civil Law).⁸

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

No, there is no such requirement in the case of a joint application for divorce (Articles 111 and 112 Swiss Code of Civil Law) or a divorce petition citing unreasonableness (Article 115 Swiss Code of Civil Law). An exception does exist for filing a *divorce petition after living apart* for four years (Article 114 Swiss Code of Civil Law).

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

No.

⁸ R. Reusser, 'Grounds for divorce and separation', in: H. Hausheer (Publisher), *Vom alten zum neuen Scheidungsrecht*, Bern 1999, p. 9 ff., marginal note 1.87.

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

Not in relation to divorce. On the other hand, a couple must be at least 18 years of age in order to be eligible to marry (Article 94 § 1 Swiss Code of Civil Law).

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

No, the various options listed are not a pre-requisite for a joint application for divorce; they should, however, be seriously considered or be the subject of a recommendation from the court within the framework of preliminary relief proceedings (*'Eheschutzverfahren'*) within the meaning of Article 171 Swiss Code of Civil Law.

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

It is necessary to submit a written application for divorce. The other steps to be taken in divorce proceedings in the case of a joint petition are detailed in Articles 111 and 112 Swiss Code of Civil Law.

The parties must appear before the court *at least once* for a *hearing* (Article 111 § 1 and Article 112 § 2 Swiss Code of Civil Law). The court may, however, order a second hearing (Article 111 § 3 Swiss Code of Civil Law).

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 a joint application for a divorce is filed on the basis of a comprehensive agreement (Article 111 Swiss Code of Civil Law), the spouses must submit an *exhaustive agreement* with regard to the (primarily economic) ancillary consequences of the divorce in respect of which the parties may make dispositions (divorce agreement), enclosing the necessary documents and including joint proposals with regard to their children (Article 111 § 1 Swiss Code of Civil Law).

A divorce upon a joint application is also possible, however, even if no agreement has been reached in respect of the consequences of the divorce, that is to say the spouses may jointly request a divorce and state that the court should deliver a judgment on the consequences on which they are not in agreement (Article 112 § 1 Swiss Code of Civil Law; divorce upon a joint application with a *partial agreement*). In this case the court delivers a decision on the disputed consequences of the divorce (Article 112 § 3 Swiss Code of Civil Law).

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?*

An agreement regarding the consequences of the divorce is not necessary (see Question 29).

If a divorce agreement is entered into, it may be exhaustive or partial (see Article 112 Swiss Code of Civil Law). The issues covered by the agreement consist of the division of matrimonial property, any arrangements regarding the family home (Article 121 Swiss Code of Civil Law), an adjustment of pension benefits under occupational pension plans (Articles 122 - 124 Swiss Code of Civil Law on the subject of the so-called second pillar/pension benefits), post-marital maintenance and proposals on those matters pertaining to the children. The arrangements concerning the spouses' children are only considered to be joint proposals in this connection (please refer to the standard to be applied by the court in examining such proposals as set forth in the reply to Question 31).

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

The court must in general examine whether the agreement is *exhaustive, clear* (i.e. directly enforceable) and *neither contrary to the law nor manifestly unreasonable* (Article 140 § 2 Swiss Code of Civil Law).

A special standard must be applied to those *issues pertaining to children*: In this connection the court must scrutinise the facts *ex officio* and it has complete discretion to weigh the evidence (Article 145 § 1 Swiss Code

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of Civil Law). Thus, the principle of an official examination (*‘Offizial- und Untersuchungsmaxime’*) applies without exception, i.e. it is not sufficient for the parents simply to agree with one another and they are not empowered to decide on the children’s legal rights, e.g. with regard to maintenance.

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 one spouse files a petition for a divorce after living apart (Article 114 Swiss Code of Civil Law) or citing unreasonableness (Article 115 Swiss Code of Civil Law) and the other spouse explicitly agrees or files a counter petition, then the provisions regarding divorce upon a joint application by mutual consent (Articles 111 and 112 Swiss Code of Civil Law) are applicable by analogy (*Article 116 Swiss Code of Civil Law*).

Conversely, should the court decide that the prerequisites for a divorce upon a joint application by mutual consent have not been fulfilled, then each spouse is to be granted a period of time to replace the joint application for divorce with a petition (*Article 113 Swiss Code of Civil Law*; switching to a divorce suit).

In both of these cases (and this also takes account of the Swiss principle in relation to private international law under which proceedings abroad that are already pending are given priority) *litispendence is upheld*.

2. Divorce on the ground of fault/ matrimonial offence

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

In view of the legislator’s aim to structure the divorce law with as little reference to the issue of fault as possible, there are no grounds for divorce which are specifically based on the fault of one spouse.

Nonetheless ‘*culpable behaviour*’ in the broadest sense may constitute a ground for divorce for one spouse in the form of the *unreasonableness* of continuing the marriage (Article 115 Swiss Code of Civil Law).

Article 115 Swiss Code of Civil Law acts as an emergency outlet for cases of hardship.⁹ It is intended to allow the party suing for divorce to dissolve the marriage if such a party can no longer be reasonably expected to wait until the end of the four-year period of separation in accordance with Article 114 Swiss Code of Civil Law. There must be *serious grounds* which are not inherent in the person of the spouse suing for divorce. The serious grounds for a divorce must, therefore, be of an objective nature or, alternatively, they must be attributable to the spouse who is being sued for divorce. ‘Attributable’ does not in this connection mean that there must be fault attached. On the contrary, it is sufficient for the serious grounds to be inherent in the person of the spouse being sued for divorce and who opposes the divorce.¹⁰

Serious grounds which justify a divorce based on Article 115 Swiss Code of Civil Law are deemed to be *inter alia* – in accordance with the case law on the new divorce law – when one spouse uses violence against the other and such violence is not of a minor nature,¹¹ when one spouse grossly infringes the other’s privacy to the detriment of the other’s health,¹² or when living together has become intolerable from an objective point of view so that the divorce also serves the interests of any children involved.¹³ The Swiss Federal Supreme Court has also recognised mental illness which results in the persecution of the other spouse as a serious ground.¹⁴ It is also possible that the overall picture which emerges from various circumstances is so serious that the

⁹ R. Reusser, ‘Grounds for divorce and separation’, in: H. Hausheer (Publisher), *Vom alten zum neuen Scheidungsrecht*, Bern 1999, Marginal note 1.79 f., with reference to how the new divorce law came about.

¹⁰ In place of many others R. Reusser, ‘Grounds for divorce and separation’, in: H. Hausheer (Publisher), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, Marginal note 1.81 ff.

¹¹ BGE 127 III 129. On the other hand, a single infringement in the form of an assault does not suffice in accordance with the BGE of 18.05.2001 [5C.35/2001].

¹² BGE 128 III 1 ff. and BGE of 06.08.2001 [5C.141/2001].

¹³ See R. Reusser, ‘Grounds for divorce and separation’, in: H. Hausheer (Publisher), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, Marginal note 1.85.

¹⁴ BGE 128 III 1.

spouse affected cannot reasonably be expected to maintain the marriage until the four-year period of separation has expired.¹⁵ However, if one party deliberately entered into the marriage only in order to obtain a collateral side-effect and had no intention of seeking a matrimonial partnership as such, then, as a rule, such a party will not be permitted to invoke Article 115 Swiss Code of Civil Law.¹⁶ On the other hand, the early dissolution of the marriage of a bona fide applicant - who in actual fact genuinely desired a marriage with a mala fide spouse who was threatened with deportation - was granted.¹⁷

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

Adultery, as such, is not stipulated as a ground for divorce. It may in certain cases – albeit admittedly only under aggravating circumstances – mean that it would be unreasonable to expect a continuation of the marriage so that it would in this way constitute a ground for divorce in accordance with Article 115 Swiss Code of Civil Law. However, *Article 115 Swiss Code of Civil Law* does not list any specific examples to illustrate the application of its *general clause*. It is on the contrary intended to leave it to the divorce court to consider the special circumstances in each individual case (Article 4 Swiss Code of Civil Law)^{18, 19}

See the comments on Question 33 with regard to the material requirements of Article 115 Swiss Code of Civil Law in general.

¹⁵ BGE of 17.01.2002 [5C.262/2001].

¹⁶ BGE 127 III 342 E. 3b and 3d.

¹⁷ BGE 127 III 347.

¹⁸ *Message ('Botschaft') from the Federal Council to the National Council and Council of States No. 95.079 regarding the amendment of the Swiss Code of Civil Law (marital status, marriage, divorce, children's law, obligation to support relatives, matrimonial home, guardianship and marriage settlement)* of 15.11.1995, p. 93. And in respect thereto BGE 127 III 134.

