

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

**SPAIN**

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**A. GENERAL**

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

In Spain there is legislative plurality in the area of Civil Law and, in accordance with a distribution of legislative powers provided by Article 149(1)(8) of the Spanish Constitution 1978, the Parliaments of some Autonomous Communities which have their own civil law have passed Acts dealing with civil law matters. The territorial legislation of these Autonomous Communities coexists with the general regulation provided in the Spanish Civil Code. In the area of Family Law, Article 149(1)(8) Spanish Constitution attributes to the Central State the power to legislate on the 'private legal relationships regarding the forms of marriage', whereas in the rest of Family law matters (as for instance, the economic effects of marriage, filiation, adoption, etc.) legislative power lies with the Autonomous Community. This distribution of powers affects the regulation of divorce. The prevailing legal opinion considers that whereas the legislation on the grounds for divorce lies in the power of the Central State, and therefore Article 86 Spanish Civil Code applies all over Spain, the legislation on the effects of marriage can be undertaken by the Autonomous Communities. This is the case, for instance, in Catalonia, where its Family Code 1998<sup>1</sup> contains norms governing the common effects of nullity, legal separation and divorce (Articles 76 to 86 Catalanian Family Code). In

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<sup>1</sup> Llei 9/1998, de 15 de juliol, *del Codi de Família* (DOGC No. 2687, 23.07.1998. Correction of mistakes DOGC No. 2732, 28.09.1998).

those Autonomous Communities which, although having power to enact legislation on this topic, have not made use of it, the provisions contained in the Spanish Civil Code dealing with this subject matter apply (Articles 90 to 107 Spanish Civil Code).

When a marriage is in crisis Spanish spouses can resort either to separation or to divorce. As will be seen, all the grounds for divorce but one require a prior period of separation –either legal or just *de facto* separation [See Question 56, Boek I, ABC]. In these cases, the grounds for divorce will be closely linked to the grounds for legal separation provided by Articles 81 and 82 Spanish Civil Code, which can be included in the two following groups:

- Consensual separation (or separation by mutual agreement), established by Article 81(1) Spanish Civil Code, in which both spouses or one of them with the other's consent file a petition for a decree of judicial separation. In this case no specific ground for separation is required and it suffices that some minimal conditions are met: a) that one year after the marriage was contracted has elapsed and b) that the petition for separation is accompanied by an agreement proposal to govern the separation in accordance with Articles 90 and 103 Spanish Civil Code (Article 77 Catalanian Family Code, in Catalonia).
- Adversary judicial separation or separation based on a legal ground (Articles 81(2) and 82 Spanish Civil Code). This takes place upon the petition of one of the spouses when the other has incurred one of the legal grounds for separation established by Article 82 Spanish Civil Code, which are the following:
  - '1. The unjustified abandonment of the family home, marital infidelity, abusive or offensive conduct and any other serious or reiterated infringement of conjugal obligations'. It must also be taken into account that '[M]arital infidelity cannot be alleged as a ground for separation when there exists a factual prior separation of the spouses, by mutual consent freely given, or imposed by the spouse alleging it' (Article 82(1) *in fine* Spanish Civil Code).

'2. Any serious or reiterated infringement of the obligations regarding the common children or regarding those of any of the spouses who reside in the family home' (Article 82(2) Spanish Civil Code).

'3. Being sentenced to a term of imprisonment for longer than six years' (Article 82(3) Spanish Civil Code).

'4. Alcoholism, drug addiction, or mental abnormalities, provided that the interests of the other spouse, or of the family, require the spouses to discontinue living together' (Article 82(4) Spanish Civil Code).

'5. The effective cessation of marital life for a period of six months by free consent. Such consent shall be understood to be freely given where a spouse requests it from the other spouse in authentic form, giving him or her express notice of the consequences of doing so, and the other spouse fails to manifest his or her will against it by any legally permissible means, or petitions for a separation or the provisional measures to which Article 103 refers, within six months of the required summons' (Article 82(5) Spanish Civil Code).

'6. The effective cessation of marital life for a period of three years' (Article 82(6) Spanish Civil Code).

'7. Any of the grounds for divorce in the terms provided by numbers 3, 4 and 5 Article 86' (Article 82(7) Spanish Civil Code). It is a common ground according to Spanish legal literature that this reference only makes sense with regard to the ground for divorce provided by Article 86(3)(a) Spanish Civil Code which refers to the prior declaration of legal absence and with regard to Article 86(5) Spanish Civil Code, which refers to the final judgement that finds the other spouse guilty of an attempt against the life of the petitioning spouse or of his or her ascendants or descendants.

This enumeration of the grounds for separation is closed.<sup>2</sup> However, the courts refer quite often to the so-called 'lack of *affectio maritalis*,<sup>3</sup> as a new ground for separation. This ground apparently consists of 'the loss of affection between spouses, continuous arguments and reproaches or the existence of a cold and distant relationship between them'.<sup>4</sup> Although this situation can be normally included in the generic ground provided by Article 82(1) Spanish Civil Code (as any other 'serious or reiterated infringement of conjugal obligations'),<sup>5</sup> the courts also resort to it when it is difficult to identify one of the typified grounds in the facts proven in the proceedings and, especially, when it is difficult to prove that the defendant has incurred a ground for separation.<sup>6</sup> In these cases the courts decree separation because they consider that, taking into account the circumstances that have been proven in the proceedings as a whole, a lack of *affectio maritalis* between the spouses can be deduced.<sup>7</sup> It must be borne in mind that rejecting a decree of separation would involve, in these cases, a serious detriment to the interests of all persons involved (children included), since in practice spouses are already separated *de facto*, measures on the common dwelling and child care and access have already been adopted and it would not make sense to impose upon the spouses the duty to return to cohabit once more.

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

After the Spanish Constitution 1978 came into force, divorce was reintroduced in the Spanish legal system by Act 30/1981, of 7 July 1981. This Act amended the regulation of the Spanish Civil Code on

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<sup>2</sup> See especially, L. Puig Ferriol, in: M. Amorós Guardiola (et alii), *Comentarios a las reformas del Derecho de Familia*, vol. I, Madrid: Tecnos, 1984, Com. Article 82, p. 452.

<sup>3</sup> For instance SAP Álava 14.05.1999 [AC 1999\5109].

<sup>4</sup> See M<sup>a</sup> Jesús Moro Almaraz and Ignacio Sánchez Cid, *Lecciones de Derecho de Familia*, Madrid, Colex, 2002, p. 154-155. See more in detail in: Ana Laura Cabezuolo Arenas, 'La cesación de la *affectio maritalis* como causa de separación en la práctica judicial: un exponente de la interpretación sociológica de la norma', *Aranzadi Civil*, 18/2002.

<sup>5</sup> See, among many others, SAP Barcelona 30.07.1999 [AC 1999\1822]; Guipúzcoa 30.06.2000 [AC 2000\4973]; Cádiz 28.03.2000 [AC 2001\4921]; Valladolid 07.05.1999 [AC 1999\6679] and Teruel 09.02.2001 [AC 2001\167].

<sup>6</sup> See, for instance, SAP Barcelona 10.03.2000; also Madrid 04.07.2000 [AC 2000\1758]; Jaén 17.02.2000 [AC 2002\65].

<sup>7</sup> See Silvia Algaba Ros, 'La falta de *affectio maritalis* como causa de separación matrimonial y la función creativa de la jurisprudencia', *La Ley*, No. 5505, 19.03.2002.

marriage and established the proceedings for the claims of nullity, separation and divorce. Divorce had already been introduced for the first time during the Second Spanish Republic by the Divorce Act of 2 March 1932. This Act followed the guidelines set out by Article 43 of the Spanish Republican Constitution 1931 ('marriage is based upon equality of rights for both sexes and can be dissolved by mutual consent, or upon the petition of any of both spouses pleading the existence of a ground') and, accordingly, provided for two methods of divorce, i.e., divorce by mutual consent and on legal grounds, and it retained separation as an alternative way out of a marriage breakdown. Actually Article 37 of the Divorce Act 1932 gave the innocent spouse a choice between one of these two ways.<sup>8</sup>

When the Spanish Civil War was over, Franco's Act of 23 September 1939 abrogated the Republican Divorce Act 1932 and divorce was banned from the Spanish legal system for over 40 years. During all these years the only way out of a marriage breakdown—leaving aside canon nullity proceedings—was the separation of the spouses on the grounds provided by Article 105 Spanish Civil Code (as amended by the Act of 24 April 1958). All the grounds for separation thus established were based upon the idea of separation as a sanction for the reprehensible conduct of the guilty spouse and only the innocent party could apply for a separation (Article 106 Spanish Civil Code, as amended by the Act of 24 April 1958).<sup>9</sup>

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

Among the most recent proposals the following stand out:

(a) To extend the scope of the only ground for divorce without a previous period of separation to serious domestic abuse. Article 86(5) Spanish Civil Code establishes as a ground for divorce 'the conviction of the other spouse for an attempt against the life of the petitioning spouse, or of his/her ascendants or descendants'. It has been proposed

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<sup>8</sup> José Luis Lacruz (et alii), *Elementos de Derecho Civil IV. Derecho de familia*, Barcelona: JM Bosch, 1997, p. 146.

<sup>9</sup> José Luis Lacruz (et alii), *Elementos de Derecho Civil IV. Derecho de familia*, Barcelona: JM Bosch, 1997, p. 127; M<sup>a</sup> Jesús Moro Almaraz and Ignacio Sánchez Cid, *Lecciones de Derecho de Familia*, Madrid: Colex, 2002, p. 153.

to extend the scope of this rule to physical and mental injury, and in general to serious abuse, against the same class of persons.<sup>10</sup>

(b) To introduce 'direct' divorce, i.e. with no need to go through a previous separation period. The legal model for divorce introduced in 1981 retained legal separation in order to offer a way out to those spouses who, in accordance with their religious beliefs, rejected the dissolution of marriage by divorce. However, rather than keeping this as only a choice, it actually imposed it as a condition for access to divorce since, if we leave aside the already mentioned ground provided in Article 86(5) Spanish Civil Code, all the other grounds for divorce establish, as a condition for divorce, a separation period in which the 'effective cessation of marital life in common' occurs [see Question 4]. As the period that is required in the case where only a *de facto* separation exists is deemed to be too long (5 years, Article 86(4) Spanish Civil Code), in most cases the spouses first have to resort to a proceeding of legal separation as a preparatory step to divorce. This duplicity involves the risk of reopening problems in the divorce proceedings which have already been solved in the previous separation proceedings and it increases the costs of divorce both for the spouses and for taxpayers.<sup>11</sup> A possible way out could be to accept the so - called 'direct' divorce which would be based upon the existence of one of the grounds for separation currently in force.<sup>12</sup>

(c) To accept mutual agreement as a ground for divorce without having to resort to grounds for divorce. The model currently in force accepts 'consensual' separation, i.e., by mutual agreement (Article 81(1) Spanish Civil Code), but not 'consensual divorce', i.e., a ground

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<sup>10</sup> See the Proposition for a Draft Bill presented by the *Grupo Parlamentario Popular* (16.11.1998; BOCG, Congreso, Serie B No. 236-1) and *Grupo Parlamentario Federal de Izquierda Unida* (14.12.1998; BOCG, Congreso, Serie B No. 262-1).

<sup>11</sup> This problem is one of the main hurdles for the person involved in divorce proceedings and family lawyers and judges widely share these criticisms (see the socio-economic analysis conducted in Juana M<sup>a</sup> Balmaseda Ripero, César Manzanos Bilbao (Coords.), *La Ley de Divorcio en España. Criterios y propuestas de modificación*, Madrid: Dykinson, 1999).

<sup>12</sup> See the Proposition for a Draft Bill by the *Grupo Parlamentario Catalán (Convergència i Unió)* (05.10.2001; BOCG, Congreso, Serie B No. 164-1) and the Proposition for a Draft Bill by the *Grupo Parlamentario Socialista* on the amendment of the Spanish Civil Code on the subject matter of separation and divorce (27.11.2001; BOCG, Congreso, serie B, No. 178-1).

according to which the mere agreement of the spouses would allow them to have access to divorce.<sup>13</sup>

Nevertheless, it must be stressed that none of these proposals has been accepted by the Spanish Parliament and that currently none of them is undergoing parliamentary proceedings. In spite of the very many problems posed by the current legislation over the last 20 years, the Government has not announced any plan for a reform of the divorce regulation in force.

## **B. GROUNDS FOR DIVORCE**

### **I. General**

#### *4. What are the grounds for divorce?*

The grounds for divorce (Article 86 Spanish Civil Code) are as follows:

#### *A) Grounds on which cessation of conjugal or marital life is not required*

When one of the spouses has been convicted of the crime of attempting to kill the petitioning spouse or his or her ascendants or descendants and the criminal judgement is final (Article 86(5)). This ground does not encompass either crimes committed without intent or crimes in which the protected interest is other than the life of the victim. For this last reason it does not include crimes in which there has been only an attempt against the physical or mental integrity of the victim, as for instance in cases of personal injury or domestic violence [see Question 3(a)].

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<sup>13</sup> The *Asociación Española de Abogados de Familia* (Spanish Society of Family Law Lawyers) favours the admission of consensual divorce in order to bring legal reality closer to social reality and to diminish the burden of the Administration of Justice and the cost of proceedings, see <http://www.aeafa.es/noprivado/docu170901.html> [Date: 30.09.2002]). This Society stresses that in practice many spouses turn to divorce directly arguing that they have been living apart for longer than two years, in spite of the fact that this separation may not be true. Additionally, it points out that the legislation now in force (Article 87 Spanish Civil Code) facilitates this way out since the effective cessation of life in common is compatible with maintaining or resuming temporarily living together in the same domicile for grounds that can be easily alleged (as, for instance, necessity, an attempt at reconciliation by one or both spouses, or the best interests of the children) [see Question 16].

