

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

SWEDEN

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A. GENERAL

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

Divorce is regulated in Chapter 5 of the Marriage Code of 1987 ('Äktenskapsbalken'). Rules relating to the divorce procedure are found in Chapter 14 of the Marriage Code. The rules are relatively clear and simple, which explains why there is very little relevant case law on divorce as such. There are, for example, no precedents decreed by the highest court, i.e., the Supreme Court, in this respect. The case law of interest is limited to a couple of judgments from second instance courts, i.e., courts of appeal. In Sweden, preparatory legislative materials (*travaux préparatoires*) are considered to be an important source of law, and in particular statements made in governmental bills (Regeringens proposition, Prop.) laid before Parliament (Riksdag) and in the reports of the Riksdag committees. With regard to divorce, in particular the bill on the revision of (the old) Marriage Code (Giftermålsbalken), contained in Proposition 1973:32 ('Kungl. Maj:ts proposition med förslag till lag om ändring i giftermålsbalken, m.m.') should be mentioned.¹

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

¹ In the legal literature, the most cited works are: L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, 1990 (A commentary on the Marriage Code of 1987) and A. Agell, *Äktenskap, Samboende, Partnerskap*, 2nd Edition, 1998.

According to an Act from 1734, the sole grounds for divorce in Sweden were adultery and desertion. Over the course of time, new (additional) divorce grounds developed, based on serious fault on the part of a spouse or a serious conflict between the spouses which had 'transferred their relationship into mutual hate and loathing'. In the latter case, the spouses first had to be warned by the clerical authorities, and a one-year judicial decree of separation had to precede the divorce. In the early 1900s, it was not unusual for simulated (arranged) desertion to be used by the spouses in order to obtain a quick divorce (one of the spouses travelled abroad, e.g., to Copenhagen, and the other applied for a divorce on the ground of desertion).²

A new outlook on divorce was introduced by *the 1915 Act on the Celebration and Dissolution of Marriage*. Namely, the 1915 Act recognized 'deep and permanent breakdown of the marriage' as a ground for divorce in addition to various 'fault-based' grounds. The Act was a result of inter-Nordic legislative cooperation (between Denmark, Finland, Iceland, Norway and Sweden) and was soon followed by similar rules in the other Nordic countries.³

According to the 1915 Act, a divorce based on 'deep and permanent breakdown of the marriage' had to be preceded by a judicial decree of *separation*. A joint application by the spouses for a decree of separation was as such considered sufficient proof of the breakdown of the marriage. Where only one of the spouses applied, the marriage breakdown had, originally, to be proved. (Later on, the applicant's claim as to the marriage breakdown was considered sufficient). Having lived apart for one year after a decree of separation, each spouse had the right to apply for divorce. The 1915 Act also contained several 'fault-based grounds' (*inter alia*, adultery, desertion) giving a spouse the right to an *immediate divorce*. Fault-based grounds, reflecting serious shortcomings in the behaviour of the other spouse (*inter alia*, failing to maintain the family, alcohol abuse, vicious lifestyle) could also be used unilaterally to acquire a decree of

² Source: G. Inger: *Svensk rättshistoria*, 1980, pp. 200-202; A. Agell, *Äktenskap, Samboende, Partnerskap*, 1998, p. 38.

³ The provisions of this Act were later transferred to the 1920 Marriage Code and remained in force, with some minor changes, until 1974, see below.

separation. One year after that judgment, a divorce was granted upon application. Divorce could also be obtained immediately, if the spouses had been living apart for three years due to the breakdown of the marriage. – According to a prominent commentator (Agell), this legislation was very liberal at the time of its enactment. In several other European States corresponding rules were only enacted 50-60 years later.⁴

In 1973, new legislation of a purely autonomous character was enacted. In this legislation the institutions of judicial separation and marriage annulment were abandoned, as were special divorce grounds. 'Fault' in the breakdown of marriage lost all relevance, also in respect of the ancillary claims to divorce. A spouse's wish to dissolve the marriage alone became sufficient to obtain a divorce and no reasons have to be given in support of the application. Divorce can be granted immediately upon application, but must in certain cases be preceded by a reconsideration period of six months. Only divorce (or death) can dissolve a marriage celebrated in spite of the existence of an absolute marriage impediment. – From the point of view of Nordic co-operation this new legislation meant Sweden's (unilateral) departure from the principles which the Nordic countries had earlier agreed, were decisive for marriage dissolution. The new rules entered into force on 1 January 1974 and are still applicable. In 1987, these rules were transferred to the new Marriage Code (Chapter 5).