¹⁹ In contrast, adultery was embodied in the old divorce law as a special ground for divorce (old Article 137 Swiss Code of Civil Law). Behaviour which constituted grounds for divorce in this connection consisted of the husband having sexual intercourse with another woman or the wife having sexual intercourse with another man. Sexual intercourse with the third party must have taken place knowingly and willingly and the spouse at fault must have had the capacity to consent thereto; see also C. Hegnauer and P. Breitschmid, *Grundriss des Eherechts* 3rd edition, Bern 1993, marginal note 9.16.

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

Offensive statements or false accusations may likewise provide a ground for divorce based on the general point of view of the unreasonableness of continuing the marriage (Article 115 Swiss Code of Civil Law) or such behaviour may result in a reduction of the period of separation pursuant to Article 114 Swiss Code of Civil Law.

36. *Is an intentional fault required?*

No. The unreasonableness of continuing the marriage as a ground for divorce (Article 115 Swiss Code of Civil Law) generally requires that the serious grounds must be of an objective nature or that they can be attributed to the respondent. In this connection 'attributable' does not mean that there must be fault in each individual case (see in this respect the reply to Question 33).

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?*

Conduct which is deemed to render the continuation of the marital bond intolerable does *not also* need to be reproachable in the sense of a 'fault constituting grounds for divorce'.²⁰

The serious grounds which give rise to divorce due to the unreasonableness of continuing the marriage in accordance with Article 115 Swiss Code of Civil Law must either be of an objective nature or be attributable to the respondent. In this connection 'attributable' does not mean that there has to be a degree of fault.²¹ See the comments in reply to Question 33 in this respect.

²⁰ See for example behaviour due to a mental illness in BGE 128 III 1 ff.

²¹ R. Reusser, 'Grounds for divorce and separation', in: H. Hausheer (Publisher), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, marginal note 1.83.

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Consequently, the serious grounds may not be attributable to the applicant spouse suing for divorce based on Article 115 Swiss Code of Civil Law.

Against this background decisions must also be made in individual cases as to whether, in view of the previous culpable conduct of one spouse, conduct on the part of the other spouse which would basically make it seem unreasonable to expect the marital bond to continue should perhaps be assessed from a more tolerant point of view.

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

No.²²

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

Again, this question can only be of any significance, if at all, in the case of Article 115 Swiss Code of Civil Law (see Question 5) which is in fact rather seldom. In this connection the answer will, as a rule, be in the affirmative, because if a reconciliation takes place, the serious grounds stipulated by Article 115 Swiss Code of Civil Law which rendered a continuation of the marriage unreasonable will as a consequence usually no longer be fulfilled with respect to the earlier facts.

40. How is the fault proved?

According to the general rules of the law of civil procedure, but in particular also pursuant to Article 8 Swiss Code of Civil Law, the serious grounds stipulated in Article 115 Swiss Code of Civil Law which render a continuation of the marriage must be proven by the applicant spouse. Legal literature is of the opinion that a strict standard is to be applied to the serious grounds so that the formalised

²² See the rejection of such a required duration in the *Message ('Botschaft') from the Federal Council to the National Council and Council of States No. 95.079 regarding the amendment of the Swiss Code of Civil Law (marital status, marriage, divorce, children's law, obligation to support relatives, matrimonial home, guardianship and marriage settlement)* of 15.11.1995, p. 85.

ground for divorce defined in Article 114 Swiss Code of Civil Law does not lose its significance;²³ in contrast, the practice of the Swiss Federal Supreme Court in its decisions BGE 127 III 134 and 346 has turned out to be more open-minded and more accommodating but *serious grounds* are nonetheless still required.²⁴ On the level of the cantonal courts there are indications of differing practices in this area.

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

Such measures are not required in the sense of a formal stipulation in Article 115 Swiss Code of Civil Law. However, the judge will regularly provide recommendations of this type if this has not already occurred in the preliminary relief procedures in accordance with Article 171 Swiss Code of Civil Law.

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

No, this possibility of a *material hardship clause* is no longer provided in the Swiss Code of Civil Law currently in force.²⁵ The divorce application is to be exclusively considered on the basis of the objective elements under Article 115 Swiss Code of Civil Law. The material hardship clause could, of course, again become relevant if the four-year period of separation is to be shortened (see Question 3).

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

Yes, but the respondent must be incorporated in the proceedings as a party.

²³ R. Reusser, 'Grounds for divorce and separation', in: H. Hausheer (Publisher), *Vom alten zum neuen Scheidungsrecht*, Bern 1999, marginal note 1.86; H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern 2002 (to be published shortly), marginal note 10.27.

²⁴ See also BGE 128 III 3.

²⁵ With regard to the Swiss Federal Supreme Court's affirmation of a hardship clause in accordance with the ZGB of 1907 see BGE 109 II 363 ff.

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

Preliminary remark: The final failure of the marriage, i.e. the irretrievable breakdown, is a prerequisite in all the grounds for divorce under the Swiss Code of Civil Law.²⁶ In specific terms the irretrievable breakdown of the marriage is deemed to be established by the filing of a *joint application for divorce* by both spouses (Articles 111 and 112 Swiss Code of Civil Law), by a *four-year period of separation* (Article 114 Swiss Code of Civil Law) or by the *unreasonableness of continuing the marital bond* (Article 115 Swiss Code of Civil Law).²⁷

Hereinafter this section will deal exclusively with *divorce after a period of separation* (Article 114 Swiss Code of Civil Law) (see sections B.III.1. and 2. above with regard to the other grounds for divorce).

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

The final failure of the marriage, i.e. irretrievable breakdown is established in terms of the four-year period of separation (Article 114 Swiss Code of Civil Law).

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

Article 114 Swiss Code of Civil Law represents a formalised ground for divorce which dispenses with the attribution of so-called fault for the divorce or responsibility of this kind.²⁸ Any enquiry as to the status of the marriage which goes beyond confirming that the spouses have

²⁶ See Message ('Botschaft') from the Federal Council to the National Council and Council of States No. 95.079 regarding the amendment of the Swiss Code of Civil Law (marital status, marriage, divorce, children's law, obligation to support relatives, matrimonial home, guardianship and marriage settlement) of 15.11.1995, p. 83.

²⁷ See also H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.04 f.

²⁸ R. Reusser, 'Grounds for divorce and separation', in: H. Hausheer (Publisher), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, marginal note 1.63.

lived apart for the required period of time is inadmissible.²⁹ The question of fault is consequently of absolutely no relevance in this connection.

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

No.³⁰

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

The separation must have lasted for four years *on the date when the petition is filed* (Article 114 Swiss Code of Civil Law). See Question 3 with regard to efforts to introduce amendments aimed at shortening the length of the period of separation.

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

Yes, it is sufficient to have consciously and deliberately lived apart for four years. The separation must be proved by the applicant spouse (Article 8 Swiss Code of Civil Law). The court is bound by the assumption that the marriage has irretrievably broken down after a four-year period of separation.³¹

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

(a) Which circumstances suspend the term of separation?

²⁹ R. Reusser, 'Grounds for divorce and separation', in: H. Hausheer (Publisher), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, marginal note 1.76.

³⁰ See *Message ('Botschaft') from the Federal Council to the National Council and Council of States No. 95.079 regarding the amendment of the Swiss Code of Civil Law (marital status, marriage, divorce, children's law, obligation to support relatives, matrimonial home, guardianship and marriage settlement)* of 15.11.1995, p. 85, with regard to the rejection of a certain duration of the marriage.

³¹ R. Reusser, 'Grounds for divorce and separation', in: H. Hausheer (Publisher), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, marginal note 1.76.

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The *separation* must be *linked to the marriage*, i.e. one or both of the spouses must have instigated the separation consciously and intentionally because they reject the conjugal community.³²

The four-year *period of separation starts* on the date on which a spouse intentionally ceases to cohabit with the other spouse or - in exceptional cases - when a spouse never takes up cohabitation. A brief unsuccessful attempt at cohabitation does not have any influence on the expiration of the period.³³ An actual joint household may no longer be in place and there may be no significant personal relationships between the spouses; an occasional encounter in the sense of mere proximity which is unavoidable when certain rooms are used by both spouses does not, on the other hand, suspend the term of separation.³⁴

(b) Does the separation need to be intentional?

See Question 49 (a).

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

See Question 49 (a).

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

No. After a four-year period of separation the court is bound by the assumption that the breakdown of the marriage is irretrievable.

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

No.

³² R. Reusser, 'Grounds for divorce and separation', in: H. Hausheer (Publisher), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, marginal note 1.71.

³³ *Message ('Botschaft') from the Federal Council to the National Council and Council of States No. 95.079 regarding the amendment of the Swiss Code of Civil Law (marital status, marriage, divorce, children's law, obligation to support relatives, matrimonial home, guardianship and marriage settlement)* of 15.11.1995, p. 92.

³⁴ R. Reusser, 'Grounds for divorce and separation', in: H. Hausheer (Publisher), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, marginal note 1.73.