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*B) Grounds on which cessation of marital life is required*

(a) When a petition for judicial separation has been previously filed:

(1) In the case of effective cessation of marital cohabitation for, at least, one uninterrupted year from the time of the filing of the petition for separation, and this petition has been filed either by both spouses or at least by one of them with the consent of the other and at least one year has elapsed since the celebration of marriage has (Article 86(1) Spanish Civil Code). Accordingly, this provision refers to the petition of judicial separation by mutual consent.

(2) In the case of effective cessation of marital cohabitation for at least one uninterrupted year from the time of filing the petition for separation, which was either filed as a claim by one of the spouses or as a reconventional claim of the respondent arguing that one of the grounds for separation pursuant to Article 82 Spanish Civil Code may apply to the petitioning spouse (Article 86(2) Spanish Civil Code). The difference between this ground for divorce and the previous one under Article 86(1) Spanish Civil Code is that whereas this ground is related to the grounds for separation pursuant to Article 82 Spanish Civil Code, the previous one was connected to judicial separation by mutual agreement and the effective cessation of marital life [see Question 1].

In these two previous cases it is not indispensable that judicial separation has already been decreed for divorce to be obtained. What is indispensable is that separation has been petitioned. Separation and divorce are two independent proceedings and therefore it is technically possible that separation is rejected and that, in spite of this, the divorce proceedings that have already been initiated continue and result in a divorce decree on any of these two grounds.

(3) In the case of the effective cessation of marital cohabitation for at least two uninterrupted years from the time when the judicial decree becomes final (Article 86(3)(a) § 2 Spanish Civil

Code). For this ground for divorce a petition of separation only is not enough.

(b) De facto separation (no previous judicial petition of judicial separation required):

(1) Effective cessation of marital life in common for at least two uninterrupted years from the time when the de facto separation is freely consented to by both spouses (Article 86(3)(a) § 1). According to Article 82(5) Spanish Civil Code such consent shall be understood to exist 'when a spouse requests it from the other spouse in an authentic form, giving him or her express notice of the consequences of doing so, and the other spouse fails to manifest his or her will against it by any legally permissible means'.

(2) Effective cessation of marital life in common for at least two uninterrupted years from the time of the declaration of the legal absence of any of the spouses at the request of the other (Article 86(3)(a) § 3). The two-year period starts to run from the day on which the decree of legal absence becomes final,<sup>14</sup> not from the day on which the application or petition for the decree of legal absence was filed or from the day on which the spouse was actually absent.

(3) Effective cessation of marital life in common for at least two uninterrupted years when the petitioner proves that when the *de facto* separation began the respondent had incurred a ground for legal separation (Article 86(3)(b)) Spanish Civil Code).

(4) Effective cessation of marital life in common for at least five years upon the petition of either of the spouses (Article 86(4)) Spanish Civil Code).

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<sup>14</sup> See Mariano Alonso Pérez, in: J. L. Lacruz (Coord.), *Matrimonio y divorcio. Comentarios al Título IV del Libro Primero del Código Civil*, Madrid: Civitas, 1994, com. Article 86, p. 909.

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

The most recent and complete statistics available on the bases for which divorce has been granted refer to the year 1998 and, unfortunately, cannot be compared either to previous years (when they were not so complete) nor to subsequent years (because they have not yet been published). The statistics for 1998 divide the 25,726 decrees of divorce granted by the Family Courts and the Courts of First Instance during this year into the following groups:

1) Grounds that do not require effective cessation of marital cohabitation:

Article 86(5): **183** (0.71%).

2) Grounds that do require effective cessation of marital cohabitation:

Articles 86(1) Spanish Civil Code: **13,198** (51.30%)

Article 86(2) Spanish Civil Code: **3,846** (14.94%)

Article 86(3)(a) Spanish Civil Code: **5,896** (includes all the three grounds provided by this provision, i.e. final decree of judicial separation, de facto separation freely consented to and legal absence) (22.91%)

Article 86(3)(b) Spanish Civil Code: **177** (0.68%)

Article 86(4) Spanish Civil Code : **2,426** (9.43%)

Recently, the *Consejo General del Poder Judicial* (i.e. the governing council of judges) has made other data available which only distinguish between divorces attained with agreement and divorces attained without agreement. Accordingly, out of a total number of 36,331 decisions decreeing divorce, 19,604 refer to divorce with agreement and 16,727 to divorce without agreement. It is stressed that since 1981 (i.e. the year in which divorce was re-established) the proportion of one type of divorce or the other has become equal since over the years divorces with agreement have increased while divorces without agreement have diminished.<sup>15</sup>

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<sup>15</sup> See *Diario de Noticias*, November 2001 (Especial Ley del Divorcio), p. 2.

6. *How frequently are divorce applications refused?*

No statistical data are available to answer this question. Nevertheless, the proportion of petitions of divorce that are rejected is very low indeed. In order to file a petition for divorce the intervention of a lawyer is mandatory [see Question 9] and therefore it is very unlikely for a lawyer to file a petition that does not meet the conditions which are expressly listed under Article 86 Spanish Civil Code (for instance, the course of the period of effective cessation of marital cohabitation required in the different cases).

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

In Spain divorce can only be obtained through a judicial process, with the intervention of the corresponding judge and according to the specific proceedings established by the Law. Currently these proceedings are governed by Articles 769 to 777 of the Ley 1/2000, de 7 de enero, *de enjuiciamiento civil* (Civil Proceedings Act) and are included under the Title of specific proceedings dealing with 'capacity, filiation, marriage and minors'.

This regulation draws a distinction between a so-called 'adversarial proceeding' (*procedimiento contencioso*) (Article 770 Civil Proceedings Act), characterised by the fact that one of the spouses files the petition without the consent of the other, and a so-called 'mutual agreement proceeding' (*procedimiento de mutuo acuerdo*) (Article 777 Civil Proceedings Act), characterised by the fact that the petition is filed by both spouses or only by one of them with the consent of the other. In both cases, the proceedings follow the procedure of the so-called 'verbal trial' (*juicio verbal*, Article 753 Civil Proceedings Act).

Before the new Civil Proceedings Act came into force on 1 January 2001, divorce proceedings were governed by the 6<sup>th</sup> Additional Provision of Act 30/1981, of 7 July 1981, i.e., the Act that re-introduced divorce in Spain.

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

The competent authorities that have jurisdiction over divorce proceedings are the ordinary or civil courts, and more specifically, the Courts of First Instance. (Article 45 Civil Proceedings Act and Article 85(1) LOPJ). If among several Courts of First Instance one of them has been given exclusive jurisdiction over family law matters (the so - called *Juzgados de Familia* (Family Courts)), this will be the only competent authority (Article 98 LOPJ). On appeal the competent authorities are the Civil and Criminal sections of the *Audiencias Provinciales* (Appellate Courts) (Article 82(4) LOPJ) and in cassation – only for the very rare cases provided by Article 477 Civil Proceedings Act— the Civil Chamber of the Supreme Court (or, in those Autonomous Communities which have their own regulation in Civil Law, the Superior Court of Justice of the Autonomous Community).

From the territorial point of view, the competent authority in adversarial proceedings is the Court of First Instance corresponding to the domicile of the spouses and, if the spouses reside in different places, the Court of First Instance corresponding to the last common domicile of the spouses or to the place of residence of the respondent, according to the election of the petitioner (Article 769 I Civil Proceedings Act). In the proceedings where spouses act in common agreement the competent authority is the Court of First Instance of the last common domicile or of the domicile of either of the petitioners (Article 769 II Civil Proceedings Act).<sup>16</sup>

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

Divorce proceedings are commenced by the presentation of a petition (*demanda*, i.e. claim) at the competent Court (Article 770 and 777 Civil Proceedings Act) [see Question 8]. According to Article 750(1) Civil Proceedings Act the proceeding requires defence and representation by a lawyer and by a *procurador* (a specific lawyer that represents the party). However, in proceedings for divorce by common agreement

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<sup>16</sup> See Fernando Peña López, 'Algunas reflexiones sobre los procesos matrimoniales en la Civil Proceedings Act 2000 (Cuestiones generales, procedimiento contencioso y procedimiento de mutuo acuerdo)', *Act. Civil*, 9/2002, p. 1-18

spouses can avail themselves of a single defence and representation. (Article 750(2) Civil Proceedings Act).

Before presenting the petition, the party who so wishes can ask for preliminary provisional measures to be taken even without the intervention of a lawyer or *procurador*. However, the intervention of both professionals will be mandatory in any of the subsequent steps (Article 771(1) and (2) Civil Proceedings Act). These measures refer to questions such as the custody of the children under the parental responsibility of both spouses or the use of the common dwelling (Articles 102 and 103 Spanish Civil Code).

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

According to Article 89 Spanish Civil Code the dissolution of marriage by divorce can only take place by means of a declaratory decree of divorce which is effective from the time this decree becomes final. However, the effects of this decree or court decision are understood to be produced only *inter partes*, until the decree is recorded in the Civil Registry, since the second part of Article 89 Spanish Civil Code provides that the divorce decree shall not prejudice third parties in good faith until this registration takes place.

*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?*

According to the prevailing legal literature<sup>17</sup> and to case law, Spanish legislation has moved away from the model of fault divorce or divorce

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<sup>17</sup> See in particular José Luis Lacruz (et al), *Elementos de Derecho Civil IV. Derecho de familia*, Barcelona: JM Bosch, 1994, p. 148; Vicente L. Montés Penadés, and M. Amorós Guardiola (et al), *Comentarios a las reformas del Derecho de familia*, T. I, Madrid: Tecnos, 1984, com. Articles 86-87, pp. 501-502; Luis Díez-Picazo / Antonio Gullón, *Sistema de Derecho Civil. Vol. IV. Derecho de familia. Derecho de sucesiones*, Madrid: Tecnos, 1998, p. 116. In contrast, some scholars consider that the Spanish

as a sanction for matrimonial misconduct, but at the same time it has not adopted divorce based only upon consent [see Question 5].<sup>18</sup>

As has already been seen [see Question 4], for most of the grounds for divorce a certain period of 'effective cessation' of marital cohabitation of the spouses before divorce is required. In most cases—but not in all [see Question 16]—this takes place by means of a judicial or *de facto* separation of the spouses. The effective cessation of marital life in common is not in itself a ground for divorce but is indeed the manifestation of the irretrievable breakdown of marriage upon which divorce becomes fully justified.<sup>19</sup> In fact, irretrievable breakdown is presumed from the objective proof of the cessation of marital cohabitation for the time provided by the Law.

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

The only ground for divorce where fault could still be of some relevance is the one provided by Article 86(5) Spanish Civil Code, which rests upon the conviction of the spouse for having attempted to kill the petitioning spouse or his or her ascendants or descendants. However, although this ground has been depicted as a true 'remnant' of fault divorce,<sup>20</sup> it is understood by the prevailing legal doctrine not

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system is a mixture of divorce-remedy and divorce-sanction in which the element of divorce-remedy prevails (see Mariano Alonso Pérez, in: J. L. Lacruz (Coord.), *Matrimonio y divorcio. Comentarios al Título IV del Libro Primero del Código Civil*, Madrid: Civitas, 1994, com. Article 86, p. 897).

<sup>18</sup> Cf. Mariano Alonso Pérez, in: J. L. Lacruz (Coord.), *Matrimonio y divorcio. Comentarios al Título IV del Libro Primero del Código Civil*, Madrid: Civitas, 1994, com. Article 86, p. 902, who, although rejecting the fact that Article 86(1) purports to be a case of divorce by consent, stresses that a separation that has been petitioned by both spouses in mutual agreement—or by one of them with the consent of the other—, with the short waiting period of one year after the cessation of life in common which is counted from the date of the petition for separation and which can be followed by a petition for divorce has a great deal to do with divorce by consent. Although this is not an instantaneous consensual divorce, this author considers that this is a sort of consensual divorce 'by instalments' which extends over time.

<sup>19</sup> In this sense see Vicente L. Montés Penadés, *Comentario del Código Civil*, Tomo I, Com. Article 86, Madrid: Ministerio de Justicia, 1993, p. 355.

<sup>20</sup> José Luis Lacruz (et al), *Elementos de Derecho Civil IV. Derecho de familia*, Barcelona: JM Bosch, 1994, p. 154

as an exception to a non-fault-based divorce system but as a ground on which such a serious situation demonstrates the existence of an irretrievable breakdown of the marriage.<sup>21</sup> On the other hand, not even in this case is a declaration of culpability pronounced. There is also no distinction between an innocent and a guilty spouse in the declaration of divorce, and the effects of divorce are the same as when divorce is declared for other grounds.

If divorce is not based on fault in this case, less can it be said that it rests on the culpability of one of the spouses when it derives from a prior legal separation which was based on the fact that this spouse had incurred a ground for separation (Article 86(3) and 86(3)(a) Spanish Civil Code). In these cases what the law requires is simply the effective cessation of marital life and it does not draw any distinction between an innocent or guilty spouse when establishing the effects of divorce.<sup>22</sup>

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

In principle it is not necessary that the marriage was of a certain duration in order to obtain a divorce. However, the duration of the marriage is taken into account for the ground for divorce provided by Article 86(1) Spanish Civil Code. This ground requires the effective cessation of marital life for at least one uninterrupted year from the time of filing the petition for separation in common agreement or by one spouse with the consent of the other. To the extent that Article 81(1) Spanish Civil Code establishes that in order to file this petition of separation it is required that the marriage has lasted for at least one year, the petition for divorce, in this case, can only be filed after at least two years have elapsed from the time of the marriage.

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<sup>21</sup> Luis Díez-Picazo and Antonio Gullón, *Sistema de Derecho Civil. Vol. IV. Derecho de familia. Derecho de sucesiones*, Madrid: Tecnos, 1998, p. 118. Cf. Vicente L. Montés Penadés, and M. Amorós Guardiola (et alii), *Comentarios a las reformas del Derecho de familia*, T. I, Madrid: Tecnos, 1984, com. Articles 86-87, p. 372.

<sup>22</sup> Vicente L. Montés Penadés, in: M. Amorós Guardiola (et alii), *Comentarios a las reformas del Derecho de familia*, T. I, Madrid: Tecnos, 1984, com. Articles 86-87, p. 365; Mariano Alonso Pérez, in: J. L. Lacruz (Coord.), *Matrimonio y divorcio. Comentarios al Título IV del Libro Primero del Código Civil*, Madrid: Civitas, 1994, com. Article 86, p. 903.

