

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

DENMARK

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A. GENERAL

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

The current source of law governing divorce in Denmark is Consolidated Act No. 147 of 9 March 1999 on the Contraction and Dissolution of Marriage, Chapter 4 'Judicial Separation', sections 29-44.¹

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

The Danish Contraction and Dissolution of Marriage Act came into force in 1922 (Act No. 276 of 30 June 1922). This Act introduced a right to separation in the event of an irretrievable breakdown and a right to divorce on the basis of separation for a certain period of time.

In 1969 the Contraction and Dissolution of Marriage Act was amended (Act No. 256 of 4 June 1969). A right to request a divorce after three years of withdrawal from matrimonial cohabitation on account of disagreement was introduced.

The Danish Marriage Act was again amended in 1989 (Act No. 209 of 5 April 1989). The right to separation became unilateral (see the Danish Marriage Act section 29). The separation period constitutes a period of time when the spouses must live apart, having time for reflection and consideration. The effects of the separation will cease if the spouses

¹ Lovbekendtgørelse No. 147 af 09.03.1999 om ægteskabs indgåelse og opløsning.

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resume marital relations for more than 2 to 4 weeks or if they continue the marital cohabitation for more than 2 to 3 months (see the Danish Marriage Act section 30). After a separation period of six months, the spouses can obtain a divorce if they both agree thereto.

Until the current legislation was introduced in 1989, the following divorce grounds were valid:

- one year of separation
- living apart for three years due to incompatibility
- the disappearance of one of the spouses for three years provided that he/she had not been known to be alive
- bigamy
- adultery
- the exposure of one's spouse to a venereal disease
- violence
- the conviction of the other spouse to a minimum two years imprisonment
- the other spouse's mental disease which had lasted for at least three years

With the latest amendment to the Danish Marriage Act in 1989, the divorce grounds were simplified and reduced to the five most often applied:

- separation (see section 31)
- living apart for two years due to incompatibility (see section 32)
- adultery (see section 33)
- violence (see section 34)
- bigamy (see section 35)

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

The latest amendments to the divorce law in 1989 all followed the proposals of a working group established by the Ministry of Justice in 1987.² Since then there has been no official proposals for reform.

² Commission Report No. 1131, *Separations- og skilsmissebetingelser* (1987, Copenhagen) (The Conditions for Separation or Divorce).

Professor Linda Nielsen has suggested that abolishing adultery as an immediate ground for divorce could be considered.³ On the other hand she has noticed that the general opinion in Denmark seems to be that adultery should still be a ground for an immediate divorce. Further, she recommends that it should be easier to obtain an immediate divorce on the basis of assault and battery.

According to lawyers at the state county offices spouses are often very surprised by the fact that it is not possible to obtain a divorce immediately. Some of the couples have said that the law should be changed so that they can instantly obtain a divorce instantly if they both agree. Some lawyers at the state county offices are of the same opinion.

In August 2002 the Minister of Justice declared that she is considering changing the rule so that it will be made possible to obtain a separation or a divorce by submitting the request in writing if the parties agree on the conditions. This proposal will mean that the spouses are no longer required to meet in person at the state county offices to negotiate the terms. The justification for this proposal is that the State should not make it difficult to become separated or divorced by making procedural demands when the couple have decided to dissolve the marriage.

B. GROUNDS FOR DIVORCE

I. General

4. What are the grounds for divorce?

The grounds for divorce are contained in the Danish Marriage Act:

- separation (see section 31, and Question 2)
- living apart for two years due to incompatibility (see section 32)
- adultery (see section 33)
- violence (see section 34)
- bigamy (see section 35)

³ In L. Nielsen and J. Vorstrup Rasmussen, *Familieretten* (2001) (Family Law), p. 252.

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

There are no statistics on the different bases for which divorce is granted. According to the state county offices, however, separation is the most common divorce ground, and the second most common is adultery. Within the last ten years the number of divorces has increased. In the same period the number of contracted marriages has also increased. ⁴

| | Marriages | Divorce |
|------|-----------|---------|
| 1991 | 31,099 | 12,655 |
| 1992 | 32,188 | 12,981 |
| 1993 | 31,638 | 12,971 |
| 1994 | 35,321 | 13,709 |
| 1995 | 34,736 | 12,976 |
| 1996 | 35,953 | 12,776 |
| 1997 | 34,244 | 12,744 |
| 1998 | 34,733 | 13,141 |
| 1999 | 35,439 | 13,537 |
| 2000 | 38,388 | 14,381 |
| 2001 | 36,567 | 14,597 |

6. *How frequently are divorce applications refused?*

There are no statistics as to how frequently divorce applications are refused. The number of refused divorce applications is known to be low, however, since the right to separation (which can lead to divorce) is unilateral.

