GROUNDS FOR DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES

ENGLAND AND WALES

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A. GENERAL

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

The current law of divorce is contained in the Matrimonial Causes Act 1973, Part I, sections 1-10, as amended principally by the Matrimonial and Family Proceedings Act 1984. General Principles underlying divorce law are set out in the Family Law Act 1996, section 1.

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

Judicial divorces were first introduced by the Matrimonial Causes Act 1857 (before that divorce could only be obtained by an Act of Parliament). Under the 1857 Act husbands could petition for divorce on the ground of their wives' adultery but wives needed to prove either adultery coupled with incest, bigamy, cruelty or two years' desertion, or, alternatively, rape or an unnatural offence. This remained the case until the Matrimonial Causes Act 1923 which permitted either spouse to petition on the other's adultery simpliciter.

Following the reforms contained in A.P. Herbert's Matrimonial Causes Act 1937,[1] petitions could be based on the respondent's adultery, cruelty, desertion for three years or (subject to certain other conditions)

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1 The Act largely gave effect to the recommendations of the majority of members of a Royal Commission appointed in 1909 (the Gorrell Commission, Cd 6478). For a lively account of the history of the passage of this Bill though Parliament, see Sir A. Herbert, *The Ayes have it*, 1937, and for a more recent discussion of it, see S. Redmayne, 'The Matrimonial Causes Act 1937: A Lesson in the Art of Compromise', *OJLS*, 1993, Issue 13, p. 183.

supervening incurable insanity. This last provision introduced for the first time the possibility of obtaining a divorce even though the respondent was in no way at fault. Such a possibility was further extended by a landmark ruling by the House of Lords[2] that cruelty did not necessary connote any intention on the respondent's part and that mental illness was therefore not necessarily a defence.[3] But apart from these instances divorce law was predicated upon the guilt of respondent and innocence of the petitioner. Indeed commission of matrimonial offence by the petitioner gave the court a discretion to refuse the decree.[4]

In the wake of spiralling divorce rates after the Second World War, many came to question the idea that the purpose of divorce was to provide a remedy only to the innocent spouse for a matrimonial wrong committed by the other. A Royal Commission (the Morton Commission) was appointed to enquire into the law of England and Scotland concerning marriage and divorce, and published its report in 1956.[5] Unfortunately, the Commission were divided on how far the concept of the matrimonial offence should remain the exclusive basis for divorce, and could not reach a clear consensus on reform. However, fresh impetus for reform was given by two major publications appearing in 1966. In the first, *Putting Asunder*, a group appointed by the Archbishop of Canterbury to consider the law of divorce in contemporary society came down in favour of the breakdown theory. They argued that this must be the sole ground of divorce and that possible abuse must be guarded against by a judicial inquest in each case. *Putting Asunder* was referred to the Law Commission who in turn reported in *Reform of the Grounds of Divorce: the Field of Choice*.[6] They concluded that the Archbishop's group's proposals for a full judicial enquiry in every case were impracticable, and put forward a number of possible alternatives based on the fundamental assumption that the aims of a good divorce law are:

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2 See *Gollins v Gollins* [1964] AC 644.

3 *Williams v Williams* [1964] AC 698.

4 Those "guilty" of a matrimonial offence - principally adultery, were expected to file a discretion statement (see Matrimonial Causes Rules, 1957, rule 28), though by the 1960s, the court normally exercised its discretion in the petitioner's favour. See generally Bromley, *Family Law*, 3rd Edition, 1966, p. 150 *et seq.*

5 Cmnd 9678.

6 Cmnd 3123.

> '…to buttress, rather than undermine, the stability of marriage, and when, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation.'

Their own preference was for introducing as an additional ground for divorce the breakdown of the marriage as evidenced by a period of separation, which should be shorter if the respondent consented than if he did not.

The consequence was the passing of the Divorce Reform Act 1969. It represented a compromise between the views put forward by the Archbishop's group and the Law Commission. All the old grounds for divorce were abolished and replaced by one ground, that the marriage had irretrievably broken down. This, however, can only be established by proof of one or more of five facts set out in the Act. The old bars to divorce, such as collusion, were abolished, but various safeguards for the financial protection of the respondent, who was now potentially at risk of being divorced against his or her will, and after having committed no matrimonial wrong, are given instead.

The Divorce Reform Act 1969 was re-enacted by the Matrimonial Causes Act 1973.

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

There is considerable dissatisfaction with the current law. In a major review of the 1973 Act, the Law Commission[7] made a number of telling criticisms. For example, they considered the law to be confusing and misleading in that while the sole ground for divorce is said to be the irretrievable breakdown of the marriage, suggesting that fault is not the basis for granting a divorce, such breakdown, no matter how profound, will not lead to a divorce decree unless a spouse can point to one of the five facts, three of which do involve fault. Further, the

[7] Law Commission, *Facing the Future - A Discussion Paper on the Ground for Divorce*, Report Number 170, 1998 and *The Ground for Divorce*, Report Number 192, 1990.

real reason for the breakdown might have nothing to do with the fact presented in the petition, the allegations becoming a peg on which to hang the petition, regardless of their significance (or insignificance) for the parties. No real scrutiny can be conducted into the truth of the allegations, and a petitioner might be encouraged to bolster the petition with trivial or exaggerated allegations.

The Commission also considered the current law to be discriminatory and unjust inasmuch as it provides a civilised no fault basis for divorce based on separation which is in practice unavailable to a large part of the population because many couples cannot afford to part and establish separate households before the divorce. Instead this poorer part of the community has to rely on the less satisfactory “fault” facts in order to obtain a speedier divorce and hence resolution of their financial and property problems.

Another criticism was that although a fundamental objective of the current law is to minimise the bitterness, distress and humiliation experienced by the parties in obtaining their divorce the system, particularly the “behaviour fact”, encourages each to make allegations against the other and to portray the other in as bad a light as possible to support the petition. This provokes resentment, hostility and distress in the other spouse at a time when the couple are experiencing severe distress and unhappiness in coming to terms with the ending of their marriage. Their emotional misery is simply compounded by the legal process.

These and other criticisms convinced the then Government to act and in 1996 the Family Law Act was passed which would have revolutionised divorce law. In brief outline the scheme was to have been as follows:

Anyone contemplating a divorce would first to have attended an information meeting, the purpose of which was inter alia to communicate a range of information (though not individual legal advice) relating to divorce, its process and its consequences. Parties would then have had to wait a minimum of three months before being able formally to commence proceedings by filing a statement of marital breakdown - the sole ground being irretrievable breakdown.

The intervening period was meant to provide a cooling off period. However, even after filing the statement there was to have been a lengthy period for reflection and consideration, namely, a minimum of nine months or as long as 15 months if there were children or the parties so requested. During this period applicants were expected to resolve all issues about children and finance and, particularly if they were being publicly funded, to at least attend a mediation meeting. If, at the end of the process, the applicant still wanted the divorce it would be granted. In short, no grounds for claiming that the marriage had broken down would have had to be shown, but the process would have been a lengthy one.

In the event, the scheme proved too controversial, and, as has been said, plans to implement the 1996 Act have been formally abandoned. Consequently, the law of divorce continues to be governed by the less than satisfactory Matrimonial Causes Act 1973.

B. GROUNDS FOR DIVORCE

I. General

4. What are the grounds for divorce?

Under section 1(1) of the Matrimonial Causes Act 1973 there is only one ground for divorce, namely, that the marriage has broken down irretrievably but that cannot be filed unless one of five facts is proved. (See Question 11).

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

There are different sources of statistics (some more reliable than others). The most recently available are those provided by the *Judicial Statistics* but which only give overall numbers and are not broken down into the number of petitions based on each of the five facts (explained in Question 11). According to this series in 2001, 161,580 divorce petitions were filed, 146,931 decrees nisi were granted and 137,270 decrees absolute were granted. The respective figures for 2000 and 1999 were 157,809 (2000), 162,137 (1999) petitions were filed,

143,729 (2000), 143,446 (1999) decrees nisi were granted and 136,410 (2000), 141,333 (1999) decrees absolute were granted.

These statistics are broken down into more detail by the Marriage, Divorce and Adoption Statistics. According to the statistics for 2000[8] of the 140,783 decrees granted in 2000 (note the discrepancy with the Judicial Statistics quoted above).