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*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 or she or he does not? Are there other exceptions?*

When there is a prior petition for separation, the period of effective cessation of common living is 1 year and it does not depend on whether or not both spouses agree to the separation (Articles. 86(1) and (2) Spanish Civil Code).

The consent of the respondent becomes relevant to separation for the period required by the corresponding ground for divorce when a prior separation petition has not been filed and there is only a *de facto* separation. In this case, if both spouses have consented to the *de facto* separation, the required period of effective cessation of life in common in order to obtain a divorce is 2 years (Article 86(3)(a) first part Spanish Civil Code). If this was not the case, the period can be extended to a maximum of 5 years (as in Article 86(4) Spanish Civil Code).

The only exception to the requirement of a previous period of separation, either legal or *de facto*, is the ground for divorce established by Article 86(5) Spanish Civil Code, i.e., when one of the spouses has been found guilty of an attempt to kill the petitioning spouse or his or her ascendants or descendants [see Question 4]).

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

See Questions 11 and 12.

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

(a) Which circumstances suspend the term of separation?

The only circumstances that interrupt (not suspend, i.e., the term of separation starts from scratch) the term of separation required as the basis of a ground for divorce is the successful reconciliation of the spouses and the resumption of life in common. A mere attempt at reconciliation which finally becomes frustrated does not suspend or

interrupt the period of separation even if the spouses have resumed life in common (see Question 16(c)).

(b) Does the separation need to be intentional?

Separation or, in the wording of the Code, 'effective cessation of marital life in common', in order to be 'effective' must be related not to the material fact of the separation itself but to what the legal literature calls *animus separationis*. Accordingly if in spite of the material separation there is still *affectio maritalis*, 'effective cessation' does not occur. For this reason Article 87 II Spanish Civil Code provides that '[T]he interruption of life in common shall not imply the effective cessation of marital life if it is grounded on labour or professional reasons, or on whichever reasons of a similar nature'.

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

According to Article 87 I Spanish Civil Code: '[T]he effective cessation of marital life in common to which Articles 82 (i.e. grounds for separation) and 86 (i.e. grounds for divorce) of this Code make reference is compatible with the continuation, or the temporary resumption of life in the same domicile, when this results, as to one or both of the spouses, from necessity, an intent to reconcile, or the interest of the children and so is duly shown in any legally admissible manner in the corresponding separation or divorce proceedings'.<sup>23</sup>

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

In the Spanish legal system there is no rule that compels persons who want to obtain a divorce to attend any form of informative session or conciliation or mediation meeting prior to filing a divorce petition. The regulation of divorce is characterized by the wide margin given to the parties in order to negotiate the effects of the breakdown and to

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<sup>23</sup> See, for instance SAP Madrid 02.03.1999 [Act. Civ. 1999\1018], and also SAP Barcelona 20.04.1997 [Act. Civ. 1998\39], where the court considered that the requirements for 'effective cessation' had not been met in a case where one of the spouses contended that he continued living in the same dwelling for the interest of their common daughter.

determine the rules that will govern their personal, family and economic relationships after divorce in the so-called 'regulating agreement' (*convenio regulador*) [see Questions 99 *et seq.*], but the Civil Code does not establish that third parties must intervene in this process of negotiation. Nevertheless, following the trend started by the Catalan legislation, several Autonomous Communities have already passed Acts regulating family mediation.<sup>24</sup>

Under Catalan law, once the court proceedings have started, there is one case in which the spouses can be referred to a mediator. This case, provided by Article 79(2) Catalanian Family Code, occurs when the petition for divorce has been filed by one of the spouses without the consent of the other. In this case, in principle, the judge should decide on those aspects that in the cases of divorce by mutual agreement are decided by the spouses in their 'regulating agreement' (custody of the children and the right of access, maintenance, attribution of the common dwelling, etc.). In this sense, Article 79(1) Catalanian Family Code provides that:

*Article 79. Absence of regulating agreement.*

1. In cases of marriage annulment, divorce or judicial separation requested by just one of the spouses, without the consent of the other spouse, the judicial authority shall resolve the aspects mentioned in Article 76.

However, if in spite of the fact that the parties do not agree to divorce the judge considers that they could still reach an agreement on these aspects, he will refer them to a mediator in order to resolve their disputes and, if they reach any agreement, to present a 'regulating agreement':

*Article 79. Absence of regulating agreement.*

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<sup>24</sup> Catalonia: Ley 1/2001, de 15 de marzo, *de mediación familiar de Cataluña* (DOGC No. 3355, 26.3.2001); Galicia: Ley 4/2001, de 31 de mayo, *reguladora de la mediación familiar* (DOG No. 117, 18.6.2001); Valencia: Ley 7/2001, de 26 de noviembre, *reguladora de la mediación familiar* (DOGV No. 4138, 29.11.2001).

2. If, further to considering the circumstances of the case, the judicial authority deems that the aspects cited in Article 76 can still be resolved by common agreement, such judicial authority may refer the spouses to a mediator or a mediation institution so that the spouses may resolve their differences, and so that the mediator or mediation institution then submits a proposal for a regulating agreement to which, if necessary, the provisions contained in Article 78 shall apply.

Nevertheless, this does not mean that the spouses have to undergo mandatory mediation since, as Article 11(1) of the Family Mediation Act provides, the parties are free not only to terminate an initiated mediation whenever they see fit, but also to commence a process of mediation or not. The provision would require only that the spouses attend an information meeting which, according to Recommendation No.(98)1 of the Council of Europe, would not run counter to the principle of voluntariness.<sup>25</sup>

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

No, although the requirement for a minimum period of effective cessation of marital life can, in fact, fulfil this function.

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

The law requires that the petitions for divorce filed by both spouses in common agreement or by one of the spouses with the other's consent are submitted together with a regulating agreement negotiated by both spouses (Article 86 II Spanish Civil Code and Article 777(2) Civil Proceedings Act. For Catalonia, Article 77 Catalanian Family Code).

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<sup>25</sup> Council of Europe, *Texts of Recommendation No. R (98) 1 of the Committee of Ministers to Member States on Family Mediation and its Explanatory Memorandum*, DIR/JUR (98) 1. See, in more detail, M. Martín-Casals, 'La mediación familiar: concepto y principios generales en las iniciativas legislativas españolas', *Familia*, 2001, pp. 1125-1153 at 1139-1140.

Article 90 of the Spanish Civil Code provides that it will have to deal, at least, with the following subjects:

- The determination of the person in whose custody the children under the parental authority of both spouses are to remain and all the questions related to the right of access of the parent who does not live with them.
- The use of the family dwelling and furnishings.
- Contributions to the expenses of marriage and support obligations, as well as the basis for updating them and guarantees, when appropriate.
- The liquidation of the property regime.
- Maintenance, which must eventually be paid by one of the spouses.

If the proposal for a regulating agreement does not provide for all these aspects, the judge will not accept the proposal and will give the spouses a period of 10 days to complete it. If this period has elapsed and the spouses have not reached an agreement, the divorce petition shall be finally rejected (ex Article 777(4) Civil Proceedings Act). By contrast, the submission of a proposal for a regulating agreement is not required if the divorce proceeding is adversarial (Article 770 Civil Proceedings Act).

If the parties do not reach agreement or when the agreement has not been approved by the judge [see Question 20], the judge shall adopt the measures corresponding to these aspects (Article 91 Spanish Civil Code, Article 774(4) Civil Proceedings Act).

Under Catalan law the following provisions of the Family Code apply:

*Article 77: Regulating agreement*

Whenever marriage nullity, divorce or legal separation is petitioned by both spouses acting in common agreement, or by one of the spouses with the other spouse's consent, a proposal for a regulating agreement shall be attached to the claim or initial writ. In such a regulating agreement, the aspects indicated in Article 76 shall be dealt with.

Article 76: Aspects that are the object of regulation

1. In cases of nullity of marriage, divorce or judicial separation, if there are children under parental authority, the following must be dealt with:

(a) The parent with whom the children shall have to live and also, if this applies, the rights of access, the periods of stay and communication with the father or mother with whom such children do not live.

(b) The way in which the custody of the children has to be exercised, in the terms established in article 139 (this Article refers to the rules and possible agreements regarding parental responsibility when parents do not live together).

(c) The sum that has to be paid for the children's support, in accordance with Article 143, by the father or mother, and the periodicity and means of payment (Article 143 refers to parental duties).

(d) The rules for the updating of the support payments and, eventually, of the guarantees to ensure them.

2. If there are adult children who live with one of the parents and have no earnings of their own, it shall be necessary to establish the support that corresponds under the terms established in Article 259 (Article 259 Catalanian Family Code provides what is to be understood under support and the items that it encompasses).

3. The remaining aspects that, according to the circumstances of the case, will need to be dealt with are the following:

(a) The attribution of the use of the family dwelling, with the appropriate household equipment and, eventually, the use of the other residences.

(b) Any maintenance allowance or support payment that, if any, shall be made by one of the spouses in favour of the other.

(c) The manner, if any, in which the spouses continue to contribute to family expenses.

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(d) The rules for updating support and maintenance payments and, if necessary, the guarantees to ensure their payment.

(e) The liquidation, if necessary, of the matrimonial property regime and the division of common assets and properties, in accordance with what is established in Article 43.

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

According to Article 90 II Spanish Civil Code, 'matrimonial agreements entered ... shall be approved by the court, unless they should be detrimental to the children or seriously damaging to one of the spouses. Their refusal must be supported by reasoned opinion, and, in such a case, the spouses must submit to the consideration of the court a new proposal for its approval, where appropriate'. Once the new proposal has been submitted, or the time established to present it has elapsed, the judge shall decide as appropriate (Article 777(7) Civil Proceedings Act).

Under Catalan law Article 78 Catalanian Family Code provides that 'the regulating agreement mentioned in Article 77 shall necessarily be judicially approved, except in those aspects that may be detrimental to the children. In such cases, the judicial authority shall indicate the points that need to be modified and shall establish the period for carrying out these modifications. Should the spouses fail to carry out the requested modification, or if these cannot be approved for the same grounds mentioned in § 1), the judge will decide as appropriate'.

Although in general terms both provisions are quite similar, and result from the idea that the judge will have to approve the agreement unless exceptional reasons are present, it is to be noted that, whereas the Spanish Civil Code allows the judge to reject an agreement when it is detrimental to the children, and also when it is 'seriously' detrimental to one of the spouses, the Catalan Family Code, probably considering that the spouses are adults and nobody can tell them what is more suitable for their interests, refers to the detriment to the children only.

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?*

The bill presented by the government in 1980 for the amendment of the Spanish Civil Code in the matter of divorce (see Question 2) included a hardship clause (Article 87), with the following wording:

'Exceptionally, the judge will be able to refuse divorce when it is proven that it causes the children or the other spouse especially serious harm to which the court decision will have to make reference.'

The bill finally passed by Parliament in 1981 no longer included this provision, however. Accordingly, it must be understood that the legislator, who was aware of the problems to which a hardship clause referred, flatly rejected the possibility that a court could not decree divorce taking into account the detriment that this might cause to the other spouse or to their children. At most, when these circumstances are present, they allow the judge not to approve the regulatory agreement and to substitute the measures agreed upon by the spouses, and which are detrimental to the children or 'seriously' (sic) detrimental to the other spouse, by other measures that do not result in such harm [see Question 20]. Therefore, the eventual negative effects of divorce for the children and for the other spouse can only be mitigated by the measures relating to the personal or economic effects of divorce and not by rejecting divorce or by postponing it.

## **C. SPOUSAL MAINTENANCE AFTER DIVORCE**

### **I. General**

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

The Spanish provisions dealing with the economic effects of divorce can be found in the Civil Code. Articles 90 to 107 Spanish Civil Code govern the common effects of nullity, separation and divorce. Some of these provisions deal with the personal aspects, such as the

determination of child custody, while others deal with patrimonial aspects related to children, such as the regulation of the payment of maintenance once life in common has ceased. With regard to the protection of the spouses, Article 96 deals with the allocation of the family home and Articles 96 to 101 Spanish Civil Code with maintenance, or more properly, what under Spanish law is called *pensión compensatoria* or payment to compensate the spouse to whom divorce has caused an economic imbalance in relation to the position of the other spouse. Additionally, since the termination of marriage by divorce (Article 85 Spanish Civil Code) will involve the dissolution of the matrimonial property regime, the provisions governing the corresponding matrimonial property regime will apply. However, with regard to matrimonial property it must be borne in mind that most Autonomous Communities with their own Civil law have provisions that govern this subject matter and then, instead of the provisions contained in the Civil Code, these territorial legislations may apply.

Moreover, some Autonomous Communities, as in the case of Catalonia, have also enacted provisions governing the economic effects of divorce. Thus, for instance, the Catalan Family Code deals with the common effects of nullity, separation and divorce —both personal and patrimonial— in Articles 76 to 86 Catalanian Family Code. Among these effects it is worth stressing that Article 83 Catalanian Family Code deals with the allocation of the use of the family home, and Articles 84 to 86 Catalanian Family Code regulate, with some differences and nuances, maintenance or, more precisely, an award with a compensatory character, which is very similar to the one established in the Spanish Civil Code.

Already at this stage, it is very important to stress that the maintenance of the spouse in cases of the breakdown of marriage is focused upon very differently in the case of separation and in the case of divorce. Whereas in the first case the separated spouse is entitled to support if he or she needs it and meets the conditions provided by Articles 68 and 143 Spanish Civil Code (Article 260(2) Catalanian Family Code), in the case of divorce the marriage is terminated and, along with it, the duty of support towards the former spouse. After divorce the former spouse will be eventually entitled to only the

compensatory award (maintenance) provided by Article 97 Spanish Civil Code (Article 84 Catalanian Family Code). By contrast, in the case of legal separation one of the spouses can eventually obtain both support and this compensatory award. Since the compensatory award covers only the economic imbalance caused by the termination of life in common, it is possible that it does not cover the minimum that is necessary for the support of the spouse in need and that the requirements to decree support obligations as established by Articles 142 *et seq.* are met (Article 259 *et seq.* Catalanian Family Code).<sup>26</sup>

For the sake of simplification, we will use the expression ‘maintenance’ in this report to refer to this compensatory award.