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?*

Within the framework of a *petition* for divorce filed on the basis of Article 114 Swiss Code of Civil Law the spouses are not required to enter into an agreement. However, at least the applicant spouse will logically submit proposals regarding the ancillary consequences of the divorce. In the final analysis, i.e. unless a divorce agreement is reached prior to the divorce decree, it is the judge who has to decide with respect to such proposals.

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

See Question 31. The court must also examine in general whether the agreement is comprehensive, clear and neither unlawful nor manifestly unreasonable (Article 140 § 2 Swiss Code of Civil Law).

A special standard applies to scrutinizing those *matters pertaining to children*: In this connection the court examines the facts *ex officio* and has complete discretion to weigh the evidence (Article 145 § 1 Swiss Code of Civil Law). The prerequisite of an official examination (*'Offizial- und Untersuchungsmaxime'*) applies without exception. This means that it is not sufficient for the parents simply to agree with one another with regard to matters pertaining to children and that the parents are not empowered to decide on the children's legal rights (e.g. with regard to maintenance).

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. However, see also the remarks on Question 42.

C. SPOUSAL MAINTENANCE AFTER DIVORCE

I. General

Switzerland

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

Articles. 125 - 132 Swiss Code of Civil Law.

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

The Swiss Civil Code of 1907 contained provisions pertaining not only to payments in respect of maintenance but also to performance in respect of property rights in connection with divorce in the old Articles 151 - 153 Swiss Code of Civil Law.³⁵

The old Article 151 Swiss Code of Civil Law provided for compensation for the impairment of property rights (in particular, until the 1984 reform of marital law - which came into effect in 1988 - in respect of a claim for maintenance by the wife who maintained the household) or for the impairment of any expectancy of an inheritance (in particular based on a marital contract or on inheritance law). It was the purpose of this provision to effect an adjustment for the damage in terms of property rights which one spouse would incur as a result of the judicial dissolution of the marriage due to the fault of the other in relation to the divorce, in particular the loss of marital claims to maintenance.³⁶

In contrast, the so-called allowance in the case of need (*'Bedürftigkeitsrente'*) defined in the old Article 152 Swiss Code of Civil Law was founded on the concept of post-marital solidarity; its aim was to avoid financial hardship on the part of a spouse to whom no blame could be attached.³⁷

³⁵ See with regard to post-marital maintenance in the old law in extensive detail A. Spycher, *Unterhaltsleistungen bei Scheidung: Grundlagen und Bemessungsmethoden*, Bern, 1996, p. 26 ff.

³⁶ *Message ('Botschaft') from the Federal Council to the National Council and Council of States No. 95.079 regarding the amendment of the Swiss Code of Civil Law (marital status, marriage, divorce, children's law, obligation to support relatives, matrimonial home, guardianship and marriage settlement)* of 15.11.1995, p. 23. For a summary of the case law: Decision of the Swiss Federal Court BGE 115 II 6 ff.

³⁷ A. Spycher, *Unterhaltsleistungen bei Scheidung: Grundlagen und Bemessungsmethoden*, Bern, 1996, p. 39.

The most important statutory requirement for a claim based on the old Article 151 or 152 Swiss Code of Civil Law was the „absence of fault’ on the part of the applicant. However, this prerequisite has been increasingly diluted by the case law of the Swiss Federal Supreme Court.³⁸

In the amendment of the divorce law of 26 June 1998 which came into operation on 1 January 2000 the principle of fault was also abandoned in maintenance law.³⁹ Post-marital maintenance payments have since – subject to manifest iniquity in accordance with Article 125 § 3 Swiss Code of Civil Law – derived their justification from the continued solidarity of divorced spouses.⁴⁰ In this connection the guiding notion is that, depending on the concrete circumstances prevailing at the time of the divorce, it is no longer feasible and at the same time reasonable in every case to be expected to revert to individual self-sufficiency after a period spent in a joint maintenance community in marriage.

Criteria which are applicable to the decision as to whether a maintenance contribution is to be paid and, if so, then how much should be paid and for how long are now to be found in Article 125 § 2 Swiss Code of Civil Law. The practice of the Swiss Federal Supreme Court which prevailed under the old law⁴¹ has thus been codified. This codification, however, took place in a modified divorce law environment to the extent that, on the one hand, the regulation of post-marital maintenance is in principle no longer linked to fault and, on the other, a distinction is no longer made between the loss of an

³⁸ See Message (‘Botschaft’) from the Federal Council to the National Council and Council of States No. 95.079 regarding the amendment of the Swiss Code of Civil Law (marital status, marriage, divorce, children’s law, obligation to support relatives, matrimonial home, guardianship and marriage settlement) of 15.11.1995, p. 22 f., and further references

³⁹ Message (‘Botschaft’) from the Federal Council to the National Council and Council of States No. 95.079 regarding the amendment of the Swiss Code of Civil Law (marital status, marriage, divorce, children’s law, obligation to support relatives, matrimonial home, guardianship and marriage settlement) of 15.11.1995, p. 29.

⁴⁰ See A. Spycher, *Unterhaltsleistungen bei Scheidung: Grundlagen und Bemessungsmethoden*, Bern, 1996, p. 273 f.

⁴¹ Summarised in the ‘leading case’ BGE 115 II 6 ff.

Switzerland

inheritance expectancy, a substitute for maintenance and an allowance based on need.⁴²

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. Maintenance to the former spouse is governed in Articles 125 - 132 Swiss Code of Civil Law.

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?*

An explicit connection between post-marital maintenance and the other financial consequences of a divorce is provided in Article 125 § 2 section 8 Swiss Code of Civil Law. Pursuant thereto - among other things - *expectations from vocational pension plans*, including the anticipated result of the division of pension termination benefits which is always to be effected in a divorce (see Articles 122 - 124 Swiss Code of Civil Law), are to be taken into account in the decision as to whether maintenance must be paid and, if so, how much and for how long.

On the other hand, post-marital maintenance and *the law of matrimonial property* are independent of one another in terms of form. However, it turns out to be imperative to take the result of the division of matrimonial property (which must invariably take place in a divorce) into account as an additional criterion to be applied to post-marital maintenance insofar as the degree of self-sufficiency (the possible capacity for self-sufficiency in accordance with Article 125 § 1 Swiss Code of Civil Law) of the spouse who wishes to claim maintenance is also a question to be considered (see also Article 125 § 2 section 5 Swiss

⁴² H. Hausheer, 'Divorce maintenance and the family home', in: H. Hausheer (Publisher), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, p. 119 ff., Marginal note no. 3.49.

Code of Civil Law, which in general stipulates that the spouses' assets are to be taken into consideration).⁴³

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

Yes. Not just the spouses' assets (Article 125 § 2 section 5 Swiss Code of Civil Law), which also include their claims under property rights (see Question 59), but social security *expectancies* (state old age and survivors' insurance) and vocational pension plans or any other private or state pension benefits (Article 125 § 2 section 8 Swiss Code of Civil Law) are also part and parcel of the overall criteria which are decisive with regard to post-marital maintenance.

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?*

Post-marital maintenance is exclusively regulated – subject to a lump-sum settlement in accordance with Article 126 § 2 Swiss Code of Civil Law – under *Article 125 Swiss Code of Civil Law*.

In Article 125 Swiss Code of Civil Law the previous maintenance allowance as a substitute for maintenance (*'Unterhaltersatzrente'*) as defined in the old Article 151 § 1 Swiss Code of Civil Law – which was based on the concept of compensation for damage – and the equity allowance to ensure at least the minimum subsistence level under family law in accordance with the old Article 152 Swiss Code of Civil Law were merged with each other. In this way *two different concepts were amalgamated*, i.e. on the one hand, compensation for the individual claim to maintenance that is lost upon the dissolution of the marriage and, on the other, post-marital support in the context of equity.⁴⁴ In this connection the principle of the post-marital obligation to provide support has, under the new divorce law, clearly gained in significance in relation to the notion of compensation for damage. In contrast to the

⁴³ See also BGE 127 III 289 with unpublished E. 2c [5C.20/2001].

⁴⁴ See H. Hausheer, 'Recent developments in compensation for damages in the field of family law, in particular with regard to household and 'divorce damages', p. 16.

maintenance allowance as a substitute for maintenance in accordance with the old Article 151 § 1 Swiss Code of Civil Law, the law concerning post-marital maintenance is basically regulated with no reference to fault, as is shown by the inverse conclusion in Article 125 § 3 Swiss Code of Civil Law, but - in comparison to the previous equity allowance in accordance with the old Article 152 Swiss Code of Civil Law - it is no longer limited in scope to a slightly extended minimum subsistence⁴⁵.