Ground	Number of divorces	Percentage (%)	By Men	By women
s 1(2)(a)	33,310	23.6	12,227	21,083
s 1(2)(b)	63,152	45.0	11,668	51,494
s 1(2)(c)	680	0.5	269	411
s 1(2)(d)	32,820	23.4	13,261	19,559
s 1(2)(e)	10,498	7.5	4,851	5,647
Total	**140,470**	**100**	**42,276**	**98,194**

A few (namely 48) were based on more than one fact. Another 245 were granted to both parties. As can be seen, easily the most popular "fact" is "behaviour". But when analysed by gender, the most popular fact for men is two years' separation, i.e. section 1(2)(d) and behaviour, i.e. section 1(2)(b), for women. It will also be noted that wives' petitions outnumber men's by over 2 to 1 (98,194 to 42,276).

6. How frequently are divorce applications refused?

Divorces are rarely defended let alone refused. It is commonly said that less than one per cent are defended but it is thought that barely 50 per annum are actually contested in court. Of course not all undefended divorces are granted but it seems unlikely that substantial numbers are refused. The reality therefore is that with very rare exceptions petitions are granted and for the overwhelming majority the question is not so much "can I obtain a divorce?" but "how quickly can I obtain it?".

8 FM2, Number 28.

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

Divorces can only be ended by a formal decree of divorce (see Question 10 for details about the decree) which can only be granted by a court. It is technically possible for a dissolution to be granted by Act of Parliament but the process is unheard of in modern times. There is no administrative process though for many, since they do not have to go to court to obtain a divorce (see Question 9), it may seem like an administrative process, save that they will usually have engaged a lawyer.

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

All petitions for divorce must[9] be commenced in a divorce county court (that is a county court specially designated as a court of trial) or in the Principal Registry in London (which is a divorce county court for this purpose). Proceedings can be transferred to the High Court.[10]

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?)

Until 1973 all petitions for divorce, regardless of whether they were defended or not (and most were not), had to be determined by a court sitting in public. Although almost every undefended petition was granted, appearance in court often led to understandable and considerable anxiety for the parties (particularly the petitioner) and contributed to the spiralling costs (whether borne by the parties or the legal aid fund). Furthermore the process involved a great deal of judicial time. Following calls for reform,[11] a so-called "special procedure" was introduced to dispense with the need to give evidence in court if the case was not defended. Originally it applied only to petitions based on two years' separation, but from 1977 all undefended

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9 Matrimonial and Family Proceedings Act 1984, section 33.

10 See sections 33(3) and 39 of the 1984 Act and section 41 of the County Courts Act 1984.

11 See principally Elston, Fuller and Murch, 'Judicial Hearings of Undefended Divorce Petitions', *MLR*, 1975, Issue 38, p. 609.

petitions for divorce are dealt with under this procedure. At the same time, legal aid for the divorce itself was withdrawn.[12]

Under the special procedure, the petitioner commences proceedings by issuing a petition to the divorce county court, accompanied by a statement of arrangements proposed for the minor children of the family and an affidavit verifying the contents of these, together with certain other information and any corroborative evidence on which the petitioner intended to rely. The papers are then served on the respondent who is given the opportunity to reply but unless he formally files an answer stating an intention to defend, the petition is assumed to be undefended. Although the petition is a specially prescribed form, it is not necessary to engage a lawyer. The forms can easily be obtained from the court registry or from law stationers, and indeed, following the withdrawal of legal aid, court officials will assist individuals not legally represented in completing the form. Service on the respondent is the court's responsibility. In practice it is common for the petition to be filed by a lawyer (a solicitor under the English system).

Where a petition is undefended, the district judge enters the cause in the special procedure list. If he is satisfied that the petitioner has proved his case and is entitled to a decree, he makes and files a certificate to this effect and a day is fixed on which a judge or district judge pronounces the decree nisi in open court. Neither party needs to be present when this is done.[13]

10. When does the divorce finally dissolve the marriage?

The divorce decree is made in two stages: the decree nisi, followed by the decree absolute.[14] The petitioner may apply for the decree to be

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12 Although it may still be obtained to make or oppose an application for an order for non-molestation or occupation, financial relief or in relation to children, but not to make an application in relation to children if there was no reason to believe that it would be opposed. Many petitioners find themselves having to draft their own divorce petition, the pitfalls of which exercise were demonstrated in *Young v Purdy* [1996] 2 FLR 795, Court of Appeal.

13 See FPR 1991, rule 2.36 and *Practice Direction* [1977] 1 All ER 845.

14 Subject to the provisions of sections 10 and 41 of the Matrimonial Causes Act 1973.

made absolute at any time after the expiration of six weeks from the granting of the decree nisi unless the court fixes a shorter time in the particular case;[15] if the petitioner fails to apply for a decree absolute, the respondent can apply at any time after the expiration of three months from the earliest date on which the petitioner could have applied.[16] The delay is intended to provide an opportunity for an unsuccessful respondent to appeal against the granting of the decree nisi, or for the Queen's Proctor or any other person to intervene to show cause why the decree should not be made absolute. The marriage ceases as soon as the decree is made absolute, and either spouse is free to remarry. The decree nisi does not have this effect, and if either party remarries before it has been made absolute, the second marriage is void.

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.

II. Divorce on the sole ground of irretrievable breakdown of the marriage

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

Under the Matrimonial Causes Act 1973 section 1(1) there is only one ground, that the marriage has broken down irretrievably. Irretrievable breakdown, however, can only be established by proving one or more of the five facts set out in section 1(2). If none of these can be established, the court cannot pronounce a decree even though it is satisfied that the marriage is at an end.[17] It might be added that, even if

15 Matrimonial Causes Act 1973, section 1(5) and *Practice Direction* [1977] 2 All ER 714.

16 Matrimonial Causes Act 1973 section 9(2). But there is a discretion whether to permit the respondent's application, and it may be refused where financial matters are outstanding and the petitioner will be prejudiced, if the respondent is permitted to obtain the freedom to remarry before these are resolved: *Smith v Smith* [1990] 1 FLR 438; *Manchanda v Manchanda* [1995] 2 FLR 590, Court of Appeal; *Wickler v Wickler* [1998] 2 FLR 326.

17 See e.g. *Pheasant v Pheasant* [1972] 1 All ER 587, a plea that his wife's failure to give the petitioner the demonstrative affection for which he craved, was held not to satisfy any fact. A divorce decree was therefore refused even though marriage had clearly broken down. For another example, see *Richards v Richards* [1972] 3 All ER

one of the facts is established, the court retains a discretion to refuse a decree, since it still must be satisfied that the marriage is at an end.[18] However, although it is the court's duty[19] "to inquire, so far as it reasonably can, into the facts alleged" by both parties, in practical terms the burden is solely on the petitioner to establish one of the five facts and for the respondent in a defended suit to show that the marriage has not broken down irretrievably.

The five facts for proving irretrievable breakdown

(a) The first fact on which the petitioner can rely is

> "that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent".[20]

It will be noted that adultery by itself is not sufficient. This is because in part it was intended to move away from the idea of matrimonial fault and in part because Parliament accepted that infidelity may be a symptom of breakdown rather than the cause of it and that an isolated act of adultery may not even be a symptom. Rather curiously it has been held that the intolerability does not necessarily have to be related to the adultery.[21]

(b) The second fact is established by the petitioner showing

> "that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent".[22]

This provision is frequently, but erroneously, abbreviated to "unreasonable behaviour",[23] thereby suggesting that all one has to look

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695 in which a husband's illness causing him to be moody and taciturn was held to be insufficient to establish any fact.

18 See section 1(4) of the Matrimonial Causes Act 1973.

19 See section 1(3).

20 See section 1(2)(a) of the Matrimonial Causes Act 1973.

21 See *Cleary v Cleary* [1974] 1 All ER 498, Court of Appeal, but doubted, obiter, by *Carr v Carr* [1974] 1 All ER 193, Court of Appeal.

22 See section 1(2)(b) of the Matrimonial Causes Act 1973.

at is the quality of the respondent's behaviour, whereas in fact what is important is the effect of that conduct upon the petitioner.[24]

The test that is generally accepted is that formulated by Dunn J in *Livingstone-Stallard v Livingstone-Stallard*[25] and adopted by the majority in *O'Neill v O'Neill*.[26]

> "Would any right-thinking person come to the conclusion that *this* husband has behaved in such a way that *this* wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?".