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

Before the reintroduction of divorce in Spain in 1981 and the regulation of the effects of separation and divorce —together with nullity— under the same chapter, the only way out of a marriage breakdown was legal separation [see Question 2], where the maintenance of the separated spouse was made expressly dependant on his or her innocence in the separation. Article 73(5) Spanish Civil Code (as amended by the Act of 24 April 1958) provided, in this sense, for ‘preservation on the part of the innocent spouse, and loss on the part of the guilty one, of the right of maintenance’. Case-law on the basis of these provisions also clearly laid down that the spouses retained the right to maintenance reciprocally when both and when neither had been found guilty.<sup>27</sup>

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

The main problem with regard to the maintenance of spouses after divorce is that the spouse who has the duty to maintain does not pay

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<sup>26</sup> See M<sup>a</sup> Paz García Rubio, *Alimentos entre cónyuges y entre convivientes de hecho*, Madrid: Civitas, 1995, p. 133.

<sup>27</sup> See SSTS 11.03.1983 (RJ 1983\1470) and 10.07.1985 (RJ 1985\3966). Cf. M<sup>a</sup> Paz García Rubio, *Alimentos entre cónyuges y entre convivientes de hecho*, Madrid: Civitas, 1995, p. 102-105.

or pays late or not in full. A possible way out of this problem could be to establish some sort of fund out of which payments could be made. However, very few of the proposals that have been made in this sense have included the payment of this compensatory maintenance to the former spouse.<sup>28</sup> None of these proposals have been accepted by the Spanish Parliament and currently none of them are subject to parliamentary proceedings. The government has not announced any action on this subject either.

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

Divorce puts an end to the bond of marriage (Article 85 Spanish Civil Code) and the law does not provide that the ex-spouses owe each other support obligations (*alimentos*) which the members of a family have to provide for each other when in need (see Articles 143 and 144(1) Spanish Civil Code, referring to support obligations, which both refer to the 'spouse'). The only benefit that the law recognises for the divorced spouses is the so-called *pensión compensatoria* (compensation allowance), provided by Articles 97 *et seq.* Spanish Civil Code (Articles 84 *et seq.* Catalanian Family Code). This 'compensation allowance' is awarded when the divorce results in an economic imbalance between one of the spouses in relation to the position of the other 'which involves a worsening of the situation which he or she had during the marriage' (Article 97 I Spanish Civil Code). However, as stated under Question 55, and for the sake of simplification, we are going to refer to this allowance, which has the aim of compensating the imbalance created by the divorce, as 'maintenance'.

When divorce creates this imbalance, maintenance will be established in the judicial decree of divorce taking into account, among other things, the following circumstances:

- The agreements that the spouses may have reached.
- Their age and health.
- Their professional qualifications and the probabilities of obtaining employment.
- Past and future dedication to the family.

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<sup>28</sup> See Proposition for a Draft Bill by the *Grupo Parlamentario Mixto* (07.05.1996; BOCC, Congreso, No. 18-1).

- Collaboration, with his or her own labour, in the commercial, industrial or professional activities of the other spouse.
- The duration of the marriage and their marital life.
- The eventual loss of a right to a pension.
- The wealth and economic means and necessities of both spouses.

Since in this case what is of paramount importance is the worsening of the situation and the economic imbalance of one of the spouses with regard to the position of the other, maintenance does not require that the petitioner is in need or lacks of the means of support to provide for his or her subsistence. Nevertheless, this does not exclude that in certain cases the worsening of the situation of one the spouses caused by divorce can place him or her in a situation of need which, if he or she had not been divorced, would have entitled him or her to claim support payments. In these cases, if there is an economic imbalance in relation to the position of the other spouse the amount paid under this concept will be used to cover his or her vital needs. With regard to Catalan law, the Catalan Family Code provides the following:

Article 84: Maintenance

1. In cases where one of the spouses' financial situation is impaired in a greater way, as a result of the divorce or judicial separation, and in the case of marriage annulment, only the bona fide spouse, shall be entitled to receive maintenance (*i.e. here also a 'compensating allowance'*) from the other spouse. Maintenance shall not exceed the standard of living that the couple led during the marriage, nor the standard of living that the spouse obliged to make the payment can afford to maintain.
2. In order to determine the maintenance awards, the judicial authority shall take the following into consideration:
  - (a) The resulting financial situation of the spouses as a consequence of the annulment of marriage, the divorce or the judicial separation, and the economic prospects for both spouses.

- (b) The duration of marital life.
- (c) The age and health of both spouses.
- (d) In cases where it applies, the specific economic compensation governed by Article 41 Catalanian Family Code.
- (e) Any other significant circumstance.

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 Spanish Civil Code does not expressly relate the right to obtain maintenance pursuant to Article 97 to the matrimonial property regime of the spouses or to any other consequences of the marital breakdown. However, it is obvious that one of the consequences of divorce is that it produces the dissolution of the matrimonial property regime (Article 95 I Spanish Civil Code) and its liquidation (Article 90 Spanish Civil Code), as well as the allocation of the family dwelling (Article 96 Spanish Civil Code). These aspects must be taken into account since it must be considered that they are included in the 'other circumstances' mentioned by Article 97 Spanish Civil Code when establishing whether or not the spouse is entitled to maintenance.<sup>29</sup> Moreover, the assets and rights that have been allocated during the liquidation of the matrimonial property regime are part of the 'wealth and economic means' of the petitioner which are mentioned by Article 97(8<sup>a</sup>) CC as one of the circumstances that must be taken into account in order to establish maintenance.

In community matrimonial property regimes, such as in the one that subsidiarily governs matrimonial property in the area of Spain where the Civil Code applies to this subject matter (the so-called *sociedad de gananciales*), the share of the applicant spouse in the common assets and in the assets that have been allocated to him or her in the liquidation of the regime will be taken into consideration. By contrast, in separation regimes, since there is no allocation of assets, what must eventually be taken into account are other rights that the law confers on the spouses and especially those provided by Articles 1438 *in fine*

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<sup>29</sup> See SAP Castellón 28.03.2001 [Act. Civ. 2002@27].

Spanish Civil Code and, in Catalonia, by Article 41(1) Catalanian Family Code.

With regard to the Civil Code area, Article 1438 Spanish Civil Code provides that, in the separation of property regime agreed upon by the spouses, housework shall generate a right to compensation upon the termination of the matrimonial property regime. The second provision refers to the subsidiary separation property regime which is in force in Catalonia and provides as follows:

Article 41. Economic compensation on the grounds of work

1. In cases of judicial separation, divorce or marriage annulment, the spouse who has worked for the household or for the other spouse without receiving any payment in exchange or who has received insufficient payment, shall be entitled to receive economic compensation from the other spouse, in the event that this fact has produced a situation of inequality between the two patrimonies, which implies an unfair enrichment.

This right is compatible with any other economic rights to which the favoured spouse may be entitled, but shall be taken into consideration for the assessment of these other rights (Article 41(3) Catalanian Family Code; see also Article 84(2)(d) Catalanian Family Code). For this last reason, it is likely that the entitlement to compensation on the ground of work which has been performed diminishes or even excludes the right to maintenance.

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

With regard to the allocation of the property of assets see Question 59. With regard to pension rights, one of the circumstances that must be taken into account when establishing whether or not the conditions to award maintenance have been met is the 'eventual loss of a pension right' (Article 97(7) Spanish Civil Code), which can be related to different situations:

- The loss of a widow's pension, which is linked to the working activity of the spouse. Nevertheless, in this case the ex-spouse does not necessarily lose his or her rights since according to Article 174(2) of the Social Security Act<sup>30</sup> widows' pensions will be allocated to the ex-spouse 'in an amount which is proportional to the period of time he or she lived together with the deceased spouse, regardless of the grounds that had led to separation or to divorce'. This right will cease if the surviving spouse remarries or cohabits as a husband and wife with another person (Article 174(3) Social Security Act). Conversely, if the ex-spouse whose work generates this widow's pension had remarried, the widow's pension will be allocated between the ex-spouse and the surviving spouse in proportion to the respective years of marital life.<sup>31</sup>
- The loss of a support allowance which had been awarded in the decree of separation in favour of the spouse who now, in the divorce proceedings divorce, claims maintenance, which is a very usual case in the practice of the courts.<sup>32</sup>
- The loss of support allowances that the petitioner obtained from Social Security or from third persons who had the obligation to provide support, which terminated with the marriage that is now is being dissolved by divorce.

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

The aim of maintenance is not to provide the support that the ex-spouse needs to cover his or her needs. Maintenance aims to offset the worsening in the situation of one of the ex-spouses that divorce causes when it produces an economic imbalance in relation to the position of the other ex-spouse [see Question 58]. Therefore, offsetting this imbalance is not a subsidiary aim but the main aim of maintenance.

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<sup>30</sup> See RDLeg 1/1994, de 20 de junio de 1994, por el que se aprueba el Texto refundido de la Ley General de la Seguridad Social (BOE num. 154, 29.06.1004).

<sup>31</sup> Cf. DA 10ª § 3º Ley 30/1981.

<sup>32</sup> See in particular Juan Montero Aroca, *La Pensión compensatoria en la separación y el divorcio: (la aplicación práctica de los artículos 97, 99, 100 y 101 del Código Civil)*, Valencia: Tirant lo blanch, 2002, p. 161.

Together with maintenance there are other remedies that aim to compensate the spouse who has undergone an impoverishment which is correlative to the enrichment of the other spouse for having worked for the household or for the other spouse without receiving any payment or receiving a payment which is insufficient (Articles 1438 Spanish Civil Code and 41(1) Catalanian Family Code) [see *supra* Question 59]. This remedy is compatible with maintenance, as it aims to offset a situation of imbalance which has occurred during marital life, whereas maintenance is applied to the situation in which the claimant spouse finds him/herself after divorce.<sup>33</sup> The amounts awarded for the work of the spouse will have to be taken into account for the calculation of the amount awarded as maintenance (arts. 41.3 *in fine* and 84.2 d) Catalanian Family Code) [see *supra* Question 59].

Damages are only awarded in the case of the annulment of a marriage, not in the case of divorce. In this sense, Article 98 Spanish Civil Code provides that: '[T]he spouse in good faith whose marriage has been declared null and void shall have a right to an indemnification award, if there has been marital life, taking into account the circumstances provided by Article 97'. Catalan law, by contrast, does not make any reference to compensation in the form of damages and, as in the case of divorce, entitles the spouse in good faith to claim maintenance (Article 84(1) Catalanian Family Code).

Another question is whether the tortious conduct that causes harm to one of the spouses can give rise to compensation in tort pursuant to the general rules of tort liability established by Articles 1902 *et seq.* Spanish Civil Code. The mere breach of marital obligations or the possibility to attribute the grounds for separation to one of the spouses cannot lead to an action in tort in favour of the spouse who has suffered the harm.<sup>34</sup>

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.*

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<sup>33</sup> Cf. Article 41.3 Catalanian Family Code and STSJC 26.10.1998 [RJC 1999\10].

<sup>34</sup> See STS 22.07.1999 [La Ley 1999, 11277] and 30.7.1999 [RJ 1999\5726]

One of the characteristics of the regulation in force that shows that the Spanish system has adopted a model of no-fault divorce is that, even in the cases in which the ground for divorce (or the ground for separation which later gives rise to divorce) can be attributed to the reprehensible conduct of one of the spouses, the economic effects of divorce are the same. If maintenance applies, it applies regardless of the grounds and the proceedings that had led to the divorce.

In fact, maintenance is included within the so-called 'common' effects which are common not only to divorce obtained by any of the grounds provided by Article 86 Spanish Civil Code, but also to judicial separation obtained by any of the grounds provided by Article 82 Spanish Civil Code which, as has been pointed out, includes many instances of conduct on the part of one of the spouses that may be considered reprehensible.

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

In Spain the courts have a great deal of leeway in order to request as much information as they consider necessary to conclude the proceedings. They can request this information either from the spouses themselves or from third parties (employers, tax authorities, the Social Security authorities, etc.), especially for the purpose of deciding on the economic effects of divorce (Article 774(2) Civil Proceedings Act).

When the spouses disagree on maintenance and the respondent refuses to divulge his or her wealth and economic means or hinders the obtaining of such information, the courts may resort to the so-called *prueba indirecta* o *indiciaria* (indirect proof or proof by circumstantial evidence) in order to establish maintenance and its amount. An investigation into the financial returns of the respondent is not essential. Any piece of evidence which allows an assessment of his or her earnings and returns suffices.<sup>35</sup>

## **II. Conditions under which maintenance is paid**

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<sup>35</sup> See SAP Alicante 23.11.2001 [AC 2001\2409].

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

Maintenance is awarded when divorce produces an economic imbalance in relation to the position of the other spouse which 'involves a worsening of the situation which he or she had during the marriage' (Article 97 I Spanish Civil Code). Accordingly, as pointed out, maintenance aims to offset the detriment that divorce has caused to one of the spouses, not to provide means of support.

The wealth and economic means of both spouses are assessed in order to establish whether this imbalance has occurred and whether the spouse who would have to pay maintenance can actually afford it. However, the economic means of the petitioner or the economic means of the respondent are only a further element which must be weighed together with other elements in order to establish the right to maintenance and its amount [see Question 58].