To briefly summarise, the law of post-marital maintenance is founded upon the principle of the self-sufficiency of each spouse (Article 125 § 1 Swiss Code of Civil Law). Only if it turns out to be impossible and/or unreasonable for one spouse to attain a 'fitting' degree of self-sufficiency does a claim to maintenance arise (Article 125 §§ 1 and 2 Swiss Code of Civil Law). Maintenance may only be completely excluded or reduced in the cases restrictively defined in Article 125 § 3 Swiss Code of Civil Law. The decisive criterion in this connection, however, is what is considered to be 'fitting' in each specific case (see Question 62).

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.*

Regardless of the types of grounds cited for divorce, any *post-marital maintenance* is *uniformly* governed by the rules contained in Articles 125 - 132 Swiss Code of Civil Law.

However, case law still continues - as was previously the case - continues to make a clear distinction with respect to 'fitting' maintenance, depending on whether or not the marriage had a lasting effect on the spouse's way of life ('*lebensprägend*'). If it did not have such a lasting effect the pre-marital circumstances will be taken into

⁴⁵ See H. Hausheer, Recent developments in compensation for damages in the field of family law, in particular with regard to household and 'divorce damages', p. 21.

consideration, otherwise it will be the last standard of living enjoyed during the marriage which will be taken into account.⁴⁶

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?

Within the framework of the *divorce* the spouses must submit documentation to the court (in accordance with Article 170 Swiss Code of Civil Law) regarding their income and assets.

The law does not explicitly stipulate an actual right to information from the other divorced spouse with regard to changes in his or her income and assets *after the divorce*. To a certain extent this represents a contradiction to the aim of Article 129 Swiss Code of Civil Law, according to which maintenance provisions may be amended by a judicial decision if there is a significant and lasting change in circumstances. Consequently, it is up to the divorced spouses who may have a potential claim in this respect to keep track of the other divorced spouse's situation concerning income and assets. However, within the framework of court proceedings information must generally be submitted and the evidence must be weighed in accordance with the rules of the law of civil procedure.

II. Conditions under which maintenance is paid

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

The *prerequisite conditions* for post-marital maintenance are stipulated in Article 125 Swiss Code of Civil Law.

Maintenance must only be paid by one spouse if the other spouse cannot reasonably be expected to provide for himself/herself a

⁴⁶ An earlier example may be found in BGE 109 II 186 f. and a recent one in BGE of 04.04.2001 [5C.278/2000], *ZBJV* 138, 2002, p. 30 ff.

fitting level of maintenance including commensurate provision for old age (Article 125 § 1 Swiss Code of Civil Law).

With regard to the decision as to *whether* maintenance is to be paid and, if so, *how much* and *for how long*, Article 125 § 2 Swiss Code of Civil Law contains a list of decisive criteria which, however, is not conclusive.⁴⁷ In particular the following aspects are to be taken into consideration: the division of duties during the marriage (section 1),⁴⁸ the duration of the marriage (section 2),⁴⁹ the standard of living during the marriage (section 3), the spouses' age and state of health (section 4), the spouses' income and assets (section 5),⁵⁰ the scope and duration of childcare still to be provided by the spouses (section 6),⁵¹ the spouses' professional qualifications and their employment prospects as well as the probable expense of reintegrating, i.e. finding gainful employment for the person entitled to maintenance (section 7), and the expected benefits from the state old age and survivors' insurance and vocational or other pension benefit plans (section 8).

The criteria listed in *sections 4, 6 and 7* are of special significance.⁵²

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

Post-marital maintenance is *basically* to be paid *without any reference to fault*. In principle Article 125 Swiss Code of Civil Law is neither based on the absence of fault as a prerequisite condition for post-marital maintenance nor on a requirement of fault on the part of the spouse liable to pay maintenance.⁵³ The refusal or reduction of an amount owed may however be permitted on the ground of manifest inequity;

⁴⁷ The use of the term 'in particular' infers that the listed criteria are only provided as examples.

⁴⁸ See BGE 127 III 140.

⁴⁹ NGE 127 III 140.

⁵⁰ See BGE 127 III 289. See under the old law also BGE 117 II 16; 117 II 519; 114 II 117.

⁵¹ See BGE of 04.04.2001 [5C.278/2001], *ZBJV* 138, 2002, p. 30 ff.

⁵² See already BGE 115 II 6. Also H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note. 10.82.

⁵³ H. Hausheer, 'Divorce maintenance and the family home', in: H. Hausheer (Hrsg.), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, p. 119 ff., marginal note 3.28.

this may in particular be affirmed if the type of conduct defined in Article 125 § 3 Swiss Code of Civil Law has been demonstrated.⁵⁴ This refers to the claimant, it is true, and not to the party liable to pay maintenance although there is no reason why the concept expressed here should not be reversed in connection with the reasonableness of post-marital self-sufficiency on the part of the spouse entitled to maintenance.

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)?*

Yes, insofar as the objective element of Article 125 § 3 section 2 Swiss Code of Civil Law is fulfilled, i.e. the claimant has deliberately caused his or her hardship. For the rest, all the criteria stated in Article 125 § 2 Swiss Code of Civil Law and all the circumstances of each individual case are to be taken into account.

If one spouse *gives up his or her job* during the marriage, this is, in accordance with Article 125 § 2 section 1 (division of duties during the marriage) and section 7 (qualifications, employment prospects and the expense of reintegration/finding employment for the claimant) Swiss Code of Civil Law, a particularly important criterion with regard to the decision as to whether maintenance is to be paid and if so how much and for how long.⁵⁵ The same applies to post-marital childcare in connection with minor children.⁵⁶

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

The circumstances at *the time of the divorce* are basically what count when it comes to deciding and awarding any maintenance within the framework of the divorce decree. However, the claimant's future

⁵⁴ H. Hausheer, 'Divorce maintenance and the family home', in: H. Hausheer (Hrsg.), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, p. 119 ff., marginal note 3.28; H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.70.

⁵⁵ BGE 127 III 291 E. 2a/a, see also BGE of 04.04.2001 [5C.278/2000], *ZBJV* 138, 2000, p. 30 ff.

⁵⁶ BGE 115 II 6 ff., was already of fundamental importance.

possible and reasonable - and consequently *foreseeable (hypothetical)* - *income* will *also* be added to his or her capacity for self-sufficiency.⁵⁷

Unforeseeable changes that occur later are to be taken into consideration in accordance with Article 129 Swiss Code of Civil Law if an allowance has been awarded. In this connection special reference must be made to Article 129 § 3 Swiss Code of Civil Law, in accordance with which the claimant may request the award of an allowance or an increase in such an allowance within five years of the divorce, if the divorce decree originally stated that it was not possible to award an allowance to cover 'fitting' maintenance but the financial situation of the person liable to pay maintenance has since improved accordingly.

III. Content and extent of the maintenance claim

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

Maintenance may basically only be claimed for as long as *the claimant's need* is established in terms of time.⁵⁸ In general the tendency today is to grant a maintenance allowance for a *limited period of time*.⁵⁹ In contrast, a *permanent maintenance allowance* for an unlimited period of time is an ever more seldom *exception* which is only awarded if an improvement in the claimant's degree of self-sufficiency is no longer possible or cannot reasonably be expected in future. The former may apply, for example, in the case of an incurable illness,⁶⁰ the latter in the case of advancing years.⁶¹

⁵⁷ See *inter alia* BGE 128 III 5 ff. and of fundamental importance in respect of the old law also BGE 115 II 6 ff.; also see the remarks on Questions 83 and 87 below.

⁵⁸ As was already the case under the old divorce law BGE 109 II 184 ff. and BGE 110 II 225 ff.

⁵⁹ H. Hausheer, 'Divorce maintenance and the family home', in: H. Hausheer (Hrsg.), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, p. 119 ff., marginal note 3.51; H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.92.

⁶⁰ See *inter alia* BGE 127 III 65 ff. and BGE 127 III 289 ff.

⁶¹ As was already the case in BGE 115 II 6 ff. See together with many others also H. Hausheer, 'Divorce maintenance and the family home', in: H. Hausheer (Hrsg.), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, p. 119 ff., marginal note 3.61. Under the old law which was in force until the end of 2000 a lifelong allowance was generally awarded from the age of 45 onwards if the marriage had lasted for a long time and the spouses had divided their duties between one another; see BGE 115 II

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?*

If the financial situation of the party liable to pay maintenance permits, then in the case of a *marriage which had a lasting effect on the spouse's way of life* (see Question 62) post-marital maintenance will be owed which – combined with the claimant's capacity for self-sufficiency – guarantees the standard of living last enjoyed during the marriage.⁶² This is the upper limit of post-marital support in the sense of Article 125 Swiss Code of Civil Law. Any major post-marital career developments on the part of the spouse liable to pay maintenance are not taken into consideration unless they were just about to occur at the time of the divorce and consequently are to be deemed to be linked to the marriage. Divorce dissolves the marriage as a 'clean-break'.⁶³

If the available funds or the funds the liable party can reasonably be expected to obtain do not suffice to cover the last mutual standard of living and if it is not possible to make up for the deficit by additional earnings, both divorced spouses are entitled to the *same standard of living on a correspondingly lower level*.⁶⁴

If there is a *shortage*, then the debtor only has to pay maintenance to the extent that he is left with his own minimum subsistence level under family law.⁶⁵

6 ff. With regard to the new divorce law there is now a tendency to raise this age to 50, see BGE 127 III 140.