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

No initiatives have been taken by the Government to reform the current divorce law. The law may be claimed to be well established and approved of by the public. On the other hand, under the auspices of the Ministers of Justice in the Nordic States (co-operating in connection with the Nordic Council) an academic group, consisting of leading Scandinavian professors of family law, has recently (August 2002) put forth two comprehensive preparatory studies on the possibilities of harmonising the rules on marriage and divorce, as well as inheritance. It remains to be seen how these proposals will officially

⁴ A. Agell, *Äktenskap, Samboende, Partnerskap* 1998, pp. 38-39.

Sweden

be received and whether they will lead to a harmonisation of, e.g., the Nordic laws on divorce.⁵

B. GROUNDS FOR DIVORCE

I. General

4. What are the grounds for divorce?

If the spouses agree that their marriage should be dissolved they have a right to an immediate divorce (except where there is a child under sixteen years of age, making it obligatory to first go through a reconsideration period of six months), Marriage Code Chapter 5 section 1. In Swedish law, marriage is seen as a voluntary union between a man and a woman. From this follows that the desire of only one of the spouses to terminate the marriage is sufficient to obtain a divorce. If the other spouse does not consent to divorce, a reconsideration period (of six months) must always precede the divorce, Marriage Code Chapter 5 section 2. If the spouses have lived apart for at least two years, either of them is entitled to divorce without a preceding reconsideration period, Marriage Code Chapter 5 section 4. In addition, there exists a special divorce ground concerning situations where the marriage has been entered into despite the existence of an absolute marriage impediment, Marriage Code Chapter 5 section 5. In those cases either one of the spouses has the right to an immediate divorce. In those cases, proceedings for divorce may also be commenced by a public prosecutor. This ground for divorce replaced marriage annulment in the previous law.

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

No such statistics are available in Sweden.

⁵ In the answers to this Questionnaire, use will be made of A. Agell, 'Nordisk äktenskapsrätt. En jämförande studie av dansk, finsk, norsk, isländsk och svensk äktenskapsrätt med diskussion av reformbehov och harmoniseringsmöjligheter' (in Swedish) in: *Nordic Law on Marriage. A comparative study on Danish, Finnish, Norwegian, Icelandic and Swedish law on marriage with discussions on the need for reform and possibilities of harmonisation* (forthcoming).

6. *How frequently are divorce applications refused?*

Divorce applications cannot be refused in Sweden. On the other hand, in many cases a divorce can be granted only after a reconsideration period of six months has elapsed, this period starting to run from the day when the application for divorce was made. After this six-month period has expired, but within one year of the application, the spouses or one spouse must renew the application for divorce (in practice, this is a separate application). If no such application is made, the question of divorce has lapsed and the original application is dismissed.

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

A judicial process is required in order to obtain a divorce in Sweden, see Marriage Code Chapter 14.

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

As the first instance in divorce proceedings, competence belongs to the District Court at the place of either spouse's habitual residence. If neither of the spouses is habitually resident in Sweden (but the Swedish court does have international jurisdiction), the District Court of Stockholm is competent to consider the application (Marriage Code Chapter 14 section 3).

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

Divorce proceedings are initiated by a joint application by the spouses, or by the application for a summons by one of the spouses (to be served on the other spouse), Marriage Code Chapter 14 section 4. There is no requirement to resort to a lawyer. If the spouses are in agreement on both the divorce and its legal effects, no lawyers are normally used. In fact, the intention is that the spouses shall be able to apply for divorce *on their own*. Special forms have been elaborated by

the National Courts Administration (Domstolsverket) for the application of divorce, including information on all the relevant rules. According to Agell, this kind of service for spouses in respect of divorce demonstrates how easily divorce matters are handled in Sweden.⁶ Further, legal aid will only be granted for divorce and related matters if there is a special reason to do so, i.e., where the circumstances are unusually complicated requiring qualified legal assistance (Legal Aid Act 1996:1619, section 11). – When applying for divorce it is sufficient that the spouses (or a spouse where the application is not a joint one) communicate directly with the court. This communication can take place orally or in writing.

10. When does the divorce finally dissolve the marriage?

The marriage is definitely dissolved when the decision granting the divorce becomes legally effective ('final'), i.e., when the period for appealing against such a decision has expired. If no appeal has been lodged against a divorce judgment delivered by the first instance court (= district court), this judgment becomes legally effective when three weeks have passed. Until that date, a spouse may withdraw his or her application for divorce or consent to divorce. Case *RH 1994:29* (appellate court decision) can be cited as an example of such a situation: At the district court, the husband had consented to an immediate divorce, which was subsequently granted by the court. Subsequently regretting the fact that he had given his consent, he appealed against the judgment. The court of appeal then set the divorce judgment aside and declared that a period of reconsideration would begin. In another case,⁷ the district court had granted a divorce on joint application by the spouses after a minimum reconsideration period (six months) had passed. At the time of the judgment, four months remained from the maximum one year reconsideration period. The spouses, who now regretted the divorce, appealed against the judgment. The court of appeal, which also ordered that the reconsideration period would continue to run, set it aside.⁸ – It is not unusual in divorce cases that the court, at the request of a spouse, first decides separately on the divorce (partial judgment which becomes

⁶ A. Agell, *Äktenskap, Samboende, Partnerskap* 1998, p. 44.