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

The rules that govern maintenance do not take into account either the fault of the spouse who claims maintenance nor his or her reprehensible conduct during the marriage in order to award such maintenance or to establish its amount. However, a section of the legal literature has pointed out that the legislator has possibly been overindulgent in this aspect,<sup>36</sup> since it can be surprising, for instance, that whereas a separated spouse is deprived of the right to claim support from his or her spouse (article. 152.4<sup>o</sup> Spanish Civil Code) or of the right to succeed his or her spouse (Articles 756-1<sup>o</sup>, 2<sup>o</sup> and 3<sup>o</sup> Spanish Civil Code) because of his or her reprehensible conduct, a separated and even a divorced spouse can claim the sort of maintenance that, according to Article 97 Spanish Civil Code, aims to offset the economic imbalance. For this reason, and as the

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<sup>36</sup> Juan Montero Aroca, *La Pensión compensatoria en la separación y el divorcio: (la aplicación práctica de los artículos 97, 99, 100 y 101 del Código Civil)*, Valencia: Tirant lo blanch, 2002, p. 149 considers that the legislator has clearly exceeded its powers.

circumstances that must be weighed in order to award or reject maintenance [see Question 58] are not limited ('among others', as stated under Article 97 I Spanish Civil Code), this part of the legal literature scholarship contends that a possible way out could be to take into account the fault of the spouse in the divorce as an additional circumstance and, accordingly, to reduce the amount of the award. Nevertheless, the Spanish courts have flatly rejected this approach, this being consistent with the model of no-fault divorce based on the irretrievable breakdown of marriage adopted by the Spanish legislator [see Question 14].

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

The claimant's lack of means is not a condition for obtaining maintenance [see Question 58]. However, since maintenance aims to offset the worsening of the claimant's situation with regard to the situation that he or she had during the marriage, the law requires that this worsening has been caused by the divorce (Article 97 I Spanish Civil Code and Article 84(1) Catalanian Family Code).

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

See Question 66. Additionally it can be pointed out that the worsening in the situation of the spouse who claims maintenance may have been previously demonstrated, since Spanish law allows a claim for maintenance in the proceedings for legal separation. Conversely, it is clear that the ex-spouse who was then not entitled to claim maintenance, will not be entitled to claim it later the account of subsequent circumstances that have worsened his or her personal or economic situation (for instance, because he or she has lost his or her job after the divorce).

In the practice of the courts the question whether the imbalance must be present when the marriage breaks down or when the court issues the decree of separation or divorce arises quite often. The most common opinion of the courts is that no maintenance will be awarded

in the divorce proceedings if: a) a reasonable period of time has elapsed since the separation has in fact occurred and the spouses have led independent households or b) maintenance had not been claimed during the prior proceedings that dealt with legal separation. In both cases the courts consider that the situation of the spouses leads to the understanding that there was no imbalance when breakdown occurred.<sup>37</sup>

### **III. Content and extent of the maintenance claim**

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

Maintenance can be claimed for an unlimited -period of time.

Until a few years ago, in most cases it was claimed and awarded for life. In fact the Civil Code does not make any reference to the duration of maintenance. Moreover, it assumes that it will be awarded without any time-limit and, for this reason, it provides for a periodic updating (Article 100 Spanish Civil Code) and that payments will continue after the death of the debtor (Article 101 Spanish Civil Code). Catalan law, by contrast, mentions 'the course of the period of time for which it was established' (Article 86(1)(d) Catalonian Family Code) as a ground for the termination of maintenance.

The Catalan rule, drafted in 1998, has taken into account the court practice which has developed within the framework of the application of the Civil Code since the beginning of the 1990s and which considers that, in spite of the silence of the Civil Code, both the parties, in the regulating agreement,<sup>38</sup> and in the divorce decree, can establish that maintenance will only be awarded for a limited period of time.<sup>39</sup> This is

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<sup>37</sup> See in this sense, for instance, SAP Girona 02.02.2000 [AC 2000\182]; Asturias 13.11.1999 [AC 1999\2247]; Alicante 04.03.1998 [Act. Civ. 1998@407]. Against this opinion, however, see SAP Sta. Cruz de Tenerife 13.02.1999 [Act. Civ. 1999@911]).

<sup>38</sup> SAP Asturias 18.09.2001 [AC 2001\1942].

<sup>39</sup> Legal literature has echoed this direction by the courts. See Julia Ruiz-Rico Ruiz-Morón, 'La concesión temporal de pensión por desequilibrio', *Aranzadi Civil*, 1995, p. 125 et seq.; Teresa Marín García de Leonardo, *La temporalidad de la pensión compensatoria*, Valencia, Tirant lo blanch, 1997; Teresa Marín García de Leonardo, 'Situación de la pensión compensatoria con limitación temporal en los Tribunales de Cataluña', *RJC* 1999, p. 721 et seq.; Ana Laura Cabezuelo Arenas, 'La

currently the prevailing solution and maintenance is nowadays usually established for a limited period.<sup>40</sup> Decisions that award maintenance for an unlimited period are exceptional. Most of them do so because the petitioning spouse, taking into account the duration of the marriage and his or her past commitment to housework, does not have many opportunities to gain employment because of his or her age (as, for instance, in the case of a 53-year-old wife, who had been married for 38 years during which time she was entirely devoted to housework).<sup>41</sup> Some Courts of Appeal, however, occasionally state that, except when the spouses so agree, it is not possible to award maintenance for a limited period since the Civil Code does not provide for this possibility.<sup>42</sup>

The time-limit for maintenance is determined according to what seems to be the most appropriate with regard to the circumstances of the case. Sometimes, maintenance will be paid until the claimant reaches a certain age, or until a certain event takes place (such as, for instance, the liquidation of the matrimonial property regime, the coming of age of a child, the repayment in full of any loans, etc.). However, what is more usual is to establish a certain number of years after which the debtor will be released and will no longer have to pay the maintenance. This fixed time-limit is usually established by taking into account how long the marriage has lasted and the age of the persons for whom the divorce has been detrimental.<sup>43</sup>

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pensióncompensatoria del art. 97 Spanish Civil Code. '¿Carácter indefinido o limitación en el tiempo?', *Aranzadi Civil* 4/2002, p. 4 ff.

<sup>40</sup> See, for instance, SAP Zamora 14.01.2000 [AC 2000\328]; Castellón 09.02.2001 [AC 2001\498].

<sup>41</sup> Juan Montero Aroca, *La Pensión compensatoria en la separación y el divorcio: (la aplicación práctica de los artículos 97, 99, 100 y 101 del Código Civil)*, Valencia: Tirant lo blanch, 2002, p. 173 *et seq.* And SAP Zaragoza 02.05.1996 [AC 1996\894].

<sup>42</sup> See in this sense, for instance, SAP Guadalajara 16.11.1998 [AC 1998\8404], Barcelona 02.07.1999 [AC 1999\1339], Badajoz 15.12.1999 [AC 1999\2334] and 13.09.2000 [AC 2000\4873].

<sup>43</sup> Juan Montero Aroca, *La Pensión compensatoria en la separación y el divorcio: (la aplicación práctica de los artículos 97, 99, 100 y 101 del Código Civil)*, Valencia: Tirant lo blanch, 2002, p. 182 *et seq.*

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

The amount of the maintenance is determined according all the factors established by Article 97 Spanish Civil Code (Article 84 Catalanian Family Code) [see Question 58], in particular 'the wealth and economic means and necessities of both spouses'. However, its aim is neither to guarantee the standard of living that the claimant had during the marriage nor to provide him or her with the economic means that may be necessary for support. Its aim is to offset the economic imbalance created by the divorce.

Starting from the existence of this imbalance, the amount of maintenance is determined according to the wealth and economic means of both spouses (Article 97(8) Spanish Civil Code (Article 84(1) *in fine* Catalanian Family Code)).<sup>44</sup>

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?*

Neither the law nor court practice have established anything like a table, a scale or a percentage in order to calculate maintenance.

By weighing all the factors set out by Article 97 Spanish Civil Code (Article 84 Catalanian Family Code) [see Question 58], the courts award maintenance within the economic possibilities of the debtor. Most commonly they establish a fixed amount which is paid in periodical payments and only very rarely do they establish this amount according to a percentage of the income of the debtor.<sup>45</sup>

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<sup>44</sup> Juan Montero Aroca, *La Pensión compensatoria en la separación y el divorcio: (la aplicación práctica de los artículos 97, 99, 100 y 101 del Código Civil)*, Valencia: Tirant lo blanch, 2002, p. 149.

<sup>45</sup> Juan Montero Aroca, *La Pensión compensatoria en la separación y el divorcio: (la aplicación práctica de los artículos 97, 99, 100 y 101 del Código Civil)*, Valencia: Tirant lo blanch, 2002, p. 168-169.

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*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?)*

This question does not arise under Spanish law, since maintenance is awarded according to different factors that must be weighed and not according to certain types of costs [see Question 58]. Since the enumeration of factors is not closed, these costs may be taken into account by the judge, both in order to decide whether or not to award maintenance and to determine its amount.

Once the amount of the maintenance has been determined the payments are not assigned either to meeting the costs of certain activities that the ex-spouse aims to carry out or to any specific present or future expenses that he or she intends to incur.

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

As has already been pointed out, the amount of maintenance is determined according to the factors established in Article 97 Spanish Civil Code (Article 84 Catalanian Family Code) [see Question 58] and, by definition, it cannot exceed the amount that would be necessary to maintain the standard of living which the spouse enjoyed during the marriage.

Nevertheless, from the point of view of the debtor the true quantitative limit is the one established by his or her economic capability. Thereby, the factor provided by Article 97(8) Spanish Civil Code ('The wealth and economic means and necessities of both spouses') will be the decisive factor.<sup>46</sup> If there is subsequently a 'substantial alteration of the economic capability' of the ex-spouse who pays the maintenance, he or she will be entitled to claim a reduction (Article 100 Spanish Civil Code and Article 84(3) Catalanian Family Code) [see Question 77].

Therefore, starting from the economic capability of the debtor, when maintenance is awarded the limit can be set at the standard of living which the debtor can afford, since it would not make much sense for the award of maintenance to place the ex-espouse, who is the

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<sup>46</sup> SAT Palma de Mallorca, 27.10.1983 [RGD 1984, 925].

maintenance debtor, in a position which is worse than the position of the ex-spouse who is entitled to maintenance.<sup>47</sup> This idea is expressed more clearly in Catalan law by Article 84(1) *in fine* Catalan Family Code, which provides that maintenance shall neither exceed 'the standard of living that the (creditor) had during the marriage nor the standard of living that the spouse obliged to pay maintenance can afford'.

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

The passing of time is in itself not a factor that will reduce the amount of maintenance that has been awarded. As an exception the theoretical possibility could be proposed in which the decision that awarded maintenance provides that, when a certain period of time has elapsed, maintenance, instead of being terminated, is reduced to a certain level. However, as a general rule any reduction will only be appropriate when 'substantial alterations of the economic capability of either spouse' have occurred (Article 100 Spanish Civil Code and Article 84(3) Catalan Family Code) [see Question 77].

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

Under Spanish law, i.e. within the framework of the Civil Code, maintenance is usually paid in periodic payments. Exceptionally, and subject to the condition that the spouses agree, Article 99 Spanish Civil Code provides that '[T]he substitution of an annuity, the usufruct of certain property, or the delivery of capital in assets other than in money, instead of the award judicially fixed pursuant to Article 97 Spanish Civil Code, may be agreed upon at any time'. For this reason the courts have rejected, for instance, that capitalisation of the periodic payments<sup>48</sup> or its substitution by a usufruct constituted upon certain

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<sup>47</sup> Joaquín Bayo, in: Joan Egea Fernández and Josep Ferrer Riba (Dirs.), *Comentari al Codi de família, a la llei d'unions estables de parella i a la llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2001, Com. Article 84 Catalan Family Code, p. 404.

<sup>48</sup> In this sense, SAT Valencia 13.10.1988 [RGD 1988, 6974]; Cádiz 14.09.2001 [Act. Civ. 2002@45].

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assets<sup>49</sup> can be imposed on the ex-spouse entitled to maintenance. By contrast, since there is agreement, the courts do not raise any objection to the regulating agreement which establishes that one of the spouses may obtain the property of the indivisible half of the common dwelling in the form of maintenance.<sup>50</sup>

Under Catalan law the solution is quite different, since Article 85(2) Catalanian Family Code expressly mentions the possibility that one of the spouses may claim the substitution of the periodic payments by other forms of payment when it provides that:

Article 85. Payment of maintenance

1. Maintenance shall be paid in money and in advance monthly payments.
2. At any time, by the agreement of the spouses or, lacking this, by judicial decree, the spouse obliged to pay maintenance may substitute this by the delivery of assets in ownership or usufruct.

The regulatory agreement does not require authorisation by the court. The spouses, however, must appear in court for the agreement to be entered in the records or they must send a copy of the document drafted by a public notary containing the agreement to the court.<sup>51</sup> The capitalisation of the periodic payments or their substitution by a usufruct made up by the judge at the request of one of the spouses does not require any specific grounds to justify such a provision.

*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?*

See Question 74.

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<sup>49</sup> In this sense, SAP Barcelona 26.02.1999 [AC 1999\4422].

<sup>50</sup> See, for instance, SAP Barcelona 18.12.1998 [AC 1998\8624].

<sup>51</sup> Joaquín Bayo, in: Joan Egea Fernández and Josep Ferrer Riba (Dirs.), *Comentari al Codi de família, a la llei d'unions estables de parella i a la llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2001, Com. Article 84 Catalanian Family Code, p. 411.

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

Article 97 II Spanish Civil Code expressly provides that '[T]he judicial decree shall establish the bases for updating the maintenance award' (Article 84(4) Catalan Family Code). The yardstick normally used to update awards is to apply the variation in prices reflected by the retail price index (RPI), which is calculated by the National Institute of Statistics. Updating will take place on an annual basis. Another yardstick occasionally used by the courts is the increase in the salary of the debtor.<sup>52</sup>

The date that must be taken into account for the updating, as long as the amount awarded by the Court of First Instance is not appealed, is the date on which the decision of the Court of First Instance providing for maintenance was issued. In contrast, on appeal it is the date of the decision of the Court of Appeal that must be taken into consideration.<sup>53</sup>

Updating will have effect *ex tunc*, so that the increase of the award of maintenance will occur automatically and the petitioner will be entitled to obtain it, with retroactive effect, starting from the relevant day.<sup>54</sup>

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

According to Article 100 Spanish Civil Code, 'the award may only be modified when there are substantial alterations in the circumstances of either spouse'. See also Article 775(1) Civil Proceedings Act.