This was spelled out rather more fully by Bagnall J in *Ash v Ash*[27]

> "I have to consider not only the behaviour of the respondent … but the character, personality, disposition and behaviour of the petitioner. The general question may be expanded thus: can this petitioner, with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this respondent?".

This fact can cover a multitude of "sins" ranging from violence to nagging, from causing embarrassment to complete neglect, from positive, intentional behaviour to involuntary passivity. But what, at any rate in theory, it cannot cover is incompatibility, for example, that the spouses no longer have anything in common and can no longer communicate[28] or one of them is bored with the marriage.[29] However, notwithstanding this last point, "behaviour" is the fact upon which

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23 Described as a 'linguistic trap' by Ormrod LJ in *Bannister v Bannister* (1980) 10 Fam Law 240, Court of Appeal.

24 *Ash v Ash* [1972] Fam 135, *Pheasant v Pheasant* [1972] Fam 202, *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47, *O'Neill v O'Neill* [1975] 3 All ER 289, Court of Appeal.

25 *Livingstone-Stallard* [1974] Fam 47.

26 [1975] 3 All ER 289 at 295 (*per* Roskill LJ with whom Browne LJ agreed).

27 [1972] Fam 135 at 140.

28 As in *Buffery v Buffery* [1988] 2 FLR 365.

29 As in *Kisala v Kisala* (1973) 117 Sol Jo. 664.

reliance must be placed when no other fact is available. It also tends to be the fact that causes most hostility between the parties (see below).

(c) The third fact is

> "that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition."[30]

In legal theory this is the most technical of the five facts but in a nutshell "desertion" can be defined as the unjustifiable withdrawal from cohabitation without the other spouse's consent and with the intention of remaining separated permanently.

In practice this fact is the least used of all the facts, in part because of its technicality and in part because reliance can be placed on the fourth fact based on two years' separation if the respondent consents to the decree. But it can be useful if the respondent is in desertion and refuses to consent to a decree, and even after five years' separation (where the respondent's consent is not required) since it avoids the possibility of use being made of the provisions (discussed below) to oppose or delay the granting of the decree absolute.

(d) The fourth fact is

> "that the parties to the marriage have lived apart for a continuous period of at least two years preceding the presentation of the petition ... and the respondent consents to a decree being granted."[31]

This was one of the most controversial provisions of the Divorce Reform Act 1969 because it introduced, albeit to a limited extent, divorce by consent. It was also expected to be a popular "fact" since it was felt to provide for the most civilised divorce. However, many do not wish to wait for two years and will therefore opt to rely on

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30 See section 1(2)(c) of the Matrimonial Causes Act 1973.
31 See section 1(2)(d) of the Matrimonial Causes Act 1973.

behaviour or adultery.[32] "Consent" for these purposes means positive consent and must be evidenced in writing.[33] It is not sufficient simply not to defend the petition. "Living apart" means living in separate households but not necessarily under different roofs.[34]

(e) The fifth fact is

> "that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition …".[35]

This was the most controversial part of the divorce reform and very nearly caused the Bill to fail, since it enabled for the first time, a marriage to be dissolved against the will of a spouse who had committed no matrimonial offence and who had not been responsible for the breakdown of the marriage. On the one hand it was hailed as a measure that would bring relief to hundreds of couples who could otherwise live in stable illicit unions unable to marry because one or both of them could not secure release from another marriage; on the other hand it was castigated as a "Casanova's charter". Indeed, it was this latter fear that led to a "hardship defence" being introduced to petitions on this fact (see Question 21).

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

The first three of the five facts are clearly fault based (though the "behaviour" fact under section 1(2)(b) does not necessarily demand that the respondent be at fault. For example, involuntary behaviour [for example problems caused by illness] can be sufficient, see *Katz v Katz* [1972] 3 All ER 219, *Richards v Richards* [1972] 3 All ER 695 and *Thurlow v Thurlow* [1976] Fam 22 - in the latter case, involuntary

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32 In fact the petition must be presented after the full period of 2 years has elapsed. Presenting it on the second anniversary of the separation is therefore insufficient, see *Warr v Warr* [1975] Fam 25.

33 *McG v R* [1972] 1 All ER 362. The usual way of proving consent is by producing the completed acknowledgement of service stating that the respondent consents to the decree which must be personally signed by him.

34 See *Mouncer v Mouncer* [1972] 1 All ER 289.

35 See section 1(2)(e) of the Matrimonial Causes Act 1973.

passivity was held to be sufficient. The Law Commission has criticised the current law (see Question 56, Boek II, XYZ) on the basis that poor members of the community have to rely on the fault based facts since they cannot afford to live separately before the divorce.

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

At one time English law imposed no requirement upon the length of marriage before a divorce petition could be granted (and indeed there is no restriction in Scotland). However, such a restriction was introduced as a stratagem for getting the 1937 divorce legislation through Parliament. After that legislation no petition could be presented during the first three years of marriage unless leave was obtained on the ground of exceptional hardship suffered by the petitioner *or* exceptional depravity by the respondent. This bar was amended, following the Law Commission's recommendation,[36] by section 1 of the Matrimonial and Family Proceedings Act 1984,[37] so that now there is an absolute bar on presenting a petition before the expiration of one year from the date of the marriage. This, however, does not prevent a spouse from later presenting a petition on facts which occurred during the first year of marriage.

14. Is a period of separation generally required before filing the divorce papers? If not, go to question 16. If so, will this period be shorter if the respondent consents than if he/she does not? Are there other exceptions?

There is no *general* requirement of separation before filing for a divorce.

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

Not applicable.

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

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36 See Law Com No. 116 (Time Restrictions on Presentation of Divorce and Nullity Petitions).

37 Substituting a new section 3 of the Matrimonial Causes Act 1973.

(a) Which circumstances suspend the term of separation?

According to section 2(5) of the Matrimonial Causes Act 1973 no period during which the parties lived with each other in the same household can be taken into account in calculating the period for which the parties have lived apart. However, the same provision also provides that "no account shall be taken of any one period (not exceeding six months) or of any two or more periods (not exceeding six months in all) during which the parties resumed living together". Overall, what this means is that any period or periods of living together in the same household for up to six months *suspends* the period required for living apart. Where the resumed cohabitation exceeds six months it will be deemed to end the period of living apart, so that the parties must separate for the whole of the 2 or 5 years if they wish to petition for divorce on either of these facts.

The reason for ignoring period or periods of resumed cohabitation not exceeding six months is that it represents an effort to promote reconciliation attempts, i.e. it was felt beneficial to have what were dubbed "kiss and make-up without prejudice" provisions.[38]

(b) Does the separation need to be intentional?

According to *Santos v Santos*[39] for the parties to be regarded as "living apart" for the purposes of section 1(2)(d) or (e) one of them at least must regard the marriage as finished, even though this does not have to be communicated to the other party. Although there is some suggestion[40] that it must be the petitioner who has formed the intention to end the consortium, the matter is far from resolved.[41]

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

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38 Section 2(5) applies equally to desertion. Similarly such period or periods are ignored for the purpose of petition based on section 1(2)(a) and (b), see respectively sections 2(2) and (3).

39 [1972] Fam 247.

40 See *Beales v Beales* [1972] Fam 210 at 218.

41 See the arguments to the contrary by Bromley and Lowe, *Family Law*, 8th Edition, p. 13.

"Living apart" means, according to the established case law, *viz* *Mouncer v Mouncer*[42] and *Fuller v Fuller*,[43] living in separate households. Hence parties can be regarded as living apart yet be living under the same roof. But it is a strict test in theory, for all effective communal life must have ceased.[44]

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

The strict answer to this question is "no". However, certain provisions in the Matrimonial Causes Act 1973 are designed to promote reconciliation between the parties. For example, if the petitioner instructs a solicitor to act for him, the latter is required to certify whether or not he had discussed with the petitioner the possibility of a reconciliation and given his names and addresses of persons qualified to help effect a reconciliation between estranged spouses.[45] However, many applicants for a divorce do not instruct a solicitor, and the provision is generally regarded as serving little purpose.[46]

There have also been various attempts to provide both in-court and out-of-court mediation,[47] though this was not particularly aimed at the divorce but rather with ancillary matters to the divorce.