⁷ *RH 1998:5*.

⁸ A. Agell, *Äktenskap, Samboende, Partnerskap* 1998, p. 43.

final), notwithstanding the fact that the matrimonial proceedings continue in respect of one or several ancillary claims to the divorce.

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.

From the point of view of Swedish law, this division is not appropriate. It may namely be claimed that Sweden has abandoned the principle of 'irretrievable breakdown of marriage'. The desire of a spouse to terminate the marriage is respected, which makes reference to the breakdown of the marriage superfluous.⁹ Also a title such as 'Multiple Grounds for Divorce' seems misleading from the Swedish point of view, although some of the questions do seem to be appropriate for Swedish law. For the purposes of this Questionnaire, Swedish divorce law will – where appropriate – be dealt with both under II and III.

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

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

Swedish law accepts 'unilateral divorce' by respecting the desire of only one of the spouses to dissolve the marriage by divorce. The circumstances of each case are irrelevant in this respect and no reasons need to be given in support of the application. From the point of view of Swedish law it is therefore superfluous to talk about 'irretrievable breakdown' as a ground for divorce.

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

One can truly speak of a non-fault-based-divorce considering that fault has no relevance at all under Swedish law, neither for granting the divorce nor for its legal effects.

⁹ A. Agell, "Grounds and Procedures Revised", in: L. J. Weitzman & M. Maclean, *Economic Consequences of Divorce, The International Perspective* Oxford: 1992, p. 55.

Sweden

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

There are no time-limits in respect of the duration of the marriage which affect the possibility to dissolve a marriage, save that under certain circumstances a divorce can only be obtained after a reconsideration period of six months has expired after making the application for divorce. The requirement of a reconsideration period is connected to children under sixteen years of age living together with custodial parent(s) or to the other spouse's opposition to the divorce, and it is totally independent of the duration of the marriage.

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

Under Swedish law, separation is not a condition – or a preliminary stage – for divorce. On the other hand, under certain circumstances, a reconsideration period of six months and a renewed application for divorce after this period has expired (but within one year) is required before a divorce can be granted. The spouses are not required to live apart during the reconsideration period. In practice, however, most spouses live apart during the period of reconsideration if they can arrange separate housing. If the spouses have lived apart for at least two years, either one of them is entitled to divorce without a preceding reconsideration period, Marriage Code Chapter 5 section 4.¹⁰

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

See Questions 11 and 14.

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

(a) Which circumstances suspend the term of separation?

¹⁰ In the legal literature this rule has been described as a remnant of the old law, i.e. before 1974, where each spouse had the right to divorce after three years' separation, based on the irretrievable breakdown of the marriage. A. Agell, *Äktenskap, Samboende, Partnerskap*, 1998, p. 45.

This question would seem to be of no relevance at all for the Swedish system.

(b) Does the separation need to be intentional?

This question would seem to be of no relevance at all for the Swedish system.

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

This question would seem to be of no relevance for the Swedish system. On the other hand, a divorce application based on the fact that the spouses have lived apart for at least two years (see Question 14) presupposes that the spouses have resided in separate dwellings.

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

Since 1974, when the new divorce rules entered into force, all mediation and counselling services relating to divorce are voluntary in Sweden and the spouses cannot be required to participate in them. Under the old law, on the other hand, mediation was obligatory before a judgment on legal separation could be granted. This solution was heavily criticized as being ill-timed (too late) and also for predetermining the spouses' positions. Currently, the municipalities in Sweden are responsible for providing family counselling services ('familjerådgivning'), e.g., for spouses and cohabitants considering divorce or separation, Social Services Act (2001:453), Chapter 5 section 3. (A more important role, also on a voluntary basis, is played by so-called 'co-operation discussions' in custody disputes between a child's parents, e.g., in connection with divorce. Such discussions are often initiated by the court and are conducted by a social welfare committee or another suitable body.)

18. Is a period for reflection and consideration required?

A six-month period of reconsideration is required, which starts to run from the time of making the application for divorce, where (a) both spouses request it, or (b) one of the spouses has custody of a child of

his or her own who is under the age of 16 and who is living with this spouse on a permanent basis, or (c) where only one of the spouses wishes the marriage to be dissolved, Marriage Code Chapter 5 sections 1-2. The purpose is to prevent too hasty divorces with regard to the spouses themselves and children under the age of sixteen years. It should be noted that the child does not need to be a child of both the spouses, but must live together with one of the spouses who is also a custodial parent. After six months have passed from the application for divorce, but within one year, the spouses or a spouse must make a separate application for divorce. Otherwise, the question of divorce lapses and the (original) application will be dismissed. In cases where the spouses agree to divorce and children under the age of sixteen are not involved, a divorce can be granted immediately.