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

An administrative procedure may be followed if a divorce ground has been fulfilled and both spouses agree on certain conditions. In other

⁴ Danmarks Statistik (Statistics Denmark).

cases - only about 10% of all cases- a divorce is obtained through a judicial process. See the Danish Marriage Act section 42 and the answer to Question 23.

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

The Courts of general jurisdiction have jurisdiction over divorce proceedings. If the couple fulfil the conditions for obtaining a divorce through an administrative procedure they may go to the state county court. See the Danish Marriage Act section 42.

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?)*

If the spouses instigate proceedings in order to obtain a divorce through a judicial process they do not need a lawyer. It is most common however that both spouses do have a lawyer. The plaintiff must file a writ that fulfils certain requirements; see section 348, Administration of Justice Act No. 857 of 12 September 2000. Both spouses can apply for free legal aid; see the Administration of Justice Act, sections 330 and 449.

If both spouses want to obtain the divorce through an administrative procedure they go to the state county offices. Each state county office has its own application form. Usually the spouses appear in person without a lawyer, but it is possible to appear with a lawyer.

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

When divorce is obtained through a judicial process the marriage is finally dissolved on the date of the divorce decree. If one of the spouses appeals to a higher Court, and the higher Court amends the decree, it is on the date of the second divorce decree that the marriage is dissolved. If the higher Court does not change the first divorce decree, it is the date of the first divorce decree that dissolves the marriage. When the divorce is obtained at the state county offices, it is on date that the divorce is granted when the marriage finally dissolves.

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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?

Divorce by consent does not exist as an autonomous ground for divorce. The spouses must have been separated for six months before it is possible to obtain a divorce. See the Danish Marriage Act section 31.

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?

If *both spouses* apply for a divorce *together* they can obtain a divorce by consent through an administrative procedure at the state county offices (see the Danish Marriage Act section 42). One of the grounds for divorce must have been fulfilled (see Question 4). In addition the couple must agree on:

- wanting the divorce through an administrative procedure, see the Danish Marriage Act section 42
- whether one spouse is liable to pay maintenance to the other spouse, see the Danish Marriage Act section 49
- whether the wife maintains a right to a widow's pension, see the Danish Marriage Act section 54
- who retains the lease if they share/have shared rented accommodation, see the Danish Marriage Act section 55
- whether, in case one of the spouses has had separate property, he/she shall pay the other spouse an amount of money. The spouse not having separate property is, under certain circumstances, entitled to claim an amount of money. This rule applies to situations where a legal separation or divorce is likely to cause grave financial hardship for one of the spouses. The Court may order the other spouse to provide financially

for his or her former spouse, see the Danish Marriage Act section 56.

If it is only *one of the spouses* who applies for a divorce, he/she can only obtain the divorce through a judicial process. If the spouse applies for divorce on the ground of separation, the spouses must have been separated for at least one year, see the Danish Marriage Act section 31. It is both easier and cheaper to obtain a divorce if both spouses apply together at the state county offices.

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

Yes, 6 months' judicial separation is required if the parties agree on a divorce. Either spouse shall be entitled to a divorce after 12 months judicial separation. See the Danish Marriage Act section 31.

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

No.

26. Is a minimum age of the spouses required?

No. The minimum age for contracting a marriage is 18 years. See the Danish Marriage Act section 1. The state county offices can grant an exemption from the minimum age. If a married person under the age of 18 wants a divorce, he or she is entitled to apply for a divorce.

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

No. If both parties so request a clergyman will attempt reconciliation, see the Danish Marriage Act section 43. Until 1989 conciliation was mandatory - the couple had to go either to the state county offices or to a minister of religion.

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

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After a separation period of six months the couple is entitled to a divorce by consent, see the Danish Marriage Act section 31. In order to become separated the couple must appear before the state county offices to negotiate the conditions (see Question 23). If both parties agree to the negotiated conditions, they do not have to appear before the state county offices again. The divorce is obtained on the basis of the negotiated conditions concerning the separation. Both parties must sign the divorce petition. The divorce petition shall be returned to the state county offices along with a fee of 500 Danish Kroner. If the parties do not agree on the negotiated conditions they will have to go to court appearing before the judge.

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 *both* parties agree to the negotiated conditions (see Question 23), the agreement is valid, and they can obtain a divorce at the state county offices (see Question 28).

If the parties do *not* agree to the negotiated conditions, they will have to go to court, where the judge will decide the conditions based on the parties' claims.