18. Is a period for reflection and consideration required?

No period for reflection and consideration is required but that would have been central to the scheme under the now aborted Family Law Act 1996 (see Question 3).

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42 [1972] 1 All ER 289.

43 [1973] 2 All ER 650. Wife taking husband in as a lodger because he was ill - held to constitute "living apart".

44 Viz it might not be enough that the parties sleep in separate bedrooms, no longer have sexual intercourse and largely live their own lives, see *Mouncer v Mouncer* [1972] 1 All ER 289.

45 Matrimonial Causes Act 1973, section 6(1), Family Proceedings Rules 1991, rule 2.6(3) and Form M3. It is sufficient for a solicitor to certify that he has not discussed reconciliation.

46 See the *Report of the Matrimonial Causes Procedure Committee* (the Booth Committee), 1985, paragraphs 4.42 - 4.43.

47 See the discussion in Lowe and Douglas, *Bromley's Family Law*, 9th Edition, 1998, p. 232 *et seq.*

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

Strictly, the spouses need not be agreed or be required to make proposals on any issue ancillary to the divorce. However, in any proceedings for divorce the court is required by section 41 of the Matrimonial Causes Act 1973,[48] to consider whether there are any relevant children of the family[49] and

> "whether (in the light of the arrangements which have been, or are proposed to be, made for their upbringing and welfare) it should exercise any of its powers under the Children Act 1989".

In exceptional circumstances the court may direct that the decree is not to be made absolute until further order if it is of the opinion that it is likely to have to exercise its powers under the Children Act 1989 with respect to children of the family under the age of 18 and it needs to give further consideration to the case.[50] This provision applies to all divorce petitions regardless of which fact is pleaded. Furthermore, the court acts on its own initiative. However, this duty is not as stringent as it once was[51] and in any event the duty is now discharged by reading the papers[52] rather than, as was formerly the case, to conduct the enquiry by means of a formal hearing. In practice plans for the children will have been discussed and will be subject to court scrutiny.

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48 As substituted by the Children Act 1989, Schedule 12, § 31.

49 Note "children of the family" which is defined by section 52(1) of the Matrimonial Causes Act 1973, refers to children of both parties *and* any other children (other than those publicly fostered) treated as a child of the family by both spouses.

50 Matrimonial Causes Act 1973, section 41, as substituted by the Children Act 1989, Schedule 12, § 31.

51 Under section 41 as originally enacted the court could not pronounce a decree absolute unless it was satisfied that the arrangements made for the children's welfare were satisfactory or the best that could be devised in the circumstances or that it was impracticable for the party or parties to make any such arrangements.

52 See Family Proceedings Rules (1991), rule 2.2(2). See also Douglas, Murch and Perry, 'Supporting children when parents separate - a neglected family justice or mental health issue?', *8 CFLQ,* (1996) 127-8.

Commonly, what is to happen to the parties' matrimonial assets and income will also be discussed, though these do not have to be finally sorted out before the final decree. However, section 10 of the Matrimonial Causes Act 1973 provides that where a decree nisi has been granted solely on the basis of two or five years' separation, the respondent can apply for it not to be made absolute unless the court is satisfied

> "(a) that the petitioner should not be required to make any financial provision for the respondent, or
> (b) that the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances".

Although section 10 is designed to protect respondents in cases where the petitioner is deliberately evading his financial responsibilities[53] its provisions can be abused. Consequently, even where a court finds that the petitioner has not made such financial provision as he should have done, it may nevertheless make the decree absolute if it appears that there are circumstances making it desirable that the divorce should not be delayed *and* the court has obtained a satisfactory undertaking from the petitioner that he will make such financial provision as the court may approve.[54]

A new form of protection is to be introduced by the Divorce (Religious Marriages) Act 2002 (which inserts a new section, section 10A into the Matrimonial Causes Act 1973). This will enable a court to delay the granting of a decree absolute until inter alia a Jewish *get* divorce has been obtained by the husband. Under Jewish law a wife but not her husband cannot remarry in the absence of a *get*. Furthermore, a divorcee who has a child by her subsequent partner is defined as an adulteress and the child branded illegitimate. This position placed the

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53 See e.g. *Hardy v Hardy* (1981) 2 FLR 321, in which the petitioner was the son of a rich race horse trainer but who was employed by his father on a minimum salary. Since he could obviously have earned more elsewhere and had considerable future expectations, the court held that the decree should not be made absolute until a reasonable and fair provision for his wife was made.

54 Matrimonial Causes Act 1973, section 10(4).

husband in a potentially powerful position[55] and the 2002 Act is intended to redress the balance.

The Act also empowers the Lord Chancellor to extend its provisions to other faiths and could, for example, provide relief in similar cases in the Islamic community.

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

See Question 19.

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

Yes, there is a defence (strictly the only one) to the granting of the decree nisi by section 5 of the 1973 Act, which in relation to petitions based solely on five year's separation, permits the respondent to oppose its grant

> "on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage."

The rationale of this provision is that spouses should not be able to divorce their innocent partners against their will if to do so would cause great hardship. In truth it was a stratagem to enable what was at the time the highly controversial provision permitting divorce without consent based on five years' separation (which some had dubbed the "Casanova's Charter"), to pass into legislation. This defence must be raised by the respondent. The court does not have power to invoke it on its own volition.

Perhaps ironically, given the importance attached to it, the defence is rarely, if ever, successful.[56] This is in part because in relation to

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[55] See e.g. *O v O (Jurisdiction: Jewish Divorce)* [2000] 2 FLR 147 and see Freeman, 'The Jewish Law of Divorce', *IFL* , [2000] 58.

financial hardship, the courts are reluctant to find a loss "grave" and in relation to the possible loss of entitlement to a widow's pension, it can be offset by a relatively cheap deferred annuity being set up by the husband.[57] In relation to grave "other" hardship such as social ostracy, it is commonly found that it is caused, if at all, by the parties' separation and not by the dissolution, as the section requires.[58]

C. SPOUSAL MAINTENANCE AFTER DIVORCE

I. General

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

Post divorce spousal maintenance is governed by the Matrimonial Causes Act 1973, Part II, as amended principally by the Matrimonial and Family Proceedings Act 1984 and the Welfare Reform and Pensions Act 1999.

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

At common law husbands were under a duty to maintain their wives[59] during marriage but not vice versa,[60] and only provided that right had not been forfeited by the commission of a matrimonial offence[61] which relieved the man's duty to cohabit with his spouse.[62] There was no corresponding duty after divorce. However, the ecclesiastical courts

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56 For a recent example of a failed defence see *Archer v* Archer [1999] 1 FLR 327 - grave hardship not proved since the respondent wife had considerable capital assets which she should be expected to use in her declining years. For a detailed discussion see Bromley and Lowe, *Family Law*, 8th Edition, p. 214.

57 See e.g. *Parker v Parker* [1972] Fam 116.

58 See e.g. *Banik v Banik* [1973] 3 All ER 45 and (1973) 117 Sol Jo 874 and *Rukat v Rukat* [1975] Fam 63.

59 Note this duty was discharged by providing for necessities of life.

60 This was the inevitable consequence of the doctrine of unity of legal personality (see Lowe and Douglas, *Bromley's Family Law*, 9th Edition, p. 53 i.e. the wife lacked capacity to hold property or to make contracts.

61 A single act of adultery would end the duty, see *Jones v Newtown and Llanidloes Guardians* [1920] 3 KB 381.

62 *i.e.* a wife had no right of separate maintenance in a separate home unless she could justify living apart from her husband.

could order a husband to pay secured maintenance to his wife after granting a decree of divorce a mensa et thoro and this power was vested in the Divorce Court by the 1857 Matrimonial Causes Act. This statutory power was steadily extended over the next century, so as to include provision for making unsecured maintenance orders (introduced in 1866) and for lump sum orders (1963) and, in certain circumstances,[63] for making orders against wives in favour of their husbands. However, major reform followed in the wake of the 1969 divorce reform, inter alia because of the fear that many so-called innocent wives, divorced against their will, would be left with inadequate provision.