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?

No such requirements exist under Swedish law. In divorce cases, the court (having jurisdiction for the divorce) may consider questions concerning maintenance payments (to the spouse/children), custody and contact with children, the right to continue to reside in the spouses' joint home until the division of property takes place, and the prohibition of mutual visits between the spouses, Marriage Code Chapter 14 section 5. These issues may also be determined through *interim orders* by the court, Marriage Code Chapter 14 section 7 and Code on Parents and Children, Chapter 6 section 20 and Chapter 7 section 15. Normally, the court considers such issues only at the request of a spouse. In divorce proceedings the court may, however, on its own initiative (without any request having been made by a spouse) grant the custody of the child to only one of the parents if joint custody is manifestly incompatible with the child's best interests, Code on Parents and Children Chapter 6 section 5.3. The starting point is that if divorce is granted between the parents, both parents shall continue to have custody of the child unless joint custody needs to be terminated. If both parents are to continue to have custody of the child after divorce, the court shall remind them in the decree that joint custody still applies, Code on Parents and Children, Chapter 6 section 3.2.

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

An agreement reached by the spouses on various issues relating to the divorce does not have to be scrutinized by the court or any other authority, save when it relates to custody, access rights or the residence of the spouses' children. Jurisdiction to scrutinize and approve an agreement between the spouses concerning the last-mentioned issues belongs to the local social welfare committee in the municipality where the child is registered, Code on Parents and Children Chapter 6 section 17a.

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?*

Under Swedish law, only the requirement of a reconsideration period of six months (see Question 18) can be claimed to show (some) regard for such concerns. If a spouse or the spouses renew the application for divorce after that period has terminated (but within one year), the divorce cannot be denied. (The only exception in Swedish law relates to situations of a private international law character. Where an application for divorce is under consideration in Sweden and both spouses are foreign citizens, the court may not grant the divorce against the wish of the other spouse if under that spouse's national law there is no ground for divorce and the court finds the divorce to be unreasonable with regard to that spouse's or their joint children's interests, Act (1904:26 p. 1) on Certain International Legal Relations Concerning Marriage and Guardianship, Chapter 3 section 4.3. The rule is that in Sweden a marriage may be dissolved only in accordance with Swedish law. According to the given instructions, however, such situations are not covered by the Questionnaire.)

III. Multiple grounds for divorce

1. Divorce by consent

Sweden

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

If the spouses agree that their marriage should be dissolved they shall be entitled to divorce, Marriage Code Chapter 5 section 1. If only one of the spouses wishes the marriage to be dissolved, that spouse shall be entitled to divorce following a reconsideration period, Marriage Code Chapter 5 section 2. As has been pointed out earlier, 'irretrievable breakdown of the marriage' does not exist as a ground for divorce under Swedish law. – For the sake of clarity, due to the difficulties involved in placing Swedish law under II or III, attempts will be made to approach the following questions from the point of view of Swedish law.

23. Do both spouses need to apply for a divorce together, and if not, how do the divorce proceedings vary according to whether one or both spouses apply for a divorce?

The spouses do not need to apply for a divorce jointly. If they do so, however, they will obtain the divorce immediately, unless there is a child under the age of 16 (see Question 18). In the latter case, a reconsideration period of at least six months must precede the divorce. The requirement of a reconsideration period also applies where only one of the spouses wishes to divorce or where the spouses request it. If a reconsideration period is required, the court shall notify the parties that the reconsideration period has begun and it will inform them how the case will be subsequently handled, Marriage Code Chapter 14 section 6. Of relevance in this respect is that the spouses or a spouse must make a separate application for divorce after a reconsideration period of six months has elapsed but within one year from the application for divorce (when the reconsideration period has also started running). The divorce can then be granted immediately. Where the application for divorce is not a joint application, divorce proceedings are commenced by an application for a summons (to be served on the other spouse), Marriage Code Chapter 14 section 4.

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

No such requirements exist under Swedish law. However, in accordance with the discussion above, a period of reconsideration is necessary under certain circumstances. See also Questions 14-15.

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

The duration of the marriage is of no relevance regarding the possibility to obtain a divorce. See Question 13.

26. Is a minimum age of the spouses required?

The age of the spouses is irrelevant for the granting of a divorce. The ordinary rules on divorce also apply in respect of a marriage which a minor has concluded without the required permission to marry from the competent authority (see Marriage Code Chapter 2 section 1 in combination with Marriage Code Chapter 5 section 5).

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

All available conciliation is voluntary and the spouses cannot be required to participate (see Question 17).