⁶² As was already the case in BGE 118 II 232 E. 3a; see also BGE of 04.04.2001 [5C.278/2000] ZBJV 138, 2002, 30 ff.; see also together with many others H. Hausheer, 'Divorce maintenance and the family home', in: H. Hausheer (Hrsg.), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, p. 119 ff., marginal note 3.53.

⁶³ H. Hausheer, 'Divorce maintenance and the family home', in: H. Hausheer (Hrsg.), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, p. 119 ff., marginal note 3.52.

⁶⁴ BGE of 04.04.2001 [5C.278/2000]; see also together with many others H. Hausheer, 'Divorce maintenance and the family home', in: H. Hausheer (Hrsg.), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, p. 119 ff., marginal note 3.54.

⁶⁵ BGE 126 III 353; 127 III 70 E. b; 127 III 292 E. bb.

70. *How is maintenance calculated? Are there rules relating to percentages or fractional shares according to which the ex-spouses' income is divided? Is there a model prescribed by law or competent authority practice?*

The two underlying factors used to calculate maintenance are, on the one hand, the post-marital *needs and*, on the other, each spouse's *ability to pay*. Needs which are established can only be satisfied subject to a corresponding ability to pay.⁶⁶

The statutory provisions under maintenance law, in particular Article 125 § 2 Swiss Code of Civil Law, stipulate the *criteria* in *abstract terms* according to which the amount of maintenance is to be calculated. However, the law does not state how the abstract stipulations are to be converted into concrete figures.

In practice *two methods of calculation* are now in common use, i.e. the abstract method, on the one hand, and the concrete method, on the other.⁶⁷

According to the *abstract method* the claim for maintenance is determined as a percentage share of the total relevant income. Thus the so-called 'one-third rule' states that a wife who does not work receives approximately one-third of her husband's income.⁶⁸ The advantage of the abstract method is that the calculation is a relatively simple one since specific details with regard to needs do not need to be clarified. However, determining a percentage share may be considered to be somewhat arbitrary.

The abstract method is mainly used in determining maintenance for minor children. The percentages for one, two and three children respectively are usually 15-17% (Canton of Bern: 17%), 25-27% (27%) and 30-35% (35%). On the other hand, when it comes to calculating the spouse's maintenance allowance, the abstract method can nowadays

⁶⁶ See H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal notes 10.78 and 10.97.

⁶⁷ H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.98.

⁶⁸ BGE 108 II 82.

only be used as a form of reverse control in families with average financial circumstances and even then it can only be applied if the claimant spouse has no income of his or her own which needs to be taken into account.⁶⁹

In contrast to the abstract method the *concrete methods of calculation* are not just based on a calculation of the income but also on the spouses' needs. Admittedly, a special, individual assessment of the actual needs of the spouses is not carried out in each case. This type of procedure would take an unreasonable amount of time and would also encounter considerable difficulties with regard to evidence. The concrete methods, therefore, work on the assumption of flat-rate amounts which are combined with the individual spouse's specific needs (e.g. the costs of renting an apartment, health insurance, etc.).⁷⁰

The use of the method of minimum subsistence calculation as defined in debt prosecution law combined with a *distribution of any surplus* is becoming increasingly popular (in the cantonal divorce courts⁷¹) in those cases in which there is a shortage or, as is the norm, there are sufficient funds available. First of all, the needs of all the claimants, i.e. the so-called family minimum subsistence amounts, are calculated on a concrete basis.⁷² The sum total of all the family minimum subsistence amounts is then compared to the total relevant income (including any hypothetical income) after the dissolution of the joint household. This either produces a deficit or a surplus. Any surplus is to be divided equally among the claimants. If necessary, a smaller percentage share is to be allocated for younger children. In any case the surplus to be distributed – as already mentioned in reply to Question 69 – does not

⁶⁹ See BGE 116 II 116. Regarding the abstract method as a whole: H Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note. 10.99 f.

⁷⁰ See H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.101.

⁷¹ The Swiss Federal Supreme Court has, on the other hand, been generally reserved in relation to a systematic division of the surplus in BGE of 19.04.2001 [5C.32/2001], BGE of 09.04.2001 [5C.54/2001] and BGE of 09.10.2000 [5C.177/2000].

⁷² The basis is provided by the guidelines for the calculation of minimum subsistence (bare necessities) in accordance with debt prosecution law pursuant to Article 93 Law of 24.11.2000, see www.be.ch/og/d/kreisschreiben.html.

have to fulfil any purpose other than, at most, ensuring the previous standard of living.⁷³

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 maximum limit for post-marital maintenance in the sense of Article 125 Swiss Code of Civil Law basically amounts to - in the case of a marriage that had a lasting effect on the spouse's lifestyle as already mentioned in several cases (see the replies to Questions 62 and 69) - the *last standard of living enjoyed during the marriage*.⁷⁴ An upper limit for maintenance after divorce is above all necessary because divorce is intended to dissolve the marriage in the sense of a 'clean break' and to bring the marriage to an end as an economic community.⁷⁵ For the rest, however, there are *no longer any limits in terms of content* as there used to be in the allowance based on need *in accordance with the old Article 152 Swiss Code of Civil Law*. There have never been *maximum amounts* of maintenance.

If the *abstract method of calculation* is used, then only the proportional share of the relevant income has to be calculated. The claimant then has to use this share in the best way possible.

The minimum subsistence amount as defined in debt prosecution law is used as the underlying basis for the calculation of the claimant's needs in the *surplus distribution method*. This minimum subsistence is made up of a basic amount and various extras. Each person is entitled to the basic amount which covers his or her needs for food, clothing, hygiene and certain incidentals. The extras - as defined in debt prosecution law - for living expenses, unavoidable professional expenses and certain social security contributions (*inter alia* health

⁷³ BGE 118 II 232 E. 3a. and BGE of 04.04.2001 [5C.278/2000] ZBJV 138, 2002, p. 30 ff. In extensive detail see H. Hausheer and A. Spycher (Publisher), *Handbuch des Unterhaltsrechts*, Bern, 1997, marginal note 02.27 ff. with examples of calculations in marginal note 02.71 ff.

⁷⁴ BGE of 04.04.2001 [5C.278/2000], ZBJV 138, 2002, p. 30 ff. See with regard to the old law BGE 118 II 232.

⁷⁵ H. Hausheer, 'Divorce maintenance and the family home', in: H. Hausheer (Hrsg.), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, p. 119 ff., marginal note 3.52.

insurance) are only to be taken into account if the costs to be covered are actually incurred. The minimum subsistence amount - as defined in debt prosecution law - is increased for certain additional expenses (insurance, taxes, telephone subscription rates, radio and TV licences, debts in respect of personal loans).⁷⁶ Any other specific needs of the claimant are then to be satisfied individually out of his or her share of the surplus.

The aspect of *expenses for reintegration/finding gainful employment* is - apart from the percentage share and the share of the surplus - mainly taken into consideration in determining the duration of the claim to maintenance.

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

Yes. The maximum limit for post-marital maintenance in the sense of Article 125 Swiss Code of Civil Law basically amounts to - in the case of a marriage that had a lasting effect on the spouse's lifestyle as already mentioned in several cases (see the replies to Questions 62 and 69) - the *last standard of living enjoyed during the marriage*.⁷⁷ An upper limit for maintenance after divorce is above all necessary because divorce is intended to dissolve the marriage in the sense of a 'clean break' and to bring the marriage to an end as an economic community.⁷⁸ For the rest, however, there are *no longer any limits in terms of content* as there used to be in the allowance based on need in accordance with the old Article 152 Swiss Code of Civil Law. There have never been *maximum amounts* of maintenance.

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

⁷⁶ On this subject as a whole see H. Hausheer and A. Spycher, 'The various methods of calculating maintenance', *ZBJV*, 1997, p. 166 ff.; see also H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.103.

⁷⁷ BGE of 04.04.2001 [5C.278/2000] *ZBJV* 138, 2002, p. 30 ff. See with regard to the old law BGE 118 II 232.

⁷⁸ H. Hausheer, 'Divorce maintenance and the family home', in: H. Hausheer (Hrsg.), *Vom alten zum neuen Scheidungsrecht*, Bern, 1999, p. 119 ff., marginal note 3.52.