This reform was first provided by the Matrimonial Proceedings and Property Act 1970[64] which in turn was re-enacted in Part II of the Matrimonial Causes Act 1973. This legislation rationalised the previous law and provided for the making of what is described as "financial provision", both in the form of periodical payments or lump sums. For the first time the court was given equal powers to order *either* spouse to make financial provision for the other regardless of who is seeking the divorce. It also extended the judicial powers to determining who is to have what property and thus to make orders transferring the property from one spouse to the other. These powers under the 1973 Act were later extended to ordering the sale of any of the spouses' property[65] and, in 1984,[66] to being able to *impose* a clean break upon a spouse. The 1984 reforms also made some important changes to the way the powers were to be exercised.

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

There have been no recent formal proposals to reform the current private law regarding maintenance of spouses after divorce. In 1998 the Lord Chancellor's Ancillary Relief Advisory Group were asked to

63 *Viz* where the wife was petitioning on the ground of her husband's insanity, see Matrimonial Causes Act 1965, section 16(3).

64 This was based on the Law Commission's recommendation in Law Commission, *Report on Financial Provision in Matrimonial Proceedings*, 1969, Report Number 25 and on which see Cretney, 'The Maintenance Quagmire', *MLR*, 1970, Issue 33, 662.

65 *Viz* by the Matrimonial Homes and Property Act 1981.

66 *Viz* by the Matrimonial and Family Proceedings Act 1984.

look at the Scottish system. One of the objects of the enquiry was to investigate ways of reducing the current uncertainty and thereby to reduce the high costs of litigation. The terms of reference also specifically included what test should be satisfied to overturn a pre-nuptial agreement or a presumption of equal division of marital property.

Masking some element of disagreement the Committee only made the blandest of recommendations.[67] They considered that any radical reform should be preceded by further research and wider consultation. They were unanimously opposed to the introduction of a system of presumptive equal division but they did think there was a case for codifying the principles actually being applied by the courts.

No action has been taken on this nor on the rather vague suggestion made in *Supporting Families* that investigations be made into reforming the legal position of prenuptial agreements.

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

Yes - divorce courts can order spousal maintenance (referred to in English law as "financial provision") after divorce. The power is entirely statutory and currently derives from the Matrimonial Causes Act 1973, Part II. Specifically, under section 23 of the Matrimonial Causes Act 1973 upon granting a decree of divorce the court may make

> "(a) an order that either party to the marriage shall make to the other such periodical payments, for such term, as may be specified in the order;
> (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court such periodical payments, for such term, as may be so specified;
> (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified; ..."

Note: Periodical payments orders may be secured (see Question 101) or unsecured.

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[67] See [1998] Fam Law 576.

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 above mentioned powers to make orders for financial provision are part and parcel of the court's wider powers to redistribute the parties' assets including their property (there is no regime of community of property under English law) so as to achieve broad fairness and equality between the parties and any relevant children. Although not usually articulated as such, since the powers to make orders for financial provision are inextricably linked to the wider powers to redistribute all the family assets, the powers over property do in part fulfil a function of support.

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

Insofar as property distribution and (perhaps to a less extent) pension sharing satisfy the claimant's needs and at the same time affect the debtor's ability to pay ongoing maintenance, then they will have an effect on what, if any, financial provision should be made.

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

No damages can be claimed. Maintenance (or financial provision) does not have the function of compensation.

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 basically only one regime governing financial relief after divorce.

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?

Both spouses are under a duty to make full, frank and up-to-date disclosure of their assets.[68] Unless the parties are agreed on the terms of the order to be made, each is required to file an affidavit setting out full particulars of the property and income,[69] but in practice it is notorious that some spouses, particularly wealthy men, may seek to conceal the full extent of their property and means.[70] Those who attempt to deceive the court by failing to make full disclosure will forfeit its sympathy,[71] and it is open to the court to draw the adverse inference that beneath a false presentation there are undisclosed assets.[72] The court may, in its discretion, penalise a reluctance or refusal to make proper disclosure in its order for costs.[73] The court possesses extensive powers to enable one party to obtain additional information from the other.[74] and may, and often does, make orders for discovery where financial and other documents and records are required to be produced.[75] While resort to such powers may be necessary in appropriate cases, there has been judicial criticism of excessive and unnecessary enquiries into the means

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68 *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424.

69 Family Proceedings Rules 1991 rule 2.58-2.61.

70 One legitimate concealment tactic is the so-called 'millionaire's defence', where the respondent, contending his wealth is more than sufficient to support any order that the court might make, will not be ordered to make full disclosure. See e.g. *Thyssen-Bornemisza v Thyssen-Bornemisza (No 2)* [1985] FLR 1069. Whether this "defence" survives *White v White* [2001] 1 AC 596, may be debated.

71 See *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26.

72 *Baker v Baker* [1995] 2 FLR 829.

73 Although not formally enshrined in the Rules of Court, the divorce courts have adopted the principle (which applies generally in litigation) that, at least where there are sufficient assets, 'costs follow the event', i.e. the loser pays the winner's costs as well as his own: *Gojkovic Gojkovic (No 2)* [1992] Fam 40. For examples of cases where a spouse's failure to make full disclosure was reflected in the costs award made by the court see e.g. *P v P (Financial Relief: Non Disclosure)* [1994] 2 FLR 381 and *S v S (Financial Provision)(Post Divorce Cohabitation)* [1994] 2 FLR 228 (the latter where costs were awarded on a full indemnity basis).

74 This includes the use of detailed questionnaires which the recipient is required to complete and which these days are 'routine feature of financial cases': *Hildebrand v Hildebrand* [1992] 1 FLR 244 at 247 (*per* Waite J).

75 See e.g. *B v B (Financial Provision)* [1989] 1 FLR 119; *P v P* [1989] 2 FLR 241; *Newton v Newton* [1990] 1 FLR 33; *Re T (Divorce: Interim Maintenance: Discovery* [1990] 1 FLR 1.

of the parties, which can be time-consuming, acrimonious and above all expensive, with enormous legal and professional costs swelling up the value of the family's assets available for distribution.[76] Courts, particularly when considering whether to permit appeals, should always consider the proportionality between the amount at stake and the costs.[77]

II. Conditions under which maintenance is paid

To answer the questions in this section it is best first of all to refer to the guidelines set out by the Matrimonial Causes Act 1973. These direct the court as follows:

- in deciding whether and how to exercise its powers "to have regard to all circumstances of the case first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen;"[78]

- when exercising its powers "to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable;"[79] and

- when exercising its powers to have regard to each party's current and potential income, earning capacity, property and other financial resources, their (and their children's) financial needs, the family's standard of living before the marital breakdown, the spouse's age and any disability, the length of the marriage, each party's contribution (past, present and future) to the welfare of the family (including looking after the home or caring for the family), each party's conduct (insofar as it would be inequitable to disregard it) and the value of any benefit (for example a pension)

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76 57*Piglowski v Piglowski* [1999] 2 FLR 763.

77 See e.g. *Newton v Newton* supra; *Re T (Divorce Interim Maintenance: Discovery)* [1990] 1 FLR 1 and *H v H (Financial Relief: Costs)* [1997] 2 FLR.

78 Matrimonial Causes Act 1973, section 25(1).

79 Matrimonial Causes Act 1973, section 25A(1). This is sometimes referred to as the 'self-sufficiency principle'.

which by reason of the ending of the marriage a party to the marriage will lose the chance of acquiring.[80]

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.

Although age, illness, duration of marriage and the raising of children are factors in determining quantum, ultimately the court must be satisfied that claimant has ongoing needs which he or she cannot otherwise meet and the debtor has the means to pay for or contribute to those needs.

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

Although fault can be a factor, strictly ongoing financial provision does *not* depend upon the behaviour of the debtor.

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

The cause of the lack of means can be a factor. For example, giving up a house or a job, particularly where the marriage is short.

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

There is no strict rule about when the claimant's needs must exist. Under section 25(2)(b) of the Matrimonial Causes Act 1973 the court is directed to consider both the claimant's current needs, obligations and responsibilities and those in the foreseeable future. Normally there will be current needs but that is by no means necessary. Indeed in one case, *Whiting v Whiting*[81] the court made what is known as a continuing "nominal order" (*viz* in that case 5p per annum) which allowed the

80 Matrimonial Causes Act 1973, section 25(2).

81 [1988] 2 All ER 275. See also *Barrett v Barrett* [1988] 2 FLR 516 and *M v M (Property Adjustment: Impaired Life Expectancy)* [1993] 2 FLR 723.

claimant's wife to return to the court to obtain a variation should there be some unforeseen disaster such as redundancy or illness. Any order for periodical payments can be backdated.[82] The general rule is that an order may be backdated to the date on which the application was first made.[83]

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?