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

When the spouses or one of them applies for a divorce, the case may be considered without a main hearing. This also applies to other questions within the scope of the case (ancillary issues), if the spouses have thereby agreed, Marriage Code Chapter 14 section 12. In such cases, the spouses do not need to appear before the court and the judgment is delivered solely on the basis of the written documents in the case. Where the spouses agree to divorce but disagree on the ancillary questions (e.g., maintenance issues or custody of children), one spouse can request that the petition for divorce be decided in the form of a partial judgment. The ancillary questions will in that case be decided later, and a main hearing – which the parties attend in person – is necessary in this respect. – In cases where a reconsideration period must precede the divorce, a separate application for a decree of

divorce must be submitted to the court within one year (running from the original application when the reconsideration period also started to run). This can be done orally before the court or in writing, by one or both spouses. If this application is submitted by one of the spouses only, the court shall give the other spouse the opportunity to respond to it, Marriage Code Chapter 14 section 10. If the spouse who has applied for divorce fails to attend a hearing on the question, the case shall nevertheless be considered if the other spouse so requests. A spouse who has applied for divorce shall be informed of this when summoned to attend the hearing, Marriage Code Chapter 14 section 11.

29. *Do the spouses need to reach an agreement or to make a proposal, or may the competent authority determine the consequences of the divorce?*

See Question 19.

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

This question is of no relevance from the point of view of Swedish law, see Question 19.

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

See Question 20.

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

Strictly speaking, this question would seem to have no relevance from the point of view of Swedish law. The following should, however, be mentioned in this connection. If one spouse withdraws his or her application for divorce after a joint application has been submitted to the court or after notice of that spouse's petition for divorce has been

served on the other spouse, the case shall nevertheless be considered if the latter so requests, Marriage Code Chapter 14 section 11.

2. Divorce on the ground of fault/ matrimonial offence

There are no fault-based grounds for divorce under Swedish law. Hence, a spouse's 'fault' is totally irrelevant for granting a divorce and there are no criteria in Swedish law as to what constitutes 'fault' or how 'fault' can be proved.

Questions 33 to 43 are not relevant.

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

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

A spouse's or the spouses' desire to dissolve the marriage is as such sufficient as a ground for divorce. The principle/concept of the irretrievable breakdown of a marriage is therefore superfluous from the point of view of Swedish law. See also Question 11.

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

The idea of fault is completely irrelevant according to Swedish law, also in respect of the outcome of ancillary issues.

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

The duration of the marriage is irrelevant. See Question 13.

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

Separation is not required under Swedish law before divorce can be granted. However, a period of reconsideration of at least six months, running from the application for divorce, is required in certain cases. The spouses are not required to live apart during the period of

Sweden

reconsideration. If, on the other hand, the spouses have lived apart for a period of at least two years, each spouse is entitled to divorce without a preceding period of reconsideration, Marriage Code Chapter 5 section 4.

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

This question has no relevance from the point of view of Swedish law, the circumstances of the marriage being irrelevant for the granting of a divorce. The purpose of a reconsideration period – where needed – is to prevent too hasty divorces. This requirement is not connected with establishing an ‘irretrievable breakdown of the marriage’, but can, from the spouse’s point of view, in reality overlap with it.

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

These questions are not relevant from the point of view of Swedish law (see Question 16). On the other hand, where a reconsideration period is necessary, the application for divorce must be renewed within one year from the original application for divorce by one or both spouses. Otherwise the question of divorce lapses. During the period of reconsideration, the spouses do not need to live apart.

(a) Which circumstances suspend the term of separation?

Not relevant.

(b) Does the separation need to be intentional?

Not relevant.

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

Not relevant.

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

Conciliation, mediation, etc., are voluntary in Sweden.

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

A six-month period of reconsideration is required where (a) both spouses so request, or (b) at least one of the spouses is living with a child under the age of 16 and has custody of that child. The reconsideration period is also necessary (c) if only one of the spouses wants to divorce. Marriage Code Chapter 5 sections 1-2.

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

See Question 19.

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

See Question 20.

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

See Question 21.

C. SPOUSAL MAINTENANCE AFTER DIVORCE

I. General

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

The maintenance of spouses after divorce is regulated in the Marriage Code of 1987 ('Äktenskapsbalken'), Chapter 6. Chapter 14 of the Marriage Code contains procedural provisions relating to claims for maintenance by a spouse in connection with divorce proceedings. The most important case law consists of a few precedents by the highest court, i.e. the Supreme Court, mainly decreed after the law reform of

1978 but some also emanate from before the reform. Supreme Court precedents are not formally binding on the lower courts but are normally observed by them, which makes it possible for the parties to foresee the outcome in similar cases. The most important *travaux préparatoires* in respect of maintenance for a spouse after divorce are found in Regeringens proposition 1978/79:12 ('Underhåll till barn och fränskilda, m.m.').¹¹