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

The couple must reach an exhaustive agreement on the conditions mentioned in Question 23; otherwise they must go to Court.

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

If the parties have reached an agreement on the negotiated conditions at the state county offices (see Questions 28 and 29), the lawyer at the state county offices has to ensure that the agreement does not contain conditions which are unconscionable to one of the parties. If it does, he must reject the (separation or) divorce application. Practice shows that this rarely happens.

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 the couple have been separated for six months and they agree to divorce, there is no need to initiate divorce proceedings (see the Danish Marriage Act section 31).

It is not possible to convert divorce proceedings on the ground of separation (which can lead to divorce on the ground of mutual consent) if one of the spouses, at the time when he or she applied for separation, knew that another divorce ground was applicable.

2. Divorce on the ground of fault/ matrimonial offence

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

Adultery or a similar sexual relationship, see the Danish Marriage Act section 33, violence, see the Danish Marriage Act section 34, and bigamy, see the Danish Marriage Act section 35.

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

‘Adultery’ amounts to a married person deliberately and voluntarily engaging in sexual intercourse with a person other than his or her spouse. Engaging in ‘an intercourse-resembling relationship’, also, constitutes a ground for divorce. This primarily concerns homosexual relationships, but also other kinds of intercourse-resembling relationships are covered by the provision.

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

Injury or false accusation cannot provide a ground for divorce.

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36. *Is an intentional fault required?*

It is not a precondition that the spouse is aware of providing the other spouse with a divorce ground whilst e.g. committing assault and battery. In that respect an intentional fault is not required.

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?*

If one spouse condones the adultery of the other, the former cannot claim a divorce on the ground of adultery, see the Danish Marriage Act section 33. If at some point the first spouse states that he/she will no longer condone the other spouse's adultery, it will, if it continues, then be a divorce ground.

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

No.

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

Yes, it will be considered that the party has waived his or her right at a later date, see the Danish Marriage Act section 33. That will be the case if the spouses continue to have a sexual relationship. See also Question 37.

40. *How is the fault proved?*

(a) Adultery: The spouse applying for divorce must prove that the other spouse has committed adultery. Adultery is proved by an admission from the other spouse and a third party. The state county offices have preprinted forms for the third party to fill out and sign. If a spouse does not admit to having committed adultery, the spouse applying for divorce may occasionally have to produce secondary evidence of the adultery. Is it possible, for example, to prove that the spouse had spent a night in a hotel with a person of the opposite sex, so that in most cases it will be reasonable to presume that the

conditions laid down in the Danish Marriage Act section 33 will have been fulfilled.

Previously, if not still, the courts, which have discretion to assess the evidence, have been extremely strict as to the standard of evidence for adultery where both the spouse and the third party have denied that it ever took place. For example, in a decision from 1954 the court found that it had not been proved 'beyond reasonable doubt' that the wife had committed adultery even though she had lived for certain periods of time in another man's apartment, where she had a settee sleeper, a table and a closet.⁵ Recent legal practice that may shed some light on the standard of evidence is scarce.⁶

Violence: the spouse applying for divorce must prove that the other spouse has committed acts of violence of a serious nature against her/him or the children. It is not necessary to adduce a criminal conviction as proof, a report from a hospital or a doctor will suffice.

(b) Bigamy: the fault is proved by the second marriage licence.

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

No. See Question 27.

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.

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

No.

⁵ See *Ugeskrift for Retsvæsen* 1954 (Weekly Journal of Law), p. 351.

⁶ On earlier legal practice see S. Danielsen, *Ægteskabsloven, kapitel 4 og 5* (1993) (The Marriage Act, Chapters 4 and 5), p. 61-62.

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

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

It is possible to obtain a separation on the ground of the irretrievable breakdown of the marriage, see the Danish Marriage Act section 29. The right to separation is unilateral, and the spouse applying for separation does not have to state any reason why he or she desires the separation.

If the spouses have lived apart for two years on account of disagreement they can obtain a divorce. The spouses must prove that they have lived apart due to incompatibility.

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

The notion of fault has no relevance.

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

No.

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

Divorce is possible after six months of separation if both spouses agree, see the Danish Marriage Act section 31. If the parties do not agree, divorce is possible after one year of separation, see the Danish Marriage Act section 31.

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

No evidence is required. The right to separation is unilateral, and after six months or one year the right to divorce is obtained (see the Danish Marriage Act sections 29 and 31).

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

(a) Which circumstances suspend the term of separation?

The effects of the separation will lapse if the spouses resume marital relations or if they continue marital cohabitation (see the Danish Marriage Act section 30).

(b) Does the separation need to be intentional?