There are no *prescribed* time limits for financial orders. Instead, duration is a matter for the court's discretion though subject to a general guideline (see the general introduction to the answers to Part II above) that they should aim to terminate financial obligations as soon as possible and subject to the enjoinder that periodical payments orders end on the claimant's death or remarriage.[84] Orders can be for a fixed term or pending further order (i.e. potentially for life of the claimant). In 2000, according to *Judicial Statistics*, 5,044 orders were made for a fixed term and 5,251 were made "pending further order").[85] Where orders are made for a fixed term it is possible for the court to add a specific direction that no application may be made to extend the period.[86] However, these orders, sometimes known as "deferred clean break" orders are not commonly made since hard evidence is needed to show that the claimant (particularly middle aged women) will indeed have an adequate income in the future.[87]

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?

As stated at the beginning of the answers to Part II, the courts are required to consider a number of factors, including "the standard of

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82 Matrimonial Causes Act 1973, section 28(1)(a).
83 Matrimonial Causes Act 1973, section 28(1)(a)(iv).
84 See Matrimonial Causes Act 1973, section 28(1).
85 In 2000 only 4562 fixed term orders were made and 3196 orders "pending further order".
86 See Matrimonial Causes Act 1973, section 28A(1).
87 See e.g. *Flavell v Flavell* [1997] 1 FLR 353 and *Fisher v Fisher* [1989] 1 FLR 423.

living enjoyed by the parties before the breakdown of the marriage" in determining what may be considered the parties' reasonable needs.

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?

In the absence of an overall statutory stated objective various broad brush approaches have been suggested in relation to the appropriate redistribution of family assets after the divorce. At one point, for example, the courts seemed to favour the so-called "one-third rule",[88] and then the so-called net effect approach[89] but the current leading case, *White v White*,[90] has sought to restate the general principles underlying the power to grant ancillary relief. According to *White* the implicit objective is to achieve a fair outcome in financial arrangements, giving first consideration where relevant to the welfare of children. Fairness requires the court to take into account all the circumstances of the case and not to discriminate between husband and wife and their respective roles. Most interestingly, Lord Nicholls added that before making an order for division of the assets

> "a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so."

White was a so-called "big money" case and was principally concerned with the division of a farm, so its application, if at all, to periodical payments orders is far from clear. However, the overall goal of fairness must surely apply and, insofar as it is possible, some notion of equality might also be appropriate though in the context of an overall asset division.

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88 See *Ackerman v Ackerman* [1972] and *Wachtel v Wachtel* [1973] Fam 72, under which wives could generally expect to be awarded one third of the overall assets.

89 This involved working out the respective position of the parties on the assumption that a hypothetical order is made and taking into account their respective tax liability. The resulting figures were then compared and related to the parties' respective needs.

90 [2001] 1 AC 596. This decision has been discussed in a number of decisions since, notably, *Cowan v Cowan* [2001] 2 FLR 192 and in numerous articles.

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?)

All types of costs can be asked to be taken into account though it is a matter for the court to decide, whether, and if so, how, to include them in the calculation. Costs of re-training, or to obtain further professional qualifications are quite likely to be taken into account, especially if that will help the claimant to become self-sufficient.

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

There is no prescribed maximum limit of the maintenance that can be ordered. The limitation is the parties' reasonable needs or requirements.

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

There is no statutory provision to provide for a reduction in financial provision after a certain time, though it is within the court's power to so provide. In any event, either party may return to the court to seek a variation of the amount of ongoing financial provision.

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

As stated at the beginning of the answers to Part II, the 1973 Act provides for both periodical and lump sums. So far as the former is concerned the interval (e.g. weekly or monthly or annually etc) is at the court's discretion taking into account the parties' circumstances. It will commonly reflect how the debtor's income is paid. Lump sums lie at the court's discretion (see Question 75). There is no power to order payments in kind.

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 are no prescribed limits in the amount of lump sums that can be ordered to be paid. Lump sums are at the court's discretion. In theory there is no overriding power of either the claimant or the debtor to opt for it.

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

There is no automatic indexation of periodical payments orders, but it lies within the court's discretion to provide for indexed increases.

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

It is also open to either party in cases of ongoing[91] periodical payment orders to return to the court to seek a variation.

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?

Although there is no statutory restriction, courts in general will not make orders depressing the debtor below subsistence level (that is the level at which income support becomes payable).[92] In assessing what order should be made the courts should[93] calculate the debtor's net available income, consider the effect of any proposed order on his living expenses and compare the sum that he would receive, if in receipt of income support (or job seekers' allowance) to ensure that he is not left with a sum below that amount.

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91 Save where a section 28(1A) direction has been imposed preventing the claimant seeking an extension of an order. Note also lump sums, once fixed, cannot be varied as to their amount but if they are payable by instalments, the number or frequency of instalments can subsequently be varied - see *Tilley v Tilley* (1979) 10 Fam Law 89 and *Penrose v Penrose* [1994] 2 FLR 621.

92 For a rare exception, see *Billington v Billington* [1974] Fam 24.

93 See *Allen v Allen* [1986] 2 FLR 265 and *Peacock v Peacock* [1984] 1 All ER 1069.

Though a matter for the court's discretion, it will often be deemed appropriate to allow the debtor a margin above subsistence level even to the extent of imposing a clean break. For example, in *Ashley v Blackman*[94] Waite J dismissed a husband's liability for maintenance where a wife, aged 48, was a long-term schizophrenic in receipt of state benefits. The husband, aged 55, had remarried, and had two young children but an income of just £7,000 per annum. The judge drew a distinction between the 'devious and feckless' husband and the 'genuine struggler'. The latter was to be allowed to see 'light at the end of the tunnel' by being spared the obligation to pay his ex-wife, with no commensurate financial benefit to her, the few pounds which separated him from penury. Similarly, in *Delaney v Delaney*[95] the husband purchased a home with his cohabitant but, after paying the mortgage, was left with insufficient income to support his wife and children. The Court of Appeal held that the needs of the wife and children had to be balanced with the husband's ability to pay, and the availability of social security benefits (including income support) should be considered. It discharged the wife's periodical payments order and made nominal orders for the children. Ward J stated that a former husband was entitled so to order his life as to fulfil his aspirations for the future: there is, after all, 'life after divorce'.

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?

Under English law both the parties' assets and income are judged at the date of the hearing.[96] There is no legal significance in whether assets or income have been acquired before or after separation or divorce. Hence, the court will take account of any increase of the debtor's income both after the separation and divorce. Indeed, it is statutorily obliged[97] to consider both what increases of income the

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94 [1988] Fam 85. See also *C v C (Financial Provision: Personal Damages)* [1995] 2 FLR 171.

95 [1990] 2 FLR 457.

96 If a party's income is liable to fluctuate, it is customary to take an overage to assess future earnings, see *Sherwood v Sherwood* [1920] p 120.

97 Matrimonial Causes Act 1973, section 25(2)(a).

debtor is likely to have in the foreseeable future and what increases it would be reasonable to expect that party to acquire.[98]

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

The courts are statutorily obliged to consider the financial obligations which each of the parties to the marriage has or is likely to have in the foreseeable future.[99] Accordingly, debts can be taken into account when assessing what financial provision the debtor should be ordered to make. However, the courts are not obliged to take into account all debts no matter how and when they have been occurred. The overriding principle is that the debts must be reasonably incurred and commensurate with the debtor's reasonable needs.[100]

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?

Although it is a matter for the court's discretion, moral obligations to maintain both stepchildren and de facto partners can and have been taken into account in determining what financial obligations the debtor has.[101]

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

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98 This specific requirement was introduced by an amendment by the Matrimonial and Family Proceedings Act 1984, section 3. In his evidence to the Special Standing Committee (HC Official Report, column 177, 22.03.1984), the President of the Family Division instanced the 'obvious case' of a husband who had reached the point in his career at which he had the right or opportunity to take some examination which would lead to a higher grade or a better remunerated appointment.