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

The law on the maintenance of spouses after divorce mirrors the law on divorce and the changes that have taken place in Swedish society. Before 1915, divorce was exceptional and the prospects of receiving maintenance after divorce were very limited. Together with the divorce law of 1915, rules on post-divorce maintenance were enacted. These rules remained in force to a large extent until a reform of the law of maintenance took place in 1978. (The reform entered into force on 1 July 1979.) Hand in hand with the increasing participation of women in the labour market, the courts had become more and more restrictive in granting the wife maintenance after divorce. In the early 1970s, maintenance was granted to the other spouse (normally the wife) on average only in one case out of ten and in half of these cases for a period of less than four years. In cases where maintenance was granted for a longer period the marriage had normally been of a long duration and the needy spouse was at least 51 years of age.¹² The 1978 law reform can be described as a codification of the case law that had developed over the years. The starting point is that a divorce terminates all legal ties between the spouses. Consequently, after divorce each spouse is responsible for his or her own support. Only exceptionally – here a number of conditions must be fulfilled – may a spouse be obliged to contribute to the other spouse's maintenance after divorce. Normally, maintenance can only be granted for a transitional period following the divorce. When the new Marriage Code was

¹¹ In the legal literature, the most cited works are: L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, 1990; A. Agell, *Äktenskap, Samboende, Partnerskap*, 2nd Edition, 1998 and A. Agell, *Underhåll till barn och make*, 4th Edition, 1988.

¹² A. Agell, *Äktenskap, Samboende, Partnerskap*, 1998, p. 55. See also: L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, pp. 130-144.

enacted in 1987, these rules were transferred into its Chapter 6. – Under the old law on the dissolution of marriage (see Question 2), the guilty spouse could be granted maintenance from the other spouse only where there were extraordinary circumstances. All such guilt-related provisions were abolished in connection with the 1973 reform of divorce law.

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

No such proposals have been advanced or initiatives taken. The proposals put forth by the Nordic academic group on the harmonisation of family and inheritance law (see Question 5), on the other hand, also include harmonised provisions on maintenance after divorce. Presently, it is not possible to predict whether these proposals will lead to any changes in the current law.

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

The starting point in Swedish law is that divorce terminates all economic ties between the spouses. Hence, following divorce, each spouse shall be responsible for his or her own support, Marriage Code Chapter 5 section 7. Where necessary a spouse can, however, be granted maintenance from the other spouse for a *transitional period* after divorce. Exceptionally, a spouse can also be granted maintenance for a longer period, perhaps even lifelong. This requires that the spouse has difficulties in supporting himself or herself after a long marriage has ended in divorce or that there are other extraordinary reasons. – Considering the basic ideology on the effect of divorce in Swedish law, it may be surprising that maintenance can be granted at all. According to the *travaux préparatoires* of the present law, the justification for post-divorce maintenance must be the marriage itself. Where it has made one of the spouses – normally the wife – unable to support him/herself, the other spouse can be obliged to pay maintenance.¹³ In practice it is rare for maintenance to be granted to a spouse following divorce.

¹³ Regeringens proposition 1978/79:12 Underhåll till barn och fränskilda, m.m., p. 139. See also A. Agell, *Åktenskap, Samboende, Partnerskap*, 1998, pp. 56-57.

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?*

When assessing a spousal claim for maintenance upon divorce the outcome of the division of the matrimonial property is taken into consideration. What a spouse receives in the property division, as well as his or her other means, is taken into consideration when evaluating the need for maintenance after divorce. Capital transferred from one spouse to the other spouse as a result of the matrimonial property distribution reduces the latter's need for maintenance after divorce. In this respect, there is a connection with the rules of matrimonial property law.

The main rule relating to matrimonial property relations in Swedish law is that all the spouses' property is marital property (so-called 'giftorättsgods') which, upon divorce, shall be divided equally between them, after the deduction of debts. However, there may also be separate property (so-called 'enskild egendom') as a result of stipulations in a marital property agreement between the spouses or in a will or a gift to a spouse. Separate property is exempt from the division of property on the dissolution of marriage. If the division of property leads to an unequal result, due to the fact that the property of one of the spouses is exempt because of its separate character, a lump-sum maintenance payment to the other spouse may be used to correct this outcome. The spouse receiving 'unreasonably little' property may, thus, be compensated by maintenance in the form of a lump-sum payment.¹⁴

Under Swedish law, special rules apply to the joint dwelling and joint household goods of the spouses. In a property division, the spouse who is most in need of this property shall be entitled to receive it, with a corresponding deduction of his or her portion or, if it is of little

¹⁴ Regeringens proposition 1986/87:1 Äktenskapsbalk m.m., p. 176; L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, pp. 142-144; A. Agell, *Äktenskap, Samboende, Partnerskap*, 1998, p. 58. See also Marriage Code Chapter 11 section 6 concerning maintenance in the form of a lump-sum payment in the division of marital property.

value, without such a deduction, Marriage Code Chapter 11 section 8. If, however, this property belongs to the other spouse the needy spouse may take it over only on condition that it can be considered reasonable, with regard to the overall circumstances. When assessing which of the spouses is most in need of the joint dwelling and household goods, preference is normally given to the custodial parent with whom the children are residing. Although these rules do not provide economic compensation to a spouse, they do function as a safeguard against the unreasonable consequences of divorce.