If the spouses move away from each other, e.g. one of them goes abroad or is sent to prison, and they live apart for two years, they are not entitled to a divorce on the ground of two years of withdrawal from matrimonial cohabitation due to incompatibility (see the Danish Marriage Act section 32), unless they are able to prove that disagreements arose after they moved away from each other. This means that the separation does not have to be intentional at its inception. In these cases the time of living apart is calculated from when the disagreement arose.

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

The spouses must live apart. See Question 2.

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

No. See Question 27.

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

Yes, a separation period is required in order to obtain a divorce on the ground of separation. See Question 2.

If the spouses apply for divorce on another ground, a period for reflection and consideration is not required.

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

No. See Question 29.

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

If the parties have reached an agreement on the negotiated conditions at the state county offices (see Questions 28 and 29), the lawyer at the state county office has to ensure that the agreement does not contain conditions which are unconscionable to one of the parties. If it does, he must reject the (separation or) divorce application. Practice shows that this rarely happens.

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.

C. SPOUSAL MAINTENANCE AFTER DIVORCE

I. General

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

The current source of law for the maintenance of spouses after divorce is Act No. 147 of 9 March 1999 on the Contraction and Dissolution of Marriage, Chapter 5: 'Terms of judicial separation and divorce and alteration of the terms, etc.', sections 45-53 and section 58.

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

Until 1922 the administration often made it a condition for obtaining a divorce that the man granted his former wife maintenance, but there

were no actual rules for the maintenance of spouses after divorce. Such rules were introduced in the Contraction and Dissolution of Marriage Act No. 276 of 30 June 1922. The guilty party was not, however, granted maintenance.

In 1989 the Act was amended (Act No. 209 of 5 April 1989). The current legislation determines that the period of time during which the man has to pay his former wife maintenance cannot usually exceed ten years, notwithstanding how long the spouses were married. It is no longer important who the guilty party is, since the guilty party, under the current legislation, can be granted maintenance.

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

In 1974, the Marriage Law Committee recommended that maintenance should not normally be granted for more than 10 years.⁷ This proposal was carried through Parliament in 1989 reference being made to the fact that the proposal was in accordance with case law.

The other proposals by the Marriage Law Committee in report No. 719 from 1974 were not implemented.⁸ The Committee recommended:

that the main criterion should be whether the marriage has caused such a reduction of a spouse's earning capacities that the spouse for a shorter or a longer period is not able to support him or herself according to the usual standard of living,

that the duration of the marriage should no longer be a criterion in the legislation,

that it should be laid down in the legislation that the state county offices should not fix an amount of maintenance if the claimant cohabits with a new partner,

⁷ Commission Report No. 719, *Vilkårene for separation og skilsmisse* (1974, Copenhagen) (The Conditions on Separation and Divorce), p. 16.

⁸ Commission Report No. 719, *Vilkårene for separation og skilsmisse* (1974, Copenhagen) (The Conditions on Separation and Divorce), p. 16-23.

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that the court should decide that maintenance obligations are annulled if the claimant cohabits for at longer period with a new partner.

High Court judge and professor Svend Danielsen recommended:⁹

that it should be manifested that in practice the principal rule is that a spouse does not receive maintenance after a separation or a divorce,

that it should be stated in a provision that maintenance may be granted for a limited period of time in order to rehabilitate the weaker party,

that it should be stated in a provision that maintenance may be granted for an extensive period of time, especially in cases where elderly women, throughout the marriage, have been housewives or have worked as assisting spouses,

that the criterion in section 52 of the Marriage Act for altering maintenance agreements should be relaxed,

that the criterion for altering a state county office's decision as to the amount should be tightened,

that the abolition of the distinction between the court's decision regarding the duty to pay maintenance and the state office's decision regarding the amount should be considered.

High Court Judge Marianne Højgaard Pedersen recommended that the politicians should take a stand on how to reform the legislation on maintenance - deriving inspiration from the reforms in the other Scandinavian countries.¹⁰

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

Yes, according to the Danish Marriage Act section 49, in connection with a judicial separation or divorce, a decision is to be made as to whether one spouse shall be obliged to contribute to the maintenance of the other spouse.

⁹ S. Danielsen, *Skilsmisseggen* (1989) (The Divorce Case), p. 464-465.

¹⁰ See I. Lund-Andersen *et al*, *Familieret* (1996) (Family Law), p. 210-211.

59. *Are the rules relating to maintenance upon divorce connected with the rules relating to other post-marital financial consequences, especially to the rules of matrimonial property law? To what extent do the rules of (matrimonial) property law fulfil a function of support?*

The rules relating to maintenance upon divorce are not connected with the rules relating to other post-marital financial consequences.