99 Matrimonial Causes Act 1973, section 25(2)(b).

100 See e.g. *G (formerly P) v P (ancillary relief: appeal)* [1978] 1 All ER 1099, where the court refused to take full account of mortgage repayments on what it considered to be an extremely expensive house bought by the husband after separating from his wife. In *Girvan v Girvan* (1983) 13 Fam Law 213 made no allowances for outgoings on what it considered a luxury item, given the husband's poor economic circumstances, namely a video recorder.

101 See e.g. *Blower v Blower* [1986] 1 FLR 292 and *Roberts v Roberts* [1970] P 1.

Yes, the court's powers to redistribute the parties' assets after divorce extends to all forms of assets including capital assets and these can, and frequently are, used to discharge or to contribute to discharging any ongoing maintenance or support 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?

In assessing what is the debtor's current and potential income the court is alive to the possibility that he or she may be deliberately earning less or not working at all. It has the power to make assessments on the assumption that the debtor is in fact earning more (for example by working overtime)[102] or that he or she is working.[103] In theory, it can do this by attributing a fictional income,[104] though it will frequently simply make orders on the assumption that the debtor can pay thereby forcing him or her to gain employment or work longer hours.

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

In theory *all* income, whether derived from private means or from public benefits under the social security schemes, are taken into account in assessing the debtor's current and potential means. A major social security benefit is income support which is payable to those without a job and who have no or virtually no capital. It is effectively what the State judges to be the minimum liveable income,

102 See e.g. *Kluinski v Kluinski* [1953] 1 All ER 683.

103 See *McEwan v McEwan* [1972] 2 All ER 708. If, however, the debtor is receiving income support, for which he will have been assessed as not being deliberately unemployed, the court will require positive evidence that he is in fact intentionally evading his or her responsibilities, see *Williams v Williams* [1974] Fam 55 and *Bromilow v Bromilow* (1976) 7 Family Law 16.

104 Cf *Leadbeater v Leadbeater* [1985] FLR 789, where a *claimant* wife was assumed to be earning more than she was.

and the court would require exceptionally compelling reasons to order payments out of that income.[105]

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?

Though ultimately a matter of discretion it is nevertheless established that a new partner's (that is a spouse or de facto partner - English law does not recognise registered partnerships) means are relevant[106] but only to the extent that they diminish the needs of the debtor, thereby extending his or her resources to support his divorcing spouse. An order cannot be made which has the effect of making the new partner pay out of his or her income or capital.[107]

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?

Since claims for ongoing financial support depend upon need, the claimant's own current and potential income is of critical importance and will certainly reduce (or even eliminate) any financial provision that might be ordered. There is certainly an element of reasonableness in assessing what the claimant should be regarded as being capable of earning. For example, in *Leadbeater v Leadbeater*[108] while it was held unreasonable to expect a 47-year-old woman with no particular skills (she was, at the time of the marriage, the secretary to her former

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105 Cf *Billington v Billington* [1974] Fam 24, where an application for an attachment of earnings order, it was held justified to make an order depressed the debtor below the subsistence level.

106 There can be difficulties in discovering these means, see e.g. *Wynne v Wynne and Jeffers* [1980] 3 All ER 659. But for methods of doing so, compare *Frary v Frary* [1993] 2 FLR 696 with *D v D (Production Appointment: Procedure)* [1995] 2 FLR 497.

107 See *Macey v Macey* (1981) 3 FLR 7 and *Brown v Brown* (1981) 3 FLR 161.

108 [1985] FLR 789. See also *M v M (Financial Provision)* [1987] 2 FLR 1, in which the difficulties of another 47-year-old wife were discussed.

husband) to adapt to new electronic methods used in offices (i.e. to acquire computer skills etc.) it was thought that she could increase the number of hours she was currently working as a receptionist. Accordingly, her earnings were assessed to £2,500 per year as against her actual earnings of £1,680. In contrast, in *Mitchell v Mitchell*[109] it was held that a wife, who was an experienced secretary, but who had taken a part-time job in a canteen, could, when the children had left school (the younger child was 13), reasonably be expected to increase her earning capacity.

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

Courts are under a statutory obligation[110] to consider whether it would be appropriate to exercise their powers so that “the financial obligations of each party towards each other will be terminated as soon after the grant of divorce order … as the court considers just and reasonable”. It is therefore expected that evidence will be led as to the employability of the claimant. It is not a pre-requisite that claimant be in employment to claim maintenance but if the court considers that the claimant should reasonably be expected to obtain paid employment it can make an order on that assumption.

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

In assessing what, if any, financial provision to order, the court must take into account all the claimant’s assets (as well as the debtor’s). In this sense the claimant’s capital assets will be relevant to any claims for ongoing support.

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?

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109 [1984] FLR 387.

110 Matrimonial Causes Act 1973, section 25A(2).

All the claimant's outgoings are taken into account when assessing needs.[111] Insofaras the claimant is liable to pay child support these payments have to be respected, as they take absolute priority.

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 answer to this question depends on the current and potential financial position of the parties. If the parties' assets are such that both households can be maintained above subsistence level (i.e. the rate of income support) then income support will be left out of the equation. In the case of State pensions which are payable as of right, these sums will simply be part of the calculation of the parties' assets.

Where the assets are insufficient to maintain both households above subsistence level there has been some difference of view. On the one hand, there are cases[112] which say that claimant's receipt or potential receipt of income support should be ignored in assessing what the debtor should pay, since otherwise the duty to provide for the claimant is shifted onto the State, but in other cases, including more recent decisions,[113] the courts have taken the claimant's entitlement to benefits into account and have not imposed any ongoing obligations of support upon the debtor.

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?

Apart from the claims of dependent children (see Question 93) there is no prescribed ranking priority among competing claimants. It is a matter of court discretion as to how to balance the competing claims.

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111 *i.e.* for the purpose of the Matrimonial Causes Act 1973, section 25(2)(b).

112 See e.g. *Peacock v Peacock* [1984] 1 All ER 1069, *Shallow v Shallow* [1979] Fam 1 and *Barnes v Barnes* [1972] 3 All ER 877.

113 *Viz Delaney v Delaney* [1990] 2 FLR 457 and *Ashley v Blackman* [1988] Fam 85. See also *C v C (Financial Provision: Personal Damages)* [1995] 2 FLR 171.

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

The second spouse's needs cannot be ignored[114] but this in itself does not justify postponing the interests of the first family to those of the second family.[115] However, to the extent that the second household should not be depressed below subsistence level, the reality is that for low income couples, the first spouse will have to give way to the second family.[116] English law does not make provision for registered partnerships.

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?

Section 25(1) of the Matrimonial Causes Act 1973 directs the court is "to have regard to all the circumstances of the case, *first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen*". Although this direction in itself does not make the children's welfare the paramount or overriding consideration[117] so far as birth children of both spouses are concerned there is a statutory regime under the Child Support Act 1991 for the *mandatory* payment of child support (calculated on the basis of a statutory laid down formula) which payments have automatic priority over any periodical payments order (or indeed any other financial provision) to a spouse.

However, the term "child of the family" referred to in section 25(1) also includes any child who has been treated by both parties as a child of the family[118] and therefore extends to step-children. These children, however, fall outside the Child Support scheme, but nevertheless

[114] *Barnes v Barnes* [1972] 3 All ER 872. But cf *Billington v Billington* [1974] Fam 24.

[115] *Roberts v Roberts* [1970] P1.

[116] See *Allen v Allen* [1986] 2 FLR 265, *Peacock v Peacock* [1984] 1 All ER 1069. Note also *Ashley v Blackman* [1988] Fam 85 and *Delaney v Delaney* [1990] 2 FLR 457, both discussed in Question 78.

[117] See *Suter v Suter and Jones* [1987] Fam 111. Cf *Anthony v Anthony* [1986] 2 FLR 353, where not all the children's interests were necessarily identical.

[118] See Matrimonial Causes Act 1973, section 52 discussed by Lowe and Douglas, *Bromley's Family Law*, 9th Edition, p. 288-290.

section 25(1) still directs that "first" consideration be given to their interests. In theory, therefore, priority ought to be given to considering what financial support ought to be given to these children. However, in assessing their needs account can be taken of the liability of any other person to maintain the child and the extent to which responsibility had been assumed by the debtor and whether or not he knew whether the child was his own.[119]

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

Although the requirement under section 25(1) of the Matrimonial Causes Act 1973 to give first consideration to the welfare of children of the family only applies to those under the age of 18 (the age of majority in England and Wales),[120] liability to pay child support under the Child Support Act 1991 continues until the child becomes 19 if he is receiving full-time non advanced[121] education.[122] Such payments will continue to have absolute priority, even when the child is 18. The courts, too, can order that financial provision for children should continue beyond their majority provided they are or would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation,[123] but in these instances no statutory priority attaches to payments for children after their 18th birthday.[124]

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

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119 See Matrimonial Causes Act 1973, section 25(4).