The law does *not provide* for a rigid reduction in the level of maintenance after a certain time. Nonetheless in particular the *criteria in respect of needs* defined in Article 125 § 2 section 6 Swiss Code of Civil Law often result in the claim for maintenance being reduced or zero-rated, for example once childcare duties come to an end or after the expiry of a period of time which the claimant requires for reintegration/finding employment. As a matter of principle, maintenance is after all only owed for as long as the claimant's needs are established, taking his or her capacity for self-sufficiency into account.⁷⁹

In order to do justice to future developments, the payment of a maintenance allowance or the amount thereof may be made contingent upon certain *conditions* at the time of the divorce (Article 126 § 3 Swiss Code of Civil Law).

In the event of a *change in circumstances* a maintenance allowance may then be reduced by the court, or even increased or revoked (this, however, is only the case if restrictive conditions are met) (Article 129 Swiss Code of Civil Law), or it may rather lapse by virtue of the law, for example in the case of remarriage and by analogy in connection with a stable state of cohabitation.

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

Maintenance is usually paid in cash in the form of an *allowance* (Article 126 § 1 Swiss Code of Civil Law). On rare occasions, maintenance may be paid in kind (e.g. by providing an apartment in the other spouse's house). Should *special circumstances* justify doing so, a *lump-sum settlement* may also be ordered instead of an allowance (Article 126 § 2 Swiss Code of Civil Law).

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 lump-sum settlement is only prescribed by law in Article 126 § 2 Swiss Code of Civil Law in the event of special circumstances which

⁷⁹ As was already the case in BGE 109 II 186.

justify such a settlement. If the applicant spouse or the debtor asserts such special circumstances, then it is up to the divorce court to decide whether such special circumstances actually apply.

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

There is *no* automatic indexation of maintenance. Depending on the concrete circumstances (in particular whether the party liable to pay maintenance has an income which is subject to indexation), the court may, however, stipulate an adjustment for the increase in the cost of living in the divorce decree and order that the maintenance be automatically increased or reduced in line with certain changes in the cost of living (Article 128 Swiss Code of Civil Law).

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

The court may link the amount of maintenance *ex ante* to any future change in circumstances and this may be contingent upon certain *conditions* (Article 126 § 3 Swiss Code of Civil Law).

Ex post, i.e. once a change in circumstances has occurred, an *adjustment* of the allowance may be effected by a court decision following the rules of Article 129 Swiss Code of Civil Law.

Furthermore, the *spouses* may provide for possibilities for adjustments in the divorce agreement or they may subsequently agree to adjustments *by way of a legal transaction*.

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?

If the debtor cannot cover the family minimum subsistence level for all parties entitled to maintenance even despite additional reasonable efforts, then the *debtor* only has to pay maintenance insofar as he or she

is left with his or her *own family minimum subsistence*.⁸⁰ This was already the standard practice of the Swiss Federal Supreme Court under the old divorce law and was confirmed in the divorce reform in that a statutory provision to the contrary was rejected. In such a case it may under certain circumstances occur that the claimant spouse who is basically entitled to receive maintenance will not even be granted the minimum subsistence, because under family law it is not permitted to distribute more money than is actually available. The claimant must obtain a supplement from the social welfare department in order to reach the necessary minimum subsistence amount (or perhaps from relatives on the basis of the obligation to support relatives in accordance with Article 328 Swiss Code of Civil Law).

Under such circumstances it would be appropriate in the divorce decree to determine the amount of the shortfall in respect of a fitting level of maintenance for the claimant spouse with a view to its possible adjustment in accordance with *Article 129 § 3 in connection with Article 143 section 3 Swiss Code of Civil Law*.

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?*

Any increase in the debtor's income is to be compared with the circumstances at the *time of the divorce* - and not with the situation at the time of the de facto or judicial separation.

If the divorce decree stated that it was not possible to order an allowance that covered a fitting level of maintenance, and if the debtor's economic circumstances have accordingly changed, then the claimant may, *within five years* of the divorce, request that a maintenance allowance be granted or that the allowance be increased (*Article 129 § 2 Swiss Code of Civil Law*). In this way justice can be done

⁸⁰ BGE of 12.03.2002 [5C.296/2001] and unpublished E. 3 of BGE 127 III 70 with further references. In this connection the Swiss Federal Supreme Court assumes – one can admittedly have certain reservations about this – that a dispensation will be granted from normal tax liability: BGE 126 III 353; 127 III 70; 127 III 292; on this matter see H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.90.

in those cases in which the debtor's financial situation and consequently also his or her income has improved considerably in a relatively short time after the divorce. The justification for such limitation in terms of time is that the economic community is also dissolved upon the divorce so that developments which can no longer be deemed to be linked to the marriage should be disregarded.

Furthermore, the claimant may – if the debtor's income has increased in an unforeseen manner after the divorce – request a future *adjustment* to the maintenance in line with the *increase in the cost of living*, even if an automatic indexation was not previously stipulated (Article 129 § 2 Swiss Code of Civil Law).

The law does not provide any further *statutory* possibility for increasing the maintenance amount in the event of an increase in the debtor's income. A (first) marriage should not become a divorced spouse's life insurance and consequently act as a de facto restriction on the other spouse's freedom to subsequently remarry under 'normal conditions'.⁸¹ On the other hand, there is no barrier to prevent contractual agreements to the contrary.

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

Only such debts which are recognised in respect of the determination of the family minimum subsistence are to be included in the calculations. See also Question 71. If the debtor has to meet *other debt obligations* as well as his liability to pay maintenance, it is in the interest of the maintenance creditor to *be extremely cautious* in recognising such other debt obligations in the calculation of the debtor's needs.⁸² Literature deems it necessary to include debts in the calculation of the debtor's basic needs if the debt was created prior to the dissolution of the joint household for the purpose of the maintenance of both spouses but not, on the other hand, if the debt is merely in the interest of one party, unless both spouses were jointly and severally liable. For example, repayments of capital in the case of mortgage loans should

⁸¹ On this subject as a whole see also H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.122.

⁸² BGE 63 III 111; 127 III 292.

not be included in the calculation of basic needs according to this doctrine because they create assets; a deviation from this principle should only be accepted if financial circumstances permit. If the maintenance debtor has to take out an additional loan to meet a claim by the maintenance debtor based on the division of marital property, then according to the practice of the Swiss Federal Supreme Court the amortization instalment which thus arises may not therefore be included in the calculation of the debtor's basic needs.⁸³

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 those legal obligations of the debtor which are recognised as being *part of the family minimum subsistence* are to be taken into account. Moral obligations or voluntary contributions in favour of other persons based on an *ethical obligation* are *irrelevant*.

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

The spouses' income and assets are a criterion with respect to the ordering of maintenance contributions (*Article 125 § 2 section 5 Swiss Code of Civil Law*).

In the legal literature and in practice, the result of the division of matrimonial property is used among other factors to assess the self-sufficiency of each spouse, looking forward to the prospect of corresponding income from assets as well as to the future accretion of assets, in particular in the case of expectations based on inheritance law if it is a matter of additional and not just substitute income.⁸⁴ Consequently, maintenance is based on income from assets and only by way of exception on the utilisation of the assets themselves.

⁸³ BGE 127 III 292 ff.

⁸⁴ H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.81 ff., with further references.

This means that the *debtor* only needs to use his or her capital to a limited extent, although the income from assets is to be included in the assessment of his or her ability to pay.

According to practice the *substance of the claimant's assets* need not be encroached upon until the current income no longer suffices to cover his or her basic needs on a low level, unless there are substantial assets available.⁸⁵

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. If one party earns a lower income than can be expected based on his or her situation, then a *hypothetical income* is to be imputed to such a party. A similar rule applies if it seems reasonable for one party to return to work.⁸⁶ The same must apply even when the debtor has given up his or her job.⁸⁷ See the remarks on Question 67 above and with reference to the practice of the Swiss Federal Supreme Court as well as the comments on Question 87.

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?*

Income from social security is in general also to be taken into consideration when assessing the spouses' *ability to pay* (see Article 125 § 2 sections 5 and 8 Swiss Code of Civil Law). However, the debtor's obligation is limited by his or her own family minimum subsistence.

⁸⁵ H. Hausheer and A. Spycher (Publisher), *Handbuch des Unterhaltsrechts*, Bern, 1997, marginal note 01.75, 03.109 and 04.65, with references to BGE 110 II 323 f. and 114 II 18.

⁸⁶ BGE 128 III 5 f. E. 4a; among many others see also H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.81h.

⁸⁷ See BGE of 27.03.2002 [5C.326/2001] regarding child maintenance and BGE of 23 March 2001 [5C.64/2001]; see also H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.81 ff. for the reverse view with regard to the claimant and not the debtor.

Within the categories of income from social security it is however necessary to distinguish between *substitute* income (instead of wages) and *additional* income (a pension in addition to wages). Only the latter category affects the ability to pay or rather the capacity for self-sufficiency.⁸⁸

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?*

A *new spouse* may, on the basis of the marital obligation to provide support in accordance with Article 159 § 3 Swiss Code of Civil Law, be ordered to contribute so that his or her spouse can afford to meet his or her existing obligations in respect of maintenance.⁸⁹ See also Question 92.