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

Provisions on the distribution of property (probably) do not influence maintenance after divorce unless the property is substantial. Provisions on the distribution of pension rights do not influence maintenance after divorce either (but in order to obtain a widow's pension the wife must be entitled to maintenance from her former husband). The right to cash benefits for persons without means is subsidiary to maintenance after divorce. On the other hand, if the claimant has an income in the shape of unemployment benefit or a pension, the amount of money which the debtor must pay in maintenance can be reduced.

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

Compensation can be claimed for the divorced spouse in addition to maintenance payments. If one of the spouses has had separate property during the marriage, the other spouse can, under certain circumstances, claim an amount. The rule applies to situations where a legal separation or divorce is likely to cause grave financial hardship to one of the spouses. The Court may order the other spouse to make financial provision for his or her former spouse, see the Danish Marriage Act section 56. The mentioned rule applies if one of the spouses has given up his or her work during the marriage in order to take care of the family. Maintenance (also) has the function of compensation.

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

There is only one type of maintenance claim after divorce. Maintenance is paid in monthly payments.

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?*

The divorced spouses are obliged to provide information to the state county offices on their income and assets. If a spouse refuses to provide the information, the state county offices can go to his or her employer in order to obtain the information. If the spouse is self-employed and does not therefore have an employer, the failure of that spouse to provide the required information may have a prejudicial effect on his or her case.

II. Conditions under which maintenance is paid

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

Legislation lays down four conditions that must be taken into consideration (see the Danish Marriage Act section 50):

- the claimant's need for maintenance after separation or divorce. Importance is attached to the claimant's level of education and income, whether she or he has been working during the marriage, age, health and the raising of children
- the other spouse's ability to pay maintenance
- the duration of the marriage
- the need for financial support for education or the like

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

Until 1969 maintenance could not be granted to the guilty party. In the legislative history of the current legislation it is said that it is still possible to take the reason for the separation or divorce into consideration.¹¹ The question of fault was said to play a role in a Supreme Court decision from 1977.¹² In recent years, however, the question of fault has not been considered to be relevant in the case law.

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, usually it is relevant whether the lack of means has been caused by the marriage. It is an important factor, but each decision is discretionary.

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

The evaluation of the four conditions mentioned in Question 64 takes place at the moment of separation or divorce.

III. Content and extent of the maintenance claim

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

Maintenance can be claimed for a maximum period of ten years, see the Danish Marriage Act section 50. Under special circumstances the claim can exist for life.

Indefinite maintenance is granted in particular when the relationship has lasted for many years – in practice 20 years or more – and when

¹¹ See *Folketingstidende* (1968-1969, tillæg B p.1899 og 1970-2) (Official reports of parliamentary proceedings, 1968-1969, supplement B p.1899 and 1970-2).

¹² See *Ugeskrift for Retsvæsen* 1977 (Weekly law Journal), p. 136.

the spouse's job opportunities are very limited because he/she has not been on the labour market for many years.¹³ The main group entitled to indefinite maintenance will be housewives, but also, for instance, women who have had a very weak connection with the labour market for many years. In 1994 the Supreme Court established that 'special reasons' does not mean that it is a precondition for being granted indefinite maintenance that the situation of the spouse in question is unique.¹⁴ In the eyes of the law housewives may also be considered a 'type' representing special conditions.

Time-limited maintenance may be granted for a period of 1 to 10 years. When fixing the period of maintenance, great importance will be attached to the length of the relationship and the overall situation of the receiving spouse. Emphasis will be placed on whether the maintenance is solely to ease the transition or to act as a safety net for a longer period of time. In addition to this, importance is attached to the age of the children living with the receiving spouse.

Both the length of the marriage and possible premarital cohabitation are of importance for the length of maintenance. Importance is undoubtedly attached to premarital cohabitation in case one or more children were born during that time, whereas this might not be the case if a couple, who are childless, have had separate finances up until contracting the marriage. From an analysis of High Court decisions from 1993 and 1994¹⁵ it appears that maintenance was not ordered for longer than 3 years in any case where the marriage had lasted for 10 years or less. Regardless of the clear connection between the length of the relationship and the length of the maintenance period, specific factors may be decisive for prolonging the duty to pay maintenance. This could for example be the case if the receiving spouse has custody of young children, or if she has been a housewife and now wants to obtain an education. Five years of marriage thus forms the basis for 3 years of maintenance and a little less than 2 years of marriage may also

¹³ The description is based on M. Højgaard Pedersen's account in: I. Lund-Andersen *et al*, *Familieret* (1996) (Family Law), p. 215-216.