According to the prevailing opinion of the courts, and in spite of the wording of this provision, the alterations in the economic capability of the spouses can only be taken into account in order to *decrease* maintenance.<sup>55</sup> This opinion is coherent in so far as what determines

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<sup>52</sup> See Carlos E. Lalana del Castillo, *La Pensión por desequilibrio en caso de separación o divorcio*, Barcelona: Bosch, 1993, p. 225. AAP Madrid 05.10.1999 [AC 1999\7385].

<sup>53</sup> AAP Navarra 09.09.1998 [AC 1998\1492].

<sup>54</sup> SAP León 26.10.2000 [El Derecho 2000\52914].

<sup>55</sup> See, however, Herminia Campuzano Tomé, *La Pensión por desequilibrio económico en los casos de separación y divorcio: especial consideración de sus presupuestos de otorgamiento*, Barcelona: Bosch, 1994, p. 182. In the decisions of the courts, see

the existence of the right to maintenance and its amount over time is the imbalance which existed when the breakdown occurred and which came about precisely as a result of the breakdown [see Question 66]. When this imbalance increases due to events which are subsequent to the breakdown of the marriage and unrelated to it —be it an improvement in the debtor's situation or the worsening of the situation of the creditor— any modification is out of place.<sup>56</sup> Thus, for instance, it is inappropriate to increase the amount awarded on the ground that after separation one of the spouses has increased his or her economic capability due to a lottery win<sup>57</sup> or has increased his or her income by obtaining a better job.<sup>58</sup> Catalan law expressly adopts this criterion in its Article 84(3) Catalan Family Code, by providing that: 'Maintenance shall be reduced if the situation of the person who is entitled to obtain it improves, or if the situation of the person obliged to pay it worsens'.

Article 100 Spanish Civil Code requires the alterations in the circumstances to be 'substantial', something that has been understood in the sense that the changes affecting economic capability (assets and income)<sup>59</sup> must be true changes based upon proof of events that are new with regard to those that had been taken into account by the decision that awarded the maintenance.<sup>60</sup> They must also amount to unforeseeable, real and not intentionally sought after alterations, and they are to be stable and permanent over time.<sup>61</sup> Thus, for instance, the reduction of maintenance has been rejected because of the mere fact that the creditor temporarily enjoyed a higher income resulting from the payment of overtime at work.<sup>62</sup> On many occasions the petition to reduce maintenance is related to a decrease in the income of the

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however SAP León 02.02.1998 (AC 1998 \3275). And also SAP Barcelona 04.05.1999 [Act. Civ. 1999@907]).

<sup>56</sup> SAP Cantabria 26.06.1998 [AC 1998 \1235].

<sup>57</sup> SAP Barcelona 06.04.1998.

<sup>58</sup> SAP Zamora 17.03.2000 [AC 2000 \859].

<sup>59</sup> Herminia Campuzano Tomé, *La Pensión por desequilibrio económico en los casos de separación y divorcio: especial consideración de sus presupuestos de otorgamiento*, Barcelona: Bosch, 1994, p. 181.

<sup>60</sup> Juan Montero Aroca, *La Pensión compensatoria en la separación y el divorcio: (la aplicación práctica de los artículos 97, 99, 100 y 101 del Código Civil)*, Valencia: Tirant lo blanch, 2002, p. 234.

<sup>61</sup> SAP Madrid 06.06.1989 [RGD 1989, 5794].

<sup>62</sup> SAP Jaén 23.04.1999 [AC 1999 \4840].

debtor, but in other cases the alleged ground for reduction is the increase in his or her expenses [see Questions 81 and 82].

Catalan law, by contrast, does not require any change in circumstances to be 'substantial' (Article 84(3) Catalan Family Code). Nevertheless, it has been pointed out that an award of maintenance will hardly ever be modified unless the circumstances that refer directly to it have at least changed in a significant way<sup>63</sup>.

#### **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?*

The starting point in Spanish law is that maintenance will be paid only if there has been economic imbalance between the spouses. When the eventual debtor lacks economic means the most usual result of the petition is for the court to consider that this imbalance has not taken place. As has been stated by one legal scholar, in these kinds of situations one can only compare 'poverty with poverty'.<sup>64</sup>

If maintenance is awarded, its amount will be limited not only by '[T]he wealth and economic means of both spouses', but also by a standard of living that the debtor can afford [see Question 72]. If the economic capacity of the debtor is substantially reduced after the award of maintenance, he or she will not be entitled to retain a certain amount, but only to file a petition requesting a reduction of the award or, even, for the termination of the payments (Article 100 Spanish Civil Code and Article 84(3) Catalan Family Code).

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<sup>63</sup> Joaquín Bayo, in: Joan Egea Fernández and Josep Ferrer Riba (Dirs.), *Comentari al Codi de família, a la llei d'unions estables de parella i a la llei de situacions convivencials d'ajuda mútua*, Madrid, Tecnos, 2001, Com. Article 84 Catalan Family Code, p. 389.

<sup>64</sup> See Juan Montero Aroca, *La Pensión compensatoria en la separación y el divorcio: (la aplicación práctica de los artículos 97, 99, 100 y 101 del Código Civil)*, Valencia: Tirant lo blanch, 2002, p. 89 referring to many decisions in this sense.

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?*

The moment that must be taken into account to establish the amount of maintenance is that of the termination of life in common, since the economic imbalance that maintenance aims to compensate is related to the situation in which the spouses were in when living together [see Question 67]. Therefore, any increase in this imbalance due to circumstances that are alien to the breakdown and to the termination of life in common and which occurs between this moment and divorce will be irrelevant. If they mean an increase in the economic capacity of the debtor, they will not entail any entitlement to claim an increase in the maintenance award. The same holds true if this increase and the new imbalance occurs after divorce.

In order to avoid the need to modify the amount shortly after it has been awarded, Catalan law explicitly requires that the foreseeable economic expectations of the spouses immediately after divorce are taken into account (see Article 84(2)(a) *in fine* Catalan Family Code).<sup>65</sup> But it must be borne in mind that, as pointed out in Question 77, this modification can only be made —both in Catalan law and in the Spanish Civil Code— if it is necessary to *reduce* the award when the economic capacity of the debtor has decreased or when the economic capacity of the creditor has increased.

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

Since the maintenance award must be established according to the wealth and economic means of the spouse who is obliged to pay the maintenance, the debts of the spouse who has to pay maintenance are a factor which must be taken into account, among others (Article 97 I Spanish Civil Code and Article 84(2) Catalan Family Code [see Question 58]) in order to establish whether an economic imbalance exists between the spouses and, if this is the case, to fix the amount of the award.

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<sup>65</sup> Joaquín Bayo, in: Joan Egea Fernández / Josep Ferrer Riba (Dirs.), *Comentari al Codi de família, a la llei d'unions estables de parella i a la llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2001, Com. Article 84 Catalan Family Code, p. 404.

With regard to obligations that the debtor has incurred after the payment of maintenance was established in favour of his or her ex-spouse, the general criterion on the modification of the award due a change in circumstances applies (Article 100 Spanish Civil Code and Article 84(3) Catalanian Family Code [see Question 77]). This is the case, for instance, when the debtor suffers an illness which decreases his or her income or when there is a noticeable increase in expenses.<sup>66</sup>

The Courts require that these expenses are unavoidable. Unnecessary or superfluous expenses are not relevant.<sup>67</sup> The Courts point out, for instance, that the acquisition of a new dwelling with a mortgage is not a ground for decreasing the payment of maintenance since it does not diminish the wealth of the debtor but increases and consolidates it.<sup>68</sup>

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

The legal obligations of the spouse who is the debtor of the maintenance payments must be taken into account, as part of his or her debit side, in the calculation of his or her 'wealth and economic means' to which Article 97(8) Spanish Civil Code refers. By contrast, moral obligations do not affect the economic capacity of the debtor and, therefore, do not have any influence upon the determination of maintenance and its amount.

Concerning *de facto* cohabitants there is no provision under the Spanish Civil Code that imposes a legal duty of mutual support. Accordingly, some decisions have considered that *de facto* cohabitation between the ex-spouse who is the debtor of maintenance, and another woman was immaterial with regard to the modification of the award.<sup>69</sup> However, it must be kept in mind that some Autonomous

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<sup>66</sup> Carlos E. Lalana del Castillo, *La Pensión por desequilibrio en caso de separación o divorcio*, Barcelona, Bosch, 1993, p. 236.

<sup>67</sup> Juan Montero Aroca, *La Pensión compensatoria en la separación y el divorcio: (la aplicación práctica de los artículos 97, 99, 100 y 101 del Código Civil)*, Valencia: Tirant lo blanch, 2002, p. 239.

<sup>68</sup> SAP Huesca 24.01.2000 [AC 2000\4041].

<sup>69</sup> SAP Cádiz 01.02.1999 [AC 1999\4134].

Communities have passed Acts dealing with *de facto* couples and registered same-sex and opposite-sex partnerships, and provide a mutual obligation of support and contributions to the common expenses of the household.<sup>70</sup>

With regard to stepchildren, the legal principle is that the maintenance of the child of the other spouse is a common expense of marriage and, therefore, the step-parent must contribute to maintenance in proportion to his or her income. In Catalonia this principle is expressed by Article 4(2) Catalan Family Code, which provides that ‘the expenses incurred for the provision of support and maintenance, in the broadest sense, for the non-common children cohabiting with the spouses shall also be deemed family expenses...’. In the Spanish Civil Code there is no such general reference, but Article 1.362 I 1st Spanish Civil Code includes the ‘maintenance and education of the children of one of the spouses... when they live in the family home’ as an expense of the matrimonial property regime of community of gains (*sociedad de gananciales*). However, from Article 82(2) Spanish Civil Code, which considers ‘any serious or reiterated violation of the obligations regarding the common children *or regarding those of any of the spouses who reside in the family home*’ as a ground for legal separation, it can be inferred that this is a general principle which applies regardless of the particular matrimonial property regime that governs the marriage.<sup>71</sup> Moreover, this principle has usually been taken into account in order to establish what the common expenses of the *de facto* couples or registered partnerships are.<sup>72</sup>

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<sup>70</sup> See Articles 4(1)(a), 8, 23(1)(a) and 26 of the Catalan Act 10/1998, de 15 de julio, *de uniones estables de pareja*; 5.3 II and 13 Aragon Act 6/1999, de 26 de marzo, *relativa a parejas estables no casadas*; 5.3 Navarra Foral Act 6/2000, de 3 de julio, *para la igualdad jurídica de las parejas estables*; 5.2 a) and 6 Balearic Act 18/2001, de 19 de diciembre, *de parejas estables*.

<sup>71</sup> M<sup>a</sup> Paz García Rubio, *Alimentos entre cónyuges y entre convivientes de hecho*, Madrid: Civitas, 1995, p. 39.

<sup>72</sup> See Articles 4(1) and 23(1) Catalan Act 10/1998, de 15 de julio, *de uniones estables de pareja*; 5.3 Aragon Act 6/1999, de 26 de marzo, *relativa a parejas estables no casadas* and 5.2 Balearic Act 18/2001, de 19 de diciembre, *de parejas estables*. By contrast, Article 7 of the Navarra Foral Act 6/2000, de 3 de julio, *para la igualdad jurídica de las parejas estables*, refers only to ‘children in common’.

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

Once maintenance has been awarded by the divorce decision it is a pecuniary obligation which is ordinarily fulfilled by periodical payments [see Question 74]. When its amount is established, both the income and the assets of the eventual debtor are taken into account. If the debtor has no income but only assets and does not fulfil the obligation to pay maintenance, the general rules of liability apply. According to these rules, a debtor is liable for the performance of his or her obligations with all his or her present future property (Article 1911 Spanish Civil Code), and therefore he or she can be asked to use his or her capital assets.

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?*

A distinction must be drawn between two possible situations:

(a) The debtor, being able to work, did not work when the breakdown occurred or received an income which was much lower than what he could have actually obtained. Since maintenance offsets the imbalance that existed when the breakdown occurred and, therefore, the spouse entitled to obtain maintenance does not have expectations with regard to a possible future increase in the economic capacity of the debtor, it is immaterial whether the debtor could have earned more by obtaining another job. The hypothetical opportunity to receive a higher income is not taken into account in order to establish the imbalance that justifies awarding maintenance.

(b) *The debtor stops working after maintenance has been established.* In this case, the courts refuse to decrease the award of maintenance if the decrease or loss of income corresponds to wilful and fraudulent conduct on the part of the debtor who aims to discontinue payments.<sup>73</sup> Nevertheless, it is widely accepted that conduct such as giving up a

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<sup>73</sup> See, for instance, SAT Pamplona 12.01.1987.

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second job, reducing overtime or early retirement can be due to legitimate causes such as a health condition or the age of the debtor.<sup>74</sup>

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

Spanish law does not draw any distinction between different sources of income when establishing maintenance and its amount. Therefore, all the earnings that the debtor actually receives or is entitled to receive must be taken into account in order to establish the existence of the imbalance and to assess the amount of the maintenance that must be paid to the ex-spouse who suffers this imbalance [see Question 58]. Additionally, it must be said that there is no social security benefit whose payment is linked to the payment of maintenance to the ex-spouse.

*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?*

Once again, a distinction between two different situations must be drawn:

(a) The new spouse, registered partner or de facto partner has his or her own economic means and, therefore, does not depend on the debtor of maintenance to the former spouse. In this case, the economic means of these persons are totally immaterial and must not be taken into account with regard to the maintenance of the ex-spouse. The debtor has certain economic means when the breakdown occurs and they do not encompass the economic means of third persons, in spite of the fact that, in practice, they can actually entail an extra source of income and increase his or her standard of living or diminish the expenses that have hitherto burdened his or her economic status.

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<sup>74</sup> Joaquín Bayo, in: Joan Egea Fernández/José Ferrer Riba (Dirs.), *Comentari al Codi de família, a la llei d'unions estables de parella i a la llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2001, Com. Article 84 Catalan Family Code, p. 409.