120 Family Law Reform Act 1969, section 1.

121 *i.e.* not tertiary education.

122 Child Support Act 1991, section 55(2)(b)(i).

123 See Matrimonial Causes Act 1973, section 29(3), and see *Richardson v Richardson (No 2)* [1996] 2 FLR 617 in which the court extended a periodical payment order in favour of a wife, so she could complete her responsibility for bringing up her two daughters whilst they were at college.

124 The courts have taken different views on whether it is appropriate to take into account a parent's wish to make provision for their non dependent adult children. In *Lilford v Glynn* [1979] 1 All ER 441, it was thought inappropriate since orders should be related to dependency but in *White v White* [2001] 1 AC 596 it was held that in cases where resources exceeds needs some account could be taken of a "natural parental wish" to leave some money for the children.

English law does not formally recognise the claims of other relatives so the question does not strictly arise.

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?

English law places no *duty* of maintenance on relatives or other relations so the question does not strictly arise. However, the moral obligation to maintain infirm parents or siblings can be taken into account when assessing what financial provision the debtor should make for his spouse.

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?

Remarriage will automatically terminate a periodical payments order.[125] Once ended, orders cannot be revived, even if the subsequent marriage is void.[126] English law makes no provision for registered partnerships but as the law currently stands, the court would have to treat such a case as turning on the claimant's needs, rather than as automatically ending their powers. Courts cannot speculate on a spouse's prospects of marriage.[127]

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?

Unlike marriage, subsequent cohabitation does not automatically end an order.[128] On the other hand, it may well lead the court to conclude that support is no longer necessary.[129]

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125 Matrimonial Causes Act 1973, section 28(1)(a).

126 This is made clear by Matrimonial Causes Act 1973, section which provides "or the avoidance of doubt it is hereby declared that references in this Act to remarriage include references to a marriage which is by law void or voidable."

127 Cf *S v S* [1976] Fam 18 at 23.

128 See *Atkinson v Atkinson* [1987] 3 All ER 849.

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

Duration of marriage is one of the factors that the courts are specifically directed to consider, though it must be examined in conjunction with others. In one case, *Leadbeater v Leadbeater*,[130] 25% was discounted from the sum that was thought appropriate to meet the wife's reasonable needs since the marriage had been short, lasting only four years. Courts are not likely to make more than a nominal order if the marriage is childless and has lasted only a matter of months and the wife has made virtually no contribution to the home and is young, fit and capable of earning her own living.[131] However, the position may be different for older claimants. In *S v S*,[132] for instance, the parties were both over 50 when they married, and even though the marriage had only lasted two years, periodical payments were ordered inter alia to compensate her for the "loss" of the comfortable old age she could have looked forward to had the marriage continued.

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?

Conduct is another factor which the courts are specifically directed to consider. Case-law suggests that only extreme forms of non financial misbehaviour, such as assisting a husband to commit suicide[133] or inciting others to kill the husband,[134] are taken into account.

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129 See *Atkinson v Atkinson* [1995] 2 FLR 356 where the court reduced the periodical payments made by a wealthy man to his former wife from £30,00 to £10,00 per year. The wife cohabited with a younger man, and had provided a comfortable home enabling the latter to develop a successful business consistently and industriously. The wife's new partner's worth was relevant insofar as it impacted on an assessment of the wife's financial needs. The husband's subsequent application for leave to appeal against the order was dismissed by the Court of Appeal: *Atkinson v Atkinson (No 2)* [1996] 1 FLR 51.

130 [1985] FLR 789.

131 See e.g. *Khan v Khan* [1980] 1 All ER 497. Aliter if she can show that the breakdown has caused her loss - e.g. *Whyte-Smith v Whyte-Smith* (1974) 5 Fam Law 20 (separation after three months, breakdown caused wife illness and loss of job).

132 [1977] Fam 127.

133 As in *Kyte v Kyte* [1988] Fam 145.

134 See *Evans v Evans* [1989] 1 FLR 351.

Matrimonial infidelity is not generally regarded as "conduct".[135] On the other hand, misuse of family funds[136] or a spouse's squandering of the assets have been taken into account.[137] A Parliamentary Secretary in the Lord Chancellor's Department commented.[138]

> "… there is a perception that conduct is not, in practice, taken into account by the courts. Anecdotal evidence suggests that if conduct is taken into account only conduct of a financial nature is considered."

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

Unsecured periodical payments orders end on the debtor's death[139] but secured periodical payments orders (that is those secured by assets transferred by the debtor to trustees)[140] continue until the claimant's death.[141]

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?

Although statutory provision is made for the making of maintenance agreements during marriage[142] these are in any event variable upon application to the court,[143] and are not binding upon divorce.[144]

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135 As Ackner LJ once famously said in *Duxbury v Duxbury* [1992] Fam 62, applying section 25 is essentially a "financial not a moral exercise".

136 See *H v H (Financial Relief: Conduct)* [1998] 1 FLR 971.

137 See *Beach v Beach* [1995] 2 FLR 160. Note also *B v B (Financial Provision: Welfare of Child and Conduct)* [2002] 1 FLR 555.

138 Standing Committee E, Official Report, 16.05. 1996, column 370.

139 Matrimonial Causes Act 1973, section 28(1)(a).

140 These orders are rare.

141 Matrimonial Causes Act 1973, section 28(1)(b).

142 *Viz* Matrimonial Causes Act 1973, section 34.

143 Matrimonial Causes Act 1973, sections 35 and 36

144 Note the court can very any ante-nuptial or post-nuptial agreement under Matrimonial Causes Act 1973, section 21(2)(c).

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

Under English law parties cannot bindingly agree to exclude the court's jurisdiction to make financial orders for a spouse - any clause in an agreement purporting to restrict a spouse's right to apply for an order containing financial arrangements is void.[145]

104. Is there a prescribed form for such agreements?

Not applicable.

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

Any agreement will only become binding if it is approved by the court. Commonly, such agreements will be embodied in a consent order.

Note notwithstanding the above answers, agreements are not irrelevant and in this respect there is a crucial difference between pre-nuptial agreements and those made on or after the marital break-up.

So far as pre-nuptial agreements are concerned, whilst not binding on the court, they can be taken into account, in deciding what, if any, order to make.[146] Much will depend upon the date of the agreement, their innate fairness both at the time they were made and in the light of subsequent events, and whether the parties were independently legally advised.[147]

In contrast to pre-nuptial agreements are those negotiated in the aftermath of the marital break-up, which in general the courts are keen to encourage. Such agreements can be made entirely outside the court or within the now universally established early financial dispute

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145 Matrimonial Causes Act 1973, section 34(1) and *Hyman v Hyman* [1929] AC 601. Note also the court's power to vary any marriage settlement, which power can neither be ousted by agreement, nor by express provision in the settlement as to how the priority is to be held if the marriage is terminated. See Matrimonial Causes Act 1973, section 21(2)(c) and *Prinsep v Prinsep* [1930] P 35 at 49.

146 See *S v S (Divorce: Staying Proceedings)* [1997] 2 FLR 100.

147 See *M v M (Prenuptial Agreement)* [2002] 1 FLR 654.

resolution appointment, generally known as FDR and which are conducted by a judge. Although these agreements, even those made in FDR,[148] are not strictly binding, provided the court is satisfied that in the case of out of court agreements each party was properly and independently advised, it will generally hold the parties to their agreement.[149] A fortiori it will require exceptional circumstances to upset an agreement made in FDR.[150]

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148 See *Rose v Rose* [2002] EWCA Civ 208, [2002] 1 FLR 978.

149 See e.g. *X v X (Y and 2 Intervening)* [2002] 1 FLR 508, *Richardson v Richardson (No 2)* [1996] 2 FLR 617 and *Edgar v Edgar* [1980] 1 WLR 1410.

150 See *Rose v Rose* [2002] EWCA Civ 208, [2002] 1 FLR 978.