¹⁴ *Ugeskrift for Retsvæsen* 1994 (Weekly Law Journal of Law) p.628 with comments by J. Nørgaard in: *Ugeskrift for Retsvæsen* 1995 (Weekly Journal of Law) B, p. 443 ff.

¹⁵ See *Domsoversigter, Landsretsdomme* (A survey of High Court Cases) 1993-94, particularly 3 and 6 and see S. Danielsen, *Ægteskabsloven, kapitel 4 og 5* (1993) (The Marriage Act, Chapters 4 and 5), p. 147 ff.

form the basis for 3 years of maintenance. Even if the marriage has lasted for many years maintenance is often granted for only a transitional period of time. In 1994 an assistant nurse working part time ($\frac{3}{4}$) was only granted 2 years, maintenance after 18 years of marriage.¹⁶ The children living with the receiving spouse were 15 and 17 years of age. Maintenance which is determined for a transitional period and is based on a specific need e.g. to find a new job, to become education or to get accustomed to a new standard of living, cannot exceed 6 years and will typically be shorter.

Even though the law is gender- neutral, only in a very few published decisions has maintenance been granted to a man. In the first of these decisions, from 1981,¹⁷ a midwife was, after 22 years of marriage, ordered to pay maintenance for 8 years to her former husband, who had been granted custody of their child. The man's income as a farmer was extremely modest. In a decision from 1999 a wife,¹⁸ who was an EU interpreter, was, after 10 years of marriage, ordered to pay maintenance to her former husband for one year. The wife's carrier abroad had taken priority and after the separation the husband was unemployed but hoping to find work at some point as a high school teacher. The woman was granted custody of their two children.

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

The amount of the maintenance is determined on the basis of the claimant's immediate needs and the debtor's immediate ability to pay.

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 calculation is made by the state county offices regardless of whether the marriage has been dissolved administratively or

¹⁶ *Ugeskrift for Retsvæsen* 1994 (Weekly Law Journal), p. 390.

¹⁷ *Ugeskrift for Retsvæsen* 1981 (Weekly Law Journal), p. 1048.

¹⁸ *Ugeskrift for Retsvæsen* 1999 (Weekly Law), p. 460.

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judicially. The parties may decide on the amount themselves, in which case it shall be noted on the separation or divorce decree.

Though the state county office, when calculating the maintenance, shall take into account the same criteria as those applied in the decision to order maintenance, the result of the two assessments will often differ. This is due to the fact that the duty to pay maintenance is a long-term decision, whereas the calculation of maintenance is based on actual needs and capabilities. This is the reason why a situation may occur where the court orders maintenance to be paid but the state county office does not find that there is a basis for fixing an amount.

The spouses provide the state county offices with information on their financial circumstances. If the debtor's monthly income exceeds that of the claimant's the amount of maintenance will be one fifth of the disparity between their incomes (e.g. if the man's monthly income is 22,000 Danish Kroner and the wife's monthly income is 10,000 Danish Kroner. The amount of maintenance is: $22,000 - 10,000 = 12,000/5 = 2,400$ Danish Kroner per month).

There is a corrective to the above: The total amount of maintenance of spouses after separation or divorce and of child maintenance cannot exceed one third of the debtor's income. This corrective gives preference to child maintenance. The two mentioned models are prescribed by practice at state county offices. There are no rules. Each decision is discretionary, although it is based on the two mentioned models.

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 claimant can only demand only the normal costs of life.

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

There is a maximum limit to the maintenance that can be ordered. The total amount of the claimant's income, maintenance included, cannot

exceed 195 - 235,000 Danish Kroner per year (in the year 2002) (the state county office assesses each case individually).

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

Yes. If the debtor applies for a reduction of the maintenance, the state county office will usually reduce it gradually, allowing it to cease when maintenance has been paid for a period of time that exceeds the duration of the spouses' cohabitation.

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

The maintenance is to be paid in periodical (monthly) payments.

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

There is no lump sum.

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

There is no automatic indexation of maintenance.

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

If the spouses agree to adjust the amount of maintenance, they are free to do so. If they disagree they must go to Court:

If the spouses have made *an agreement* as to the amount of maintenance, they can go to Court in order to adjust the amount of maintenance, provided that circumstances have considerably changed, making it unreasonable to continue the original agreement, see the Danish Marriage Act section 52.