As regards a *debtor's post-marital state of cohabitation*, it depends on the actual financial advantages enjoyed by the debtor or rather the possibility of a related improvement in the debtor's ability to pay.⁹⁰

Swiss law does not currently recognise the notion of a *registered partnership*.

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?*

⁸⁸ See H. Hausheer and A. Spycher (Publisher), *Handbuch des Unterhaltsrechts*, Bern, 1997, marginal note 05.69.

⁸⁹ Inter alia BGE in ZR 1994, No. 6. Details in this regard in H. Hausheer and C. Brunner, *Handbuch des Unterhaltsrechts*, marginal note 03.30 and in particular 03.92 ff. See also BGE 115 III 103 regarding child maintenance.

⁹⁰ Further details in H. Hausheer and A. Spycher (Publisher), *Unterhalt nach neuem Scheidungsrecht*, Bern, 2001, Chapter 10.

The claimant's entire income is basically to be taken into account when calculating his or her ability to pay and the capacity for self-sufficiency within the meaning of Article 125 § 1 Swiss Code of Civil Law. As a rule this consequently results in a corresponding reduction of the maintenance contribution.

A *separation* may mean that one spouse who previously did not work or only worked part-time must now work more in gainful employment in addition to performing services within the family. As long as this additional work is also balanced by additional work on the part of the spouse who works full time, there is no objection to an extension of the other spouse's duties. However, if it seems that the burden of one of the parties involved in the maintenance relationship is significantly larger than the burden of the other party or if one party is working much more than can reasonably be expected in the circumstances, then it must basically be possible to ignore the income actually earned in order to achieve an adjustment.⁹¹

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 court cannot oblige a divorced spouse to seek gainful employment or to work more in terms of gainful employment. However, if it is reasonable for the divorced spouse to seek gainful employment or to work more in terms of gainful employment after a divorce, then a corresponding *hypothetical income* is imputed to the divorced person with regard to his or her degree of self-sufficiency.⁹²

The concrete circumstances of the individual case are to be taken into account in the assessment of whether a divorced spouse may reasonably be expected to seek gainful employment again or to work more in terms of gainful employment. The criteria to be applied in such a decision are to be found in Article 125 § 2 Swiss Code of Civil Law, whereby special attention is to be paid to sections 4 (spouses' age

⁹¹ See in this connection the High Court of Basel-Land, decision of 18.1.1992, in: SJZ 1993, No. 20. On the subject as a whole see H. Hausheer and A. Spycher (Publisher), *Handbuch des Unterhaltsrechts*, Bern, 1997, marginal note 01.75 ff.

⁹² See BGE 119 II 317. In detail also H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.81 ff. in particular marginal note 10.81h ff.

and state of health), 6 (child-care duties) and 7 (qualifications and job prospects and the claimant's expected expense in reintegration/finding gainful employment).⁹³

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

Yes, at least in part. See also Article 125 § 2 section 5 Swiss Code of Civil Law, according to which the spouses' capital assets are to be taken into account in the decision as to whether a maintenance contribution is to be paid.

According to case law the substance of capital assets must not be encroached upon until the current income no longer suffices to cover the claimant's basic needs on a low level, unless there are substantial assets available.⁹⁴ See also the comments on Question 82 above including a reference to the pertinent decision of the Swiss Federal Supreme Court.

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 maintenance obligations of the claimant in relation to third parties such as children from an earlier marriage are to be taken fully into account. They accordingly reduce the claimant's ability to pay.⁹⁵ However, under certain circumstances it is necessary to adjust the various, i.e. the old and the new, maintenance obligations in order to achieve a mutual balance since the principle of priority based on age

⁹³ Of fundamental importance in this respect is BGE 115 II 6 ff. With regard to details concerning the most recent Swiss Federal Supreme Court practice see H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.82 ff.

⁹⁴ H. Hausheer and A. Spycher (Publisher), *Handbuch des Unterhaltsrechts*, Bern, 1997, marginal notes 01.75, 03.109 and 04.65, with references to BGE 110 II 323 f. and 114 II 18.

⁹⁵ See also with regard to a similar situation on the part of the debtor H. Hausheer and A. Spycher, 'The various methods of calculating maintenance', *ZBJV* 133, 1997, p. 164.

cannot automatically apply if there are several maintenance obligations.⁹⁶

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?*

Benefits which the claimant receives from social security are to be taken into account as *substitute income* in principle when establishing his or her claim to maintenance. Such individual income on the part of the person potentially entitled to maintenance in general increases his or her capacity for self-sufficiency, ensuing a corresponding cut-back in his or her maintenance needs so that in the final analysis the result is a reduction of the other divorced spouse's maintenance obligation.

However, in individual cases it is necessary to distinguish between *substitute income* and *social welfare*.

In the case of *substitute income* benefits are received from social security or private insurance which are intended to cover the loss of income in the event of the occurrence of a certain risk. If it is not certain whether and for how long the loss of earnings resulting from a switch from gainful employment to substitute income will have an effect, then a subsequent amendment to the calculation of maintenance based on uncertain income may be secured by means of a proviso.⁹⁷

If the preconditions for *social welfare* are met, these benefits may take the place of income from gainful employment or substitute income or may be paid in addition thereto. In this connection social welfare benefits are – in contrast to other types of income – *subsidiary* to any

⁹⁶ More details regarding the question of coordination of maintenance contributions are to be found in H. Hausheer and A. Spycher, *Unterhalt nach neuem Scheidungsrecht*, Bern, 2001, Chapter 8.

⁹⁷ H. Hausheer and A. Spycher (Publisher), *Handbuch des Unterhaltsrechts*, Bern, 1997, marginal note 01.37.

claim for maintenance. This means that they may not be taken into account as income in the calculation with regard to maintenance.⁹⁸

VI. Questions of priority of maintenance claims

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

In the Swiss Code of Civil Procedure there are no statutory rules regarding the priority relationship of maintenance claims. Consequently, the law is to be interpreted to determine whether maintenance for certain persons takes precedence over other maintenance claimants.⁹⁹

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

In relation to the debtor's *divorced spouse and a new spouse* the new spouse must – as already explained under Question 85 – do everything which is reasonable on the basis of the marital obligation to support (Article 159 § 3 Swiss Code of Civil Law), i.e. he or she must under certain circumstances make additional efforts before the debtor may request a reduction of maintenance contributions to his or her divorced spouse.¹⁰⁰ This obligation to make special efforts does not however mean that the first spouse has precedence over the second. If the ability to pay of all the parties involved has been exhausted in full, then shortfalls are basically to be borne by all the parties involved to an equal extent.¹⁰¹

⁹⁸ H. Hausheer and A. Spycher (Publisher), *Handbuch des Unterhaltsrechts*, Bern, 1997, marginal note 01.38.

⁹⁹ H. Hausheer and A. Spycher (Publisher), *Handbuch des Unterhaltsrechts*, Bern, 1997, marginal note 08.22.

¹⁰⁰ BGE 79 II 137 ff. See further references to court practice under Question 85 above.

¹⁰¹ A. Spycher, *Unterhaltsleistungen bei Scheidung: Grundlagen und Bemessungsmethoden*, Bern, 1996, p. 134, with further references.

The debtor's maintenance obligations towards a divorced spouse and a new spouse or among several divorced spouses are therefore *equal in ranking*.¹⁰²

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?*

Article 285 Swiss Code of Civil Law is decisive with regard to the calculation of maintenance for a child. In accordance with Article 285 § 1 Swiss Code of Civil Law the maintenance contribution should correspond to the child's needs and the parents' standard of living and their ability to pay; it should furthermore take the child's assets and income – as well as the contribution to the provision of child-care by the parent who was not awarded custody - into consideration.

The law does not stipulate any rank with regard to the relationship between the maintenance claim of a child and a divorced spouse's claim. Opinions are divided on this subject in doctrine and in practice: On the one hand, precedence is given to the child's maintenance, while, on the other, equal ranking is advocated for the maintenance claims of both the claims of divorced spouses and children that have not yet come of age.¹⁰³

The Swiss Federal Supreme Court – in a decision delivered some time ago – only indirectly referred to the relationship between the claims of minor children and the claims of spouses entitled to maintenance. It is to be inferred from the decision which was delivered in connection with a remarriage that an equal reduction in the claims has to take place.¹⁰⁴

¹⁰² BGE 79 II 140. On the subject as a whole see H. Hausheer and A. Spycher (Publisher), *Handbuch des Unterhaltsrechts*, Bern, 1997, marginal note 08.23 ff.

¹⁰³ With regard to this discussion see A. Spycher, *Unterhaltsleistungen bei Scheidung: Grundlagen und Bemessungsmethoden*, Bern, 1996, p. 133 ff., who is in favour of the introduction of a statutory provision which stipulates an equal ranking for spouses' and children's maintenance claims. See also with regard to the coordination of spouses' and children's maintenance and with regard to selecting a method: H. Hausheer and A. Spycher, *ZBJV* 133, 1997, p. 175 ff.