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

What a spouse receives in the division of matrimonial property is taken into consideration when evaluating his or her need for maintenance after divorce (or the ability to pay maintenance to the other spouse). In a Supreme Court judgment from 1984,¹⁵ a 51-year-old wife's claim for maintenance was refused after a marriage that had lasted 28 years and where two children had been born, because her economic situation would be sufficiently guaranteed after the distribution of the spouses' property, also taking into account the small income from the part-time job she had been able to find.

As has been mentioned earlier (see Question 59), maintenance payments in the form of a lump sum may in some cases be used to correct an unequal outcome of matrimonial property division. When assessing the issue, the spouse's economic situation as a whole is taken into consideration, including all of his or her resources. Also pension rights to which the spouse is (presently) entitled are included, as are unemployment benefits, sickness benefits, housing allowances, etc. Excluded is only general public (social) assistance, i.e., the last-resort measure of assistance for the needy. Social assistance remains subsidiary to inter-spousal maintenance obligations also after divorce.¹⁶

¹⁵ NJA 1984, p. 493.

¹⁶ A. Agell, *Underhåll till barn och make*, 1988, p. 121; L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, p. 136.

Sweden

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?*

Swedish law does not provide for any compensation (damages) in addition to or instead of maintenance payments. This is a natural consequence of the fact that the principle of fault is completely irrelevant in divorce proceedings in Sweden.

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.*

Under Swedish law, no reason needs to be given for an application for divorce. There is only one type of maintenance claim after divorce, based on the marriage and the claimant's need for maintenance due to the marriage.

63. *Are the divorced spouses obliged to provide information to the 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?*

According to the Marriage Code Chapter 1 section 4, the spouses 'shall supply each other with the information needed to enable the financial circumstances of the family to be assessed', which includes issues of relevance for the duty to maintain. This duty to provide information is of particular relevance in connection with the dissolution of marriage. The provision should, therefore, be read together with both the Marriage Code Chapter 9 section 3 and the Marriage Code Chapter 17 section 5. According to the former provision, each spouse, up to the division of property, has a duty to give an account of his or her property and also to disclose all other information of importance for the property division. According to the latter provision, each spouse shall declare his or her assets and debts to the executor of the property division. If a spouse fails to provide particulars for the property inventory, the court may, on the application of the property division executor, order that he or she must do so on penalty of a fine.

In the legal literature there is support for the opinion that banks, irrespective of banking secrecy, have the right to provide information to a spouse or a property division executor on the (other) spouse's accounts.¹⁷ If a spouse has failed to provide the information required for assessing his or her economic position or ability to pay maintenance, the agreement on property division or maintenance may be regarded as invalid (null and void). In a Supreme Court case,¹⁸ an agreement between the spouses concerning maintenance to the wife following divorce was declared invalid on general contractual grounds, due to the fact that the husband had not provided the relevant information for determining his ability to pay maintenance.

II. Conditions under which maintenance is paid

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

The starting point in Swedish law is that each spouse is responsible for his or her own support after divorce, Marriage Code Chapter 6 section 7. Thus, the claimant's lack of means and the respondent's ability to pay do not as such suffice for a maintenance grant. It is required, *in addition*, that the marriage as such has resulted in the need for maintenance. Marriages of short duration do not, therefore, normally qualify for maintenance after divorce.¹⁹

The first exception to the rule that divorce terminates all economic ties between the spouses concerns a spouse's need for maintenance during a *transitional period* following divorce. If maintenance is necessary to enable the needy spouse to obtain education or find gainful employment, then the other spouse can be obliged to pay maintenance during a limited period, on the basis of what is reasonable in view of that spouse's ability and other circumstances. In practice, such provisional maintenance normally runs for 14 years following the

¹⁷ L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, p. 46.

¹⁸ NJA 1961, p. 124.

¹⁹ L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, p. 138; A. Agell, *Underhåll till barn och make*, 1988, pp. 107-108.

divorce.²⁰ Its purpose is to provide the 'primary homemaker' (normally the wife) with the opportunity to maintain him/herself in the future. As is illustrated by a Supreme Court judgment,²¹ transitional maintenance is also considered preferable in marriages of a long duration. In this judgment, the husband was obliged to pay maintenance to the wife (retroactively) for a period of two years following the divorce until the date when the wife had acquired full-time employment. The marriage had lasted for 28 years, three children had been born and the wife had been the 'homemaker' for most of the marriage.