If the spouses have had the amount of maintenance *fixed by the state county office*, the state county office can, under certain (not listed) circumstances, adjust the amount; see section 53 of the Danish

Marriage Act. In these cases the requirements are not strict.¹⁹ A calculation of the maintenance amount is always provisional, inasmuch as it is only determined for the time being. If the state county receives a request for an adjustment a new calculation, following the same rules as the first, will be made. Conditions that most often lead to adjustments, are income changes, both in the form of a reduction due to illness, unemployment or retirement or an increase due to promotion or other kinds of economic improvements. If the receiving spouse has adapted his or her situation so as to be able to live, partly or completely, without maintenance and the paying spouse without paying maintenance, this may limit the possibilities of having an amount fixed or increased at a later point. Passivity, too, may lead to the rejection of a request to have an amount fixed or increased.

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?

Yes. The total amount of spouse and child maintenance after separation or divorce cannot exceed one third of the debtor's income. See Question 70.

79. To what extent, if at all, is an increase of the debtor's income a) since the separation, b) since the divorce, taken into account when calculating the maintenance claim?

When calculating the maintenance claim the debtor's current income is relevant.

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

The debtor's debts are not taken into consideration.

¹⁹ See M. Højgaards Pedersen in: I. Lund-Andersen *et al*, *Familieret* (1996) (Family Law), p. 225-226.

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

The debtor can only rely on his (or her) legal obligations.

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

If the debtor does not fulfil his (or her) maintenance obligations, the claimant can recover the debt by judicial means, consequently the debtor can be obliged to use his (or her) capital assets in order to fulfil his (or her) maintenance obligations.

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 (but this rarely occurs).

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?*

If the debtor's income is moderate (less than 16,500 – 18,500 Danish Kroner per month), which will often be the situation if he (or she) receives social security benefits, he (or she) does not usually have to pay maintenance to his (or her) former spouse. Thus, the size of the income matters, but it does not matter whether the income is derived from employment or from social security benefits.

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?*

No.

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?*

The amount of maintenance is calculated on the basis of the difference between the spouses' incomes. It is not relevant where the income is derived from.

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 claimant cannot be obliged to seek gainful (full-time) employment before he or she may claim maintenance from the divorced spouse, if there are reasonable grounds for not doing so (e.g. if the claimant wants an education or wishes to have more time with the children). If the claimant voluntarily gives up his or her job or if s/he refuses a job offer, the maintenance claim can be adjusted or extinguished.

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

No. When calculating the claimant's income, what derives from capital assets forms part of her (or his) income (see Question 70).

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?*

Maintenance obligations to third parties are not taken into account when calculating the claimant's income and assets.

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?*

The legal situation differs according to the type of social benefits. The duty to maintain a former spouse ranks higher than the possibility for the claimant to seek supplementary benefits. If the claimant receives cash benefits, the local authority has a right to deduct the maintenance grant from the amount paid by the local authority.

The local authority also has the right to claim maintenance, if a spouse receives supplementary benefits and he or she would be entitled to receive maintenance if he or she were to claim it. If there is already a maintenance claim, the local authority can apply for an adjustment, see section 97 of the Active Social Policy Act No. 266 of 12 April 2000.²⁰

If the claimant receives unemployment benefit or a pension the payment will be considered an income for the claimant and the amount of the maintenance will be accordingly reduced (see Question 60).

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?*

The total amount of spouse and child maintenance after separation or divorce cannot exceed one third of the debtor's income (e.g. if the debtor's income is 21,000 Danish Kroner, the total amount of the maintenance cannot exceed $21,000/3 = 7,000$ Danish Kroner. If the debtor already pays child maintenance, e.g. 3,000 Danish Kroner per month, the maintenance of spouses after divorce cannot exceed 4,000 Danish Kroner, regardless of the claimant's (low) income).

²⁰ Lovbekendtgørelse No. 266 af 12.4.2000 om aktiv socialpolitik.

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

No, but the debtor's ability to pay is taken into account when determining whether a new spouse qualifies for maintenance after divorce. One of the conditions for the court to consider is whether the debtor already pays maintenance to children and/or to former spouses. See Question 91.

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?*

Yes, the claim of a child ranks ahead. See Question 91.

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

If the child has reached the age of majority he or she is not entitled to claim maintenance from his or her parents, see the Children's Legal Right Act No. 293 of 2 May 1995 section 14.

The child can, however, claim maintenance for educational purposes until the age of 24. The child's position is the same as mentioned above in Question 91-93.

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

No. It is not possible for relatives of the debtor to claim maintenance.

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?*

It has no effect unless someone supports the claimant to the extent that his or her income exceeds the maximum limit. See Question 72.

VII. Limitations and end of the maintenance obligation

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

The maintenance claim is extinguished upon the claimant's remarriage or entering into a registered partnership, see the Danish Marriage Act section 51. The claim will not revive.