¹⁰⁴ BGE 79 II 137. On the subject as a whole see also H. Hausheer and A. Spycher (Publisher), *Handbuch des Unterhaltsrechts*, Bern, 1997, marginal note 08.27 ff.

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

The parents' maintenance obligation continues until the child *has reached the age of majority* (Article 277 § 1 Swiss Code of Civil Law). At this point in time the parental obligation to pay maintenance basically ends. This results in a new calculation of the spouses' ability to pay which can be taken into account according to the rules of Article 129 Swiss Code of Civil Law.

However, if the child does not yet have *an adequate education* upon reaching the age of majority, then the parents must provide maintenance to the extent that they can reasonably be expected to do so until a corresponding education can be completed (Article 277 § 2 Swiss Code of Civil Law).

The end of the obligation to pay maintenance to children may result in an *increase* in the allowance for the divorced spouse. If this possibility is foreseeable, it must already be specifically agreed upon at the time of the divorce.

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

Yes. The maintenance obligations of parents and spouses take precedence over the obligation to provide support for relatives (*Article 328 § 2 Swiss Code of Civil Law*). In general only those persons who have a high standard of living are subject to an obligation to provide support for relatives (Article 328 § 1 Swiss Code of Civil Law).¹⁰⁵

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

The obligation of relatives of the claimant to support him or her basically has no effect since the spouse's duty to maintain him or her takes precedence (Article 328 § 2 Swiss Code of Civil Law).

¹⁰⁵ On this subject in general H. Hausheer and A. Spycher (Publisher), *Handbuch des Unterhaltsrechts*, Bern, 1997, marginal note 08.36 ff.

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 obligation lapses *by virtue of the law* in the event of the claimant's remarriage, unless an agreement to the contrary has been reached (Article 130 § 2 Swiss Code of Civil Law). A statutory provision regarding the registered partnership is currently in preparation in Switzerland; in our opinion entering into a registered partnership must by analogy with the present provision contained in Article 130 § 2 Swiss Code of Civil Law result *ex lege* in extinguishing the post-marital maintenance claim. This also corresponds to the ruling foreseen in a preliminary draft of a Federal Act on the registered partnership (Article 36 §§ 3 and 4 *Vorentwurf RegPG*).¹⁰⁶

The maintenance obligation of the original spouse lapses *irretrievably*. This fact will need to be taken into account in the event of the dissolution of the subsequent second marriage when calculating maintenance contributions. The same ruling is explicitly foreseen for the registered partnership in Article 36 § 3 *Vorentwurf*

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?*

Yes, the practice of the Swiss Federal Supreme Court has turned corresponding rules into *judge-made law* which is always observed. In this connection a distinction is made between a qualified state of cohabitation and a normal state of cohabitation.

A *qualified marriage-type partnership* is deemed to exist if it is to be assumed that the divorced spouse receives the same support from his or her new partner as is owed among spouses.¹⁰⁷ A presumption of fact drawn up by the Swiss Federal Supreme Court is based on the premise that if a state of cohabitation lasts for five years or more then it is to be

¹⁰⁶ See also the Explanatory Report of November 2001 on this subject, p. 36.

¹⁰⁷ See *inter alia* BGE 118 II 237.

considered as such a qualified relationship; after this period of time the burden of proof to the contrary is incumbent on the respondent¹⁰⁸ or proof that, despite the existence of a qualified state of cohabitation, there are serious grounds for adhering to the maintenance allowance. If it is deemed to be a qualified state of cohabitation, then according to the practice of the Swiss Federal Supreme Court this results in extinguishing the post-marital maintenance claim because adhering to such a claim appears to be an abuse of rights. In contrast to remarriage which results *ex lege* in extinguishing the maintenance allowance (see Question 97 in this respect), the debtor must however regularly file a *suit for an amendment* in the event of a qualified, marriage-type partnership.¹⁰⁹

If the spouse who could basically claim the award of a maintenance allowance is already living in a consolidated state of cohabitation at the time of the divorce, then in accordance with recent Swiss Federal Supreme Court practice a maintenance payment should *already be rejected at the time of the divorce* as it is analogous to the above-mentioned court practice.¹¹⁰

If the claimant spouse is *living in a state of post-marital partnership which is not yet deemed to be a qualified state of cohabitation*, then it is possible in practice to suspend the maintenance contribution stipulated in the divorce decree. However, only limited use should be made of this possibility in order to allow the divorced claimant spouse a certain degree of latitude with regard to remarriage, since the debtor spouse also has such a degree of latitude. Moreover, according to Swiss Federal Supreme Court practice any improvement in the claimant's financial status arising from a marriage-type partnership is in any case to be taken into account in respect of the change in the claimant's needs.¹¹¹

¹⁰⁸ BGE 114 II 299.

¹⁰⁹ On the subject as a whole see also H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.111 - 10.113.

¹¹⁰ BGE 124 III 52.

¹¹¹ See BGE of 12 March 2002 [5C.296/2001]. More details in H. Hausheer, Th. Geiser and E. Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, 2nd edition, Bern, 2002 (to be published shortly), marginal note 10.121 with further references

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

A maintenance claim may not be denied simply because the marriage was of short duration. However, the duration of the marriage is one of the criteria to be applied in the decision as to whether maintenance is to be paid and, if so, how much and for how long (Article 125 § 2 section 2 Swiss Code of Civil Law). It can basically be said that the shorter the duration of the marriage, the greater the likelihood that no maintenance at all or merely a small amount of maintenance will be awarded because in such a case the *marriage did not turn out to have a lasting effect in terms of lifestyle*.¹¹² See the remarks on Questions 62, 69 and 72 in this respect.

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?*

Maintenance law is fundamentally based on a *no fault* concept. Accordingly the claimant's conduct during the marriage or facts in relation to the grounds for divorce have no relevance with regard to the maintenance claim. This is however subject to the principle of manifest inequity in accordance with Article 125 § 3 Swiss Code of Civil Law and the concrete examples laid down in sections 1 to 3 thereof. See the comments on Question 65 *et seq.* in this respect.

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

Yes. The maintenance claim ends – subject to an agreement to the contrary – upon the death of the claimant or debtor (Article 130 § 1 Swiss Code of Civil Law).

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?*

¹¹² See BGE of 04.04.2001 [5C.278/2000], ZBJV138, 2002, p. 30 ff.

Agreements regarding maintenance – even if they were already entered into beforehand – require the *judge's approval* in the divorce decree. The agreement regarding the consequences of the divorce is not legally valid until the court has given its approval. It should also be included in the summary of the judgment (*'Urteilsdispositiv'*) (Article 140 § 1 Swiss Code of Civil Law).

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 law does not provide any possibility for a spouse to *renounce his or her future* right to maintenance. In accordance with general principles of civil law such an advance waiver is not excluded per se. It is, however, *subject to statutory reservations* such as may arise in particular under Articles 19 and 20 Swiss Code of Obligations and Article 27 Swiss Code of Civil Law. The latter provision is of special significance since the implications of this type of waiver can only be assessed in connection with the financial circumstances within the limits of a divorce.

At the time of the divorce the agreement and consequently any waiver would have to be *examined by the court in all cases*. Before this examination has taken place, any such waiver is not legally binding (Article 140 § 1 Swiss Code of Civil Law).

The *Swiss Federal Supreme Court practice* with regard to the old divorce law (old Article 158 section 5 Swiss Code of Civil Law) recently ruled that even a marital contract entered into prior to the marriage with regard to the ancillary consequences in the event of a divorce¹¹³ - in the case in question it concerned the declaration of an advance waiver to maintenance claims - is subject to the obligation to obtain judicial approval. Furthermore, the Supreme Court held that judicial approval is to be refused if the agreement is unclear and the payments awarded to the wife are inequitable.¹¹⁴ Nothing has changed under the new law

¹¹³ However, this was only an agreement transacted on the occasion of a marital contract and such an agreement did not form the subject matter of the marital contract which is restricted to provisions regarding the spouses' assets.

¹¹⁴ BGE 121 III 393 ff. See in this connection also BGE 121 I 325, according to which a divorce agreement drawn up by the parties also requires the approval of the court.

in view of the requirement still stipulated in Article 140 Swiss Code of Civil Law that the divorce agreement must be approved by the court.

104. Is there a prescribed form for such agreements?

Since it is not a marital contract agreement, a special form is *not per se* prescribed by law. For the sake of proof and with a view to the necessity to submit it to the court within the framework of divorce proceedings it is recommended, or rather indispensable, to draw up such agreement in written form.

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

Prior to the divorce no such agreement is required. Within the framework of the divorce they require the approval of the court in order to become legally binding (Article 140 § 1 Swiss Code of Civil Law).