The second exception relates primarily to *marriages of long duration* where a spouse has difficulties in supporting himself or herself after the divorce. In such cases, maintenance can be granted for an extended period, maybe even lifelong. When assessing the right to maintenance for an extended period, consideration is given to such conditions as the duration of the marriage and whether the needy spouse's work at home and care for the children has made it extra difficult for her (!) to find gainful employment, as well as factors such as her age, illness, etc. Maintenance cannot be granted on the basis of one of these factors alone but on the basis of an overall assessment of the situation. Also extraordinary reasons other than a long-time marriage in combination with other conditions may result in maintenance being granted not only provisionally, but on a more permanent basis. This condition could be fulfilled where the other spouse has contributed (through the 'division of labour' between the spouses) to the other spouse's successful career and high income. In the case law, these conditions have been strictly interpreted. As an example one can mention a Supreme Court judgment²² where maintenance was granted for only a transitional period. Another example is a Supreme Court judgment²³ where the wife's claim for maintenance after a marriage that had lasted 28 years was refused. In that case the wife had given up her employment because of her husband's work and had been a homemaker for twenty years. Since the claimant would be able to support herself once the property division had taken place, in

²⁰ A. Agell, *Äktenskap, Samboende, Partnerskap* 1998, p. 62.

²¹ NJA 1983, p. 821.

²² NJA 1983, p. 821.

²³ NJA 1984, p. 493, see Question 60.

combination with the income from the part-time job which she had managed to find, the Court did not find any extraordinary circumstances to support her claim. In another judgment from 1983 the Supreme Court,²⁴ on the other hand, granted the wife lifelong maintenance, taking into consideration the length of the marriage (22 years), the conditions that had prevailed during the marriage (the wife had been the homemaker making it possible for the husband to develop a career and earn a high income), the wife's difficulties in finding employment due to her age (50), her illness and lack of education, and the husband's ability to pay.

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

Under Swedish law, such circumstances are irrelevant for the granting of maintenance.

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

Before post-divorce maintenance can be granted it must be established that the marriage as such is the cause of the lack of means and the resulting need for maintenance, see Question 64. In the case law, this condition is interpreted restrictively. In a judgment from 1998,²⁵ the Supreme Court denied maintenance to a 50-year-old woman after 28 years of marriage and where two children had been born. During the marriage, the woman had not been employed. She had, instead, been suffering from ill-health during the whole marriage and had, for the last 18 years, been entitled to sickness benefit. Although her need for maintenance was established, in the Court's opinion this had been caused by her illness and not by the marriage!

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

²⁴ NJA 1983, p. 826.

²⁵ NJA 1998, p. 238.

The claimant's need for maintenance (as a result of a lack of means) must exist at the time when the court decides on the question.

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?*

Under Swedish law, a divorce terminates the interspousal duty to pay maintenance during the marriage. After divorce, each spouse shall be responsible for his or her own support, Marriage Code Chapter 6 section 7. If, however, a contribution towards the maintenance of a spouse is required, the starting point is to grant it for a transitional period following the divorce, on the basis of what is reasonable in view of the other spouse's ability to pay and other circumstances.²⁶ Such maintenance normally runs for one to four years and its purpose is to enable the needy spouse to obtain education or to find gainful employment, without having to borrow money for this purpose. Exceptionally, maintenance can also be granted, according to the above-mentioned provision, for an extended period. The law mentions situations where a spouse has difficulties in supporting himself or herself after a marriage of long duration has ended in divorce or situations where there are other extraordinary reasons for awarding maintenance for a longer period.²⁷ The *travaux préparatoires* to the current law clarify that also an extended right to maintenance should, where possible, be limited in time.²⁸ See also the Supreme Court judgment from 1983 cited above.²⁹ If a future event can be foreseen which will end the need for maintenance, e.g., the date when the maintenance creditor becomes entitled to old-age pension, it is recommended that maintenance should be granted only until that date.³⁰ In a judgment by the Supreme Court in 1961,³¹ maintenance to the wife following divorce was granted until the date when her then 82-year-old mother would die. Upon the death of her mother the wife

²⁶ This provision was originally enacted in 1973, when a judicial decree of separation was abolished under Swedish law.

²⁷ See above, the Supreme Court judgment, NJA 1983, p. 826.

²⁸ Regeringens proposition 1978/79:12 *Underhåll till barn och fränskilda, m.m.*, p. 140.

²⁹ NJA 1983, p. 821.

³⁰ L. Tottie, *Åktenskapsbalken och promulgationslag m.m.*, p 141.

³¹ NJA 1961, p. 652.

would inherit a considerable fortune and would no longer be in need of maintenance. The law does not exclude the possibility of granting lifelong maintenance. Such maintenance was also