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?*

(a) Former spouses who have had the amount fixed by the state county offices: If the claimant enters into an informal long-term relationship with another person, the maintenance claim is reduced to zero, if the debtor requests the state county office to do so. See the Danish Marriage Act section 53. Practice at the state county offices provides that in these cases there are special circumstances. If the claimant enters into an informal long-term relationship, he/she does not necessarily have to cohabit with the other person. It is sufficient that the claimant and the other person have a certain financial and personal community of interests.²¹ It is for the paying spouse to prove that the receiving spouse has entered into a steady relationship. In practice it is not taken into account whether the new relationship entails an economic advantage or, on the contrary, an economic loss for the receiving spouse. The fact alone that the receiving spouse has engaged him or herself with someone in such a way that their economic interests have become, partly or completely, intertwined is enough.²² Emphasis will, for example, be put on whether the partners spend nights and weekends together, go on vacations together, visit family and friends together. The decision is made – often after an extensive collection of information – on the basis of an overall assessment in each case. If the partners eat and sleep together regularly, appear as a couple to the outside world and go on long vacations together,

²¹ The description is based on M. Højgaard Pedersen's account in: I. Lund-Andersen et al, *Familieret* (1996) (Family Law), p. 225-226.

²² The administrative practice is described in: *Skarrildhus* 1994 (Report from the Department of Civil Law), p. 11-13.

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maintenance will, in practice, and on request, be reduced to zero, even if the partners have completely separate finances and live at different addresses. A purely sexual relationship, however, cannot lead to a discontinuation of maintenance.

The restrictive practice is based on a consideration of fairness, namely that the wife should not, when she has engaged in a steady personal and economic relationship with someone else, be entitled to claim maintenance from a former spouse. This practice is very far-reaching and it entails that maintenance is in actual fact often discontinued long before the duty to pay has formally ceased. The High Court, however, has not established a basis for setting this practice aside and, consequently, it has determined that this practice is not contrary to the law.²³ In 1988 the Ombudsman pointed out that the criterion applied – economic and personal relationship – is not in immediate accordance with the marriage legislation. It was pointed out that the wording of section 50 does not cover a broad assessment of fairness that does not take into account whether a new relationship gives an economic advantage. Consequently, the Ombudsman has stated that when amending the act a clarification of the state of the law is advisable.²⁴

If the relationship has lasted for more than 2½ years, maintenance will not be recalculated if the relationship ends. If it lasts for less than 2½ years maintenance may be recalculated, but the new amount will usually be between one third and two thirds of the original amount. The reason for this practice is that it must be taken into consideration to what extent the paying spouse has rightly based his or her financial situation on not having to pay maintenance in the future.²⁵

Former spouses who have entered into **an agreement** as to the amount of maintenance: it depends on the content of the agreement what exactly will happen if the claimant enters into an informal long-term relationship with another person. According to section 52 the amount may be altered by a court judgement on the basis of materially

²³ See *Ugeskrift for Retsvæsen* 1979 (Weekly Law Journal), p. 769.

²⁴ See *Folketingets ombudsmands beretning* 1988 (Report from the Ombudsman), p. 293 and p. 306.

²⁵ *Skarrildhus* 1990 (Report from the Department of Civil Law), p. 9-10.

changed circumstances, when it would be unreasonable to uphold the agreement.

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

Yes. If the duration of the marriage (or the duration of the non-marital cohabitation and the marriage) is less than 2 to 3 years, the maintenance claim will be denied.

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?

No. See Question 65.

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

Yes, the maintenance obligation ceases when one of the spouses dies. See the Danish Marriage Act section 51.

VIII. Maintenance agreements

102. May the spouses (before or after the divorce or during the divorce proceedings) enter into binding agreements on maintenance in the case of (an eventual) divorce?

The spouses may enter into binding agreements on maintenance; see the Danish Marriage Act section 50.

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

A spouse may not agree to renounce his or her future right to maintenance before or during the marriage. A valid agreement can be made in anticipation of a divorce (which is effected up to around six months after the agreement was made). The agreement can be set aside if it was preposterous at the time it was made, see the Danish Marriage Act section 58.

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If circumstances have considerably, making it unreasonable to continue the original agreement, the spouses can go to Court in order to have the amount of maintenance adjusted, see the Danish Marriage Act section 52.

104. Is there a prescribed form for such agreements?

No.

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

No. If the spouses have reached an agreement on the negotiation of conditions at the state county offices (see Questions 28 and 29), the lawyer at the state county office will scrutinize the agreement reached. If he finds that one of the conditions (including the agreement on maintenance) is unconscionable as regards one of the spouses, he must reject the (separation or) divorce application. Practice at the state county offices shows that this rarely occurs.