(b) The new spouse, registered partner or de facto partner does not have economic means and, therefore, does depend on the debtor of maintenance to the former spouse. In this case, as long as a legal obligation of support with regard to the new partner exists [see Question 81], the ex-spouse will be able to obtain a decrease in the amount of the maintenance award on the grounds of a substantial alteration of circumstances if he or she can prove that a significant reduction of the economic means available to pay maintenance has taken place [see Question 92].

**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?*

As already pointed out [see Question 58], in order to be entitled to maintenance it is not required that the petitioner is in a situation of necessity as a consequence of the divorce. In principle, it is sufficient that his or her situation, compared to the one that existed during the marriage, has worsened and that divorce has brought about an economic imbalance. The situation of economic imbalance is assessed according to the factors provided by Article 97 (Article 84 Catalanian Family Code). One of these factors, among others, is 'the wealth and economic means ... of both spouses' (Article 97 I (8) Spanish Civil Code). The income of the petitioning spouse, therefore, must be taken into consideration in order to establish whether an imbalance exists and, accordingly, whether he or she is entitled to maintenance payments.

The fact that the petitioner for maintenance obtains an award which exceeds what could reasonably be expected on account of his or her professional capabilities is immaterial. The imbalance must be assessed according to the economic means of both spouses that were available when the breakdown occurred and, at that moment, the petitioner did actually receive these earnings.

Under Catalan law, however, Article 84 Catalanian Family Code refers to the 'foreseeable economic prospects' of either spouse, which in all

likelihood may allow taking into account the exceptional nature of the situation in which the petitioning spouse finds him/herself and to foresee a future fall in earnings. In fact, the reverse situation can also take place with regard to the debtor and, in order to prevent an immediate modification of the amount of the payments awarded, it is accepted that the earnings during the period prior to the breakdown can have an extraordinary or exceptional character (such as, for instance, when they exceed the amount of the usual salary by including overtime or specific tasks that may fail to take place in the future).<sup>75</sup>

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

Among the circumstances that must be taken into account in order to establish maintenance are 'professional qualifications and the possibility of obtaining employment' (Article 97 I (3) Spanish Civil Code), something which must be related to other factors such as 'age and state of health' (Article 97 I (2) Spanish Civil Code) and 'past and future dedication to the family' (Article 97 I (4) Spanish Civil Code).

In principle, the possibility of obtaining employment is a factor which decreases the economic imbalance that one of the spouses may have suffered as a result of divorce. For this reason it is pointed out that he or she cannot refuse to take a job that is in accordance with his or her professional qualifications and which, if this is necessary, is also compatible with caring for the family.<sup>76</sup> By the same token, the judge may order the termination of the maintenance payments when it is proven that the creditor does not do anything to overcome his or her situation<sup>77</sup> and currently maintenance during a limited period of time is very widespread [see Question 68] precisely in order to allow the spouse who receives maintenance to have time to look for a job and to adapt to it as well as to encourage him or her to do so.

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<sup>75</sup> Joaquín Bayo, in: Joan Egea Fernández and Josep Ferrer Riba (Dirs.), *Comentari al Codi de família, a la llei d'unions estables de parella i a la llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2001, Com. Article 84 Catalanian Family Code, p. 410

<sup>76</sup> Encarna Roca Trias, in: M. Amorós Guardiola (et al), *Comentarios a las reformas del Derecho de Familia*, vol. I, Madrid: Tecnos, 1984, Com. Article 97, p. 170.

<sup>77</sup> SAP Las Palmas 12.06.1999 [Act. Civ. 2000@417].

When, due to his or her professional qualifications, age or dedication to the family, it is clear that the petitioning ex-spouse does not have the possibility of obtaining a job, it cannot be asked of him/her to prove that he or she has been looking for work without success (for instance, by enrolling at the employment office or by accepting eventual offers) as a precondition for the award.<sup>78</sup>

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

Since this is not a case of proving a situation of necessity or a lack of economic means as a condition for applying for maintenance, according to Spanish law this question must be framed in the sense that both the income and capital assets of the petitioning spouse must be taken into account in order to establish whether an economic imbalance exists and, if so, what is its extent ('wealth and economic means...of both spouses', Article 97 I (8) Spanish Civil Code). Accordingly, if the petitioning spouse has income and capital assets and nevertheless there has been an economic imbalance, the petitioning ex-spouse will be entitled to maintenance without first having to use his or her capital assets.

*89. When calculating the claimant's income and assets, to what extent are the maintenance obligations of the claimant in relation to third persons (e.g. children from an earlier marriage) taken into account?*

The claimant's income and capital assets are taken into account as a whole, i.e. including not only assets [see Question 88] but also liabilities. The debts that the claimant may have to face after the marital breakdown reduce the means that are available and, for this reason, these are aspects that must be taken into account in order to establish the existence of an economic imbalance.

Article 97 I (8) Spanish Civil Code mentions the 'necessities' of either of the spouses as an element that diminishes their economic capacity. However, support obligations with regard to children from an earlier marriage which, by definition, already existed during the marriage

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<sup>78</sup> In this sense, SAP Zaragoza 02.05.1996 [AC 1996\894].

which has now been dissolved must be taken into account. Moreover, it must be borne in mind that they were an expense that might have been shared by both spouses if these children were living in the common home [see Question 81].

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?*

It is necessary here to draw a distinction between *contributory* pensions and other benefits, to which the petitioning spouse is entitled as long as he or she fulfils the requirements of affiliation and the specific requirements that entitle him or her to obtain the corresponding benefit (for instance, the time of contribution) and *non-contributory* benefits, which have a welfare nature.

Contributory benefits are related to the events of retirement, unemployment or disability in its different forms. These benefits must be taken into account as income when analysing whether an economic imbalance exists (i.e. in order to establish, in the wording of Article 97 I (8) Spanish Civil Code, his or her 'wealth and economic means').

By contrast, non-contributory benefits entitle a claimant to obtain a minimum allowance which is conditional upon proving lack of sufficient income and earnings and apply in certain cases only (for instance, old age — i.e. over 65 years of age— and serious disability —over 85%). This situation of necessity is not only established by taking into account his or her income, but also by taking into consideration the income of the other persons who are part of the family unit to which the claimant of the benefit belongs (*household means test*), inasmuch as these are persons 'tied to (the claimant of the benefit) by marriage or by blood ties of kinship up to the second degree' (Article 144(4) LGSS) and only if they live together with him or her. Therefore, the obligations that other relatives that do not live with the claimant of the non-contributory benefit may have towards him or

her are disregarded.<sup>79</sup> For this reason, the claim for a non-contributory benefit of an ex-spouse who has not received maintenance cannot be rejected on the grounds that he or she is entitled to obtain it.<sup>80</sup> By contrast, when maintenance has already been awarded, even when it is not actually paid, since it belongs to the income of the claimant according to Article 144(5) LGSS, it will have to be taken into account in order to establish whether or not the family unit of the claimant exceeds the upper limit of income which is required to award a non-contributory benefit or not.

## **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?*

There are no general rules on the priority of the eventual concurring claims on this subject. However, the courts have encountered this problem with regard to the eventual modification (reduction) of the maintenance that has already been awarded as the result of the new support obligations that arise when the debtor establishes a new family which may entail a substantial alteration of the circumstances for the purposes provided by Article 100 Spanish Civil Code [see Questions 77 and 93].

*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 new marriage of the debtor is, according to the most recent court decisions, a case of an alteration of the circumstances that entitles a claim to be made for a reduction of the maintenance awarded on the grounds that it has increased his or her expenses. Decisions that accept the reduction of maintenance awards as the result of the new family's

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<sup>79</sup> See Jordi Ribot Igualada, *Alimentos entre parientes y subsidiariedad de la protección social*, Valencia: Tirant lo Blanch, 1999, p. 52-54.

<sup>80</sup> It must be taken into consideration, additionally, that when the petitioning ex-spouse has already divorced and maintenance has not been awarded in the separation or divorce proceedings it is understood that the ex-spouse entitled to it has waived his or her right and cannot claim it again [see Question 103] and therefore there are no legal grounds for the Social Security administration to make a calculation of the amount that might have been attained if it had been claimed for.

duties ensuing from this new marriage have become more and more usual.<sup>81</sup> The grounds for this new direction of the courts can be found in the consideration that the previous direction would run counter to the free exercise of the freedom to marry, which is a constitutionally protected right (Article 32(2) Spanish Constitution),<sup>82</sup> and to the constitutional protection of the family (ex Article 39(1) Spanish Constitution). Accordingly, the family obligations of the new marriage, which encompass support for the spouses and for children in common and not in common who live together with the spouses, are also a factor that must be taken into consideration in order to reduce the amount of maintenance already awarded.<sup>83</sup> With regard to the situation of the registered or *de facto* partner see Question 81.

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?*

Having new support obligations resulting from the birth of children that have been born after divorce and after maintenance for the ex-spouse has been awarded is considered to be a subsequent substantial alteration in the circumstances of one spouse, the debtor, if he or she cannot afford to meet these new obligations and at the same time the payments of maintenance to the ex-spouse in full.<sup>84</sup>

The priority of the obligations towards the children must not only be based upon the constitutional protection of the family (ex Article 39(1) Spanish Constitution) but also on the specific protection of minor children. In this sense the rights of the minor children prevail even over the support obligations which can be claimed by the spouse who is not divorced. In this sense Article 145 III Spanish Civil Code

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<sup>81</sup> In this sense, for instance, SAP Cuenca 29.04.1998 [AC 1998\4566] and Huelva 28.04.1999 [AC 1999\6105]). By contrast, prior court decisions held that this new situation was immaterial (for instance, SAP Madrid 24.10.1988 [RGD 1989, 1406] and Granada 24.10.1990 [RGD 1991, 8476]).

<sup>82</sup> Joaquín Bayo, in: Joan Egea Fernández / Josep Ferrer Riba (Dirs.), *Comentari al Codi de família, a la llei d'unions estables de parella i a la llei de situacions convivencials d'ajuda mútua*, Madrid: Tecnos, 2001, Com. Article 84 Catalanian Family Code, p. 409.

<sup>83</sup> See, among the oldest decisions in this sense, SAP Bilbao 02.11.1989 [RGD 1990, 7061].

<sup>84</sup> This is the prevailing opinion of the courts. See, among others, SSAP Bilbao 02.11.1989 [RGD 1990, 7061]; Cuenca 29.04.1998 [AC 1998\4566] and Huelva 28.04.1999 [AC 1999\6105]).

provides that when the spouse and a child under parental responsibility concur in seeking support 'the latter shall be preferred over the former' (Article 265 *in fine* Catalanian Family Code). If this happens with support, the more it must be the case with regard to the right of maintenance of the ex-spouse.

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

When the child has reached the age of majority a distinction between two different situations must be drawn:

(a) When the minor child reaches majority but continues to live in the home of the debtor of maintenance. In this case, the duty of support, which is part of family expenses and which prevails over the maintenance of the ex-spouse [see Question 93], is retained with no variations until the child has become economically independent (Articles 142 II and 93 II Spanish Civil Code and Articles 259 and 76(2) Catalanian Family Code). For this reason, the very fact that the children come of age could not be a legal ground for claiming that the maintenance payments should once again be set at the amount that had originally been established.

(b) The case in which the child who has reached majority, after having become economically independent and having left the family home, brings a claim for support against the parent who is, at the same time, the debtor of maintenance to the ex-spouse. In this case, the legal regime that applies is the general one corresponding to the support obligations towards any other relative [see Question 95].

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

According to the general rules on the legal obligations of support, an essential condition of its existence is that the debtor has sufficient economic capacity (Articles 146 and 147 Spanish Civil Code and Article 267 Catalanian Family Code). In order to establish this economic capacity, the obligations that the debtor of support must fulfil must be taken into consideration, and a previous obligation of maintenance is one of these obligations. If in spite of the existence of

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this obligation towards his or her ex-spouse, the debtor has sufficient economic means available, he or she will have to pay both support and maintenance. If this is not the case, the relative who is in need will have to claim support, partially or totally, from the other relatives who are subsidiarily obligated.

The solution to this case is very different from the cases of the spouse [see Question 92] and of the minor children [see Question 93], since in the case of relatives the claim for support neither arises with the establishment of a new family unit by the debtor of maintenance, nor is it linked to his or her parental responsibility with regard to a minor child. The grounds of the obligations are simply kinship and the situation of necessity to which, in principle, the debtor of maintenance is totally alien.

*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?*

As has already been pointed out [see Question 58] under Spanish law maintenance does not depend on the need of the petitioning spouses. Hence, whether or not the petitioning spouse has relatives who have a legal duty to support him or her or not must be disregarded. The right to maintenance is a legal right to which the petitioning spouse is entitled when the subjective and objective conditions provided by the law are met (Article 97 Spanish Civil Code and Article 84 Catalonian Family Code). If the spouse is entitled to it, it is a right included in his or her assets.

The claim of support against relatives will only take place when there is no right of maintenance or this is insufficient. This claim for support is, in any case, subsidiary to the economic means available to the claimant. Accordingly, if as the result of offsetting the imbalance created by the marriage breakdown the amount of maintenance awarded is insufficient to cover the vital needs of the ex-spouse entitled to it, he or she will be entitled to claim support from the relatives who, according to the law, have this obligation.

## **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?*

According to Article 101 Spanish Civil Code, the right to receive maintenance terminates with the subsequent marriage of the spouse entitled to it or by his or her marital cohabitation with another person (Article 86(1)(b) Catalonian Family Code).

As can be observed, the law does not draw any distinction between registered partnership and de facto cohabitation. The courts encounter enormous difficulties when trying to establish the meaning of 'marital cohabitation' in these cases. As a general rule, the courts seem to require that the relationship can be characterised as permanent and stable, although it is not necessary that it is definitive, since marriage is not definitive either. In order to prove these requirements the courts take into account circumstantial evidence such as residing in the same domicile,<sup>85</sup> common actions in economic matters (for instance, opening joint accounts, purchasing assets in common, reciprocal guarantee of loans),<sup>86</sup> or other elements that reveal the existence of an union with similar characteristics to a marriage.<sup>87</sup> In this sense, for instance, SAP Baleares 27.03.2000 (AC 2000\3890) declared that the right of maintenance had terminated because the new situation was not a 'sporadic or circumstantial situation, or emotional only ... but, by contrast, a stable and permanent relationship, which has lasted since 1995 and which is shown and recognised socially'.

There is no provision that allows a possible revival of the maintenance which had already been terminated on this ground and, therefore, it must be understood that termination is final.<sup>88</sup>

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<sup>85</sup> SAP Toledo 10.02.2000 [AC 2000\2799].

<sup>86</sup> SAP Granada 09.02.2000 [AC 2000\4528].

<sup>87</sup> SAP Avila 05.02.1998 [AC 1998\3645].

<sup>88</sup> Encarna Roca Trias, in: M. Amorós Guardiola (et al), *Comentarios a las reformas del Derecho de Familia*, vol. I, Madrid: Tecnos, 1984, Com. Article 97, p. 645.

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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?*

See Question 97.

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

The reason that gives rise to maintenance is the economic imbalance resulting from the marriage breakdown [see Question 58]. Although Article 97(6) Spanish Civil Code (Article 84(2)(b) Catalan Family Code) makes reference to the duration of the marriage and of marital life as factors that must be taken into consideration, a short duration of a marriage is not in itself a sufficient ground for denying maintenance. Other factors must be weighed up and we can consider, for instance, the case of an elderly man and an elderly woman who marry, with the result that one of them loses his or her widow's pension, and who shortly afterwards obtain a divorce. In this case, in spite of the short duration of the marriage, it seems clear that there has been an imbalance which would give rise to a right of maintenance in favour of the spouse who had lost his or her widow's pension (Article 97(7) Spanish Civil Code).

However, what happens more often in practice is that the courts deny maintenance in cases of marriages of short duration since, precisely because of the short time of their life in common, most of the circumstances that give rise to an imbalance have not taken place<sup>89</sup> and the situation of the spouses, such as for instance their age, economic independence or lack of children in common, shows that this imbalance has not occurred.<sup>90</sup>

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?*

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<sup>89</sup> In this sense see, for instance, SAP Navarra 18.01.1995 [AC 1995\70] and 12.06.1992 [AC 1992\906].

<sup>90</sup> In this sense, SAP Barcelona 23.02.1998.

As has been pointed out in general terms [see Questions 12 and 62], the imputation of the ground for divorce or of reprehensible conduct during the marriage to one of the spouses must not have any influence on the award of maintenance or on its amount. The 'guilty' spouse will be able to claim maintenance, regardless of his or her conduct, if economic imbalance has occurred.<sup>91</sup>

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

In contrast to support obligations among relatives (Article 152(5) Spanish Civil Code and Article 271(1)(a) Catalanian Family Code), maintenance does not terminate with the death of the debtor (Article 101 II Spanish Civil Code). However, 'the debtor's heirs may request the reduction or suppression of the award from the court if the hereditary assets were insufficient to discharge the debt or if their right to the legitimate portion would be affected'. However, if hereditary property does not have enough liquidity but, taken as a whole, is sufficient to continue the payments, the heir will not be able to avoid paying maintenance and, if necessary, will have to sell some assets in order to pay.<sup>92</sup> Under Catalan law Article 86(2) Catalanian Family Code makes no reference to the rights to the legitimate portion of the heirs and only provides that 'his heirs may claim a reduction in maintenance or the exoneration thereof, if the profitability of the inheritance assets is not sufficient to pay the maintenance'.

### **VIII. Maintenance agreements**

The complexity of this topic under Spanish law does not allow an answer in instalments. Therefore the reporters have elaborated a joint answer in Question 102.

*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?*

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<sup>91</sup> M<sup>a</sup> Paz García Rubio, *Alimentos entre cónyuges y entre convivientes de hecho*, Madrid: Civitas, 1995, p. 146-147.

<sup>92</sup> In this sense see STSJC 26.07.2000 [RJ 2000\748], which applied Article 101 II Spanish Civil Code.

The agreements between the spouses with regard to the economic effects of the breakdown of the marriage and, specifically, with regard to the eventual right of maintenance to which either of them can be entitled to, can take place at different moments in time:

(a) *Before divorce*. This moment includes two different situations: a) the agreements are entered into by those who intend to marry and they are aimed at governing the consequences of an eventual marriage breakdown (*prenuptial agreements*), and b) the agreements are entered into by the spouses in order to govern a separation which has already occurred and with a view to a future legal separation or divorce.

The formal vehicle for both types of agreement is the so-called *capítulos matrimoniales* (matrimonial contracts or agreements) which can be entered into before or after the marriage has been contracted (Article 1326 Spanish Civil Code and Article 15(2) Catalan Family Code). However, only Catalan law (Article 15(1) Catalan Family Code) expressly admits that it may contain 'the lawful stipulations and pacts that they see fit, even as precaution against marriage breakdown'. One of these possible lawful pacts would be precisely to waive the right to maintenance to which either of the spouses would be eventually entitled.

In the Spanish Civil Code there is no similar provision to Article 15 Catalan Family Code. Article 1325 Spanish Civil Code, when dealing with the possible content of matrimonial contracts, mentions only the stipulations regarding the matrimonial property regime and '*any other dispositions by virtue of the same (marriage)*'. However, although traditional legal scholarship considered including agreements on the consequences of the dissolution of marriage by divorce as a denaturalisation of matrimonial contracts,<sup>93</sup> more current legal opinion is inclined to think that these stipulations could also be included in the matrimonial agreements as '*other dispositions by virtue of marriage*'.<sup>94</sup>

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<sup>93</sup> See in particular Manuel Amorós Guardiola, and M. Amorós Guardiola (et al), *Comentarios a las reformas del Derecho de Familia*, vol. II, Madrid: Tecnos, 1984, Com. Article 1325, p. 1525-1526 and the further references there.

<sup>94</sup> Antonio Cabanillas Sánchez, en *Comentario del Código Civil*, Tomo II, com. Article 86, Madrid: Ministerio de Justicia, 1993, Article 1325, p. 603; REncarna Roca Trías, in

Matrimonial agreements must be recorded in a public deed (Article 1327 Spanish Civil Code and Article 17(1) Catalanian Family Code), but in practice the courts consider that those agreements on the effects of separation and divorce that have been recorded in a private document are also valid. STS 26.7.2000 [RJ 2000\748) has accepted the validity *inter partes* of an agreement in a private document made after the parties had entered into a matrimonial contract by which they modified the previous matrimonial property regime and the husband committed himself to paying a certain amount as support allowance and contribution to the family expenses. SAP Murcia 9.5.2000 (AC 2000\1104) admitted the validity of a matrimonial agreement in which the right to maintenance was waived.

With regard to the efficacy of these agreements, whatever the form in which that have been contracted when they are incorporated into the subsequent proceedings of separation or divorce a distinction must be drawn by taking into account whether the spouses have acted by mutual agreement or not.

1) If the spouses act by mutual agreement, they ratify the agreements that they have already reached and incorporate them in the proposal for a regulating agreement that they must present together with the petition of separation or divorce, and the agreements will thereby have full effect. However, the judge will be able to deny the regulatory agreement if the agreements reached by the spouses are detrimental to their children (Article 90 II Spanish Civil Code and Article 78(1) Catalanian Family Code) or, only in the case of the Spanish Civil Code, if they are seriously detrimental to one of the spouses (Article 90 II Spanish Civil Code).

2) If the spouses enter into adversarial proceedings, the judge will adopt the measure provided by Article 91 Spanish Civil Code (Article 79(1) Catalanian Family Code) [see Question 19] and may take into consideration all those agreements that the spouses have reached with

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M. Amorós Guardiola (et al), *Comentarios a las reformas del Derecho de Familia*, vol. I, Madrid: Tecnos, 1984, Com. Article 97, p. 644, who deals with the renunciation of maintenance in the matrimonial contract; M<sup>a</sup> Paz García Rubio, *Alimentos entre cónyuges y entre convivientes de hecho*, Madrid: Civitas, 1995, p.152.

a view to the breakdown of the marriage.<sup>95</sup> Actually, with regard to maintenance, the first factor mentioned by Article 97 Spanish Civil Code refers, in general terms, to 'the agreements reached by the spouses'. For instance, the validity of an out of court agreement prior to filing the petition for an adversarial separation in which the right to maintenance was waived was admitted.<sup>96</sup> In a case in which both spouses waived their eventual right to maintenance in the regulatory agreement, the validity of the stipulation by which they provided for a complementary payment to be made by the husband but which was subject to the condition that his earnings increased was held to be valid.<sup>97</sup>

(b) *During the separation or divorce proceedings: the regulatory agreement.* In petitions for divorce by mutual agreement or those which have been filed by one of the spouses with the agreement of the other, the law requires that the spouses include a proposal for a regulatory agreement, a document that reflects the agreements that they have reached, with the petition. (Article 86 II Spanish Civil Code, Article 777(2) Civil Proceedings Act and Article 77 Catalanian Family Code). The minimum content of the regulatory agreement is provided by Article 90 Spanish Civil Code (see also Article 76 Catalanian Family Code) [see Question 19] and it includes 'maintenance which, according to Article 97, one of the spouses has to pay, eventually, to the other'. Except if this proposal for a mutual agreement is detrimental to the children (Article 90 II Spanish Civil Code and Article 78(1) Catalanian Family Code) or —only in the case of the Spanish Civil Code— is highly detrimental to one of the spouses (Article 90 II Spanish Civil Code), the judge has the duty to approve it and it thereby becomes the regulatory agreement that will govern the effects of the divorce.

If the spouses follow the mutual agreement proceedings but do not expressly refer to maintenance in the proposal for a regulatory agreement, the judge will not admit the petition and will give 10 days

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<sup>95</sup> In this sense Juan José López Burniol, Com. Article 15 Catalanian Family Code, p. 160, who appeals to the principle of respect towards one's own acts and the binding character that must be recognised in every contract that has been signed in good faith and which does not infringe upon the rights of third parties or any mandatory norm.

<sup>96</sup> SAP Barcelona 22.10.1998 [AC 1998 \8950].

<sup>97</sup> STS 07.03.1995 [RJ 1995 \2151].

to the spouses to complete whatever is necessary. If this period has elapsed and the spouses have not reached an agreement, the petition will be dismissed once and for all (ex Article 777(4) Civil Proceedings Act) and the spouses will have to channel their separation or divorce through the adversarial proceedings, in which every spouse will claim what he or she thinks fit. In this sort of case the most common practice is that both spouses expressly stipulate that they agree to waive any eventual right to maintenance that they might have<sup>98</sup> or state for the record that the imbalance that might give rise to maintenance does not exist.<sup>99</sup> If this renunciation is stated in the separation proceedings it will also extend its effects to the eventual subsequent proceedings for divorce.<sup>100</sup>

In the for adversarial separation proceedings, if the spouse who is entitled to receive maintenance does not state his or her right to obtain it, and since this right is at the free disposal of the parties, it will be understood that he or she has tacitly waived this right<sup>101</sup> and the judge will not be able to establish it *ex officio*.<sup>102</sup> As was the case in proceedings by mutual agreement, the right to maintenance will not be awarded in the divorce proceedings if it was not claimed in the separation proceedings,<sup>103</sup> unless as a result of the separation proceedings the spouse obtained support payments and subsequently claims maintenance for the first time in the divorce proceedings.<sup>104</sup>

c) *After divorce*. In general terms the Spanish Supreme Court has ruled that, as long as it concerns a subject which they can freely decide upon, the spouses may establish the agreements that they see fit apart from modifying the regulatory agreement. These agreements will be legally

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<sup>98</sup> SAP Las Palmas 25.05.1999 [AC 1999\5486].

<sup>99</sup> SAP Navarra 04.09.2002 [AC 2002\341].

<sup>100</sup> See, in this sense, SAP Valladolid 25.02.2000 [AC 2000\797]; Las Palmas 25.05.1999 [AC 1999\5486]. Against this last opinion, however, see SAP Segovia 21.09.2000 [AC 2000\1797].

<sup>101</sup> STS 02.12.1987 [RJ 1987\9174]. Francisco Rivero, in: J. L. Lacruz (Coord.), *Matrimonio y divorcio. Comentarios al Título IV del Libro Primero del Código Civil*, Madrid: Civitas, 1994, Com. Article 91, p. 998.

<sup>102</sup> SAP Zamora 03.12.1999 [AC 1999\8231]. Carlos E. Lalana del Castillo, *La Pensión por desequilibrio en caso de separación o divorcio*, Barcelona: Bosch, 1993, p. 252.

<sup>103</sup> So, for instance, SAP Sevilla 10.01.2001 [AC 2001\423].

<sup>104</sup> Among others, see SAP Salamanca 23.06.1998 [Act. Civ. 1998@752; Jaén 05.12.2001 [Act. Civ. 2002@129] and Barcelona 01.02.2001 [AC 2001\379].

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binding upon the parties as long as all the conditions for their validity have been met (the principle of free will, Article 1255 Spanish Civil Code) and without requiring the court's approval.<sup>105</sup>

With regard to maintenance it is possible, once it has been established, that the parties agree to modify its amount or the way in which it is paid. This last possibility is expressly mentioned by Article 99 Spanish Civil Code [see Questions 74 and 75]. Since this is a property right,<sup>106</sup> a subsequent renunciation, with or without payment in exchange, seems to be fully admissible with the only limitation being, however, that it is not detrimental to third parties (Article 6(2) Spanish Civil Code).

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

See Question 102.

*104. Is there a prescribed form for such agreements?*

See Question 102.

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

See Question 102.

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<sup>105</sup> See STS 22.04.1997 [RJ 1997\ 3251]; 21.12.1998 [RJ 1998\9649].

<sup>106</sup> Carlos E. Lalana del Castillo, *La Pensión por desequilibrio en caso de separación o divorcio*, Barcelona: Bosch, 1993, p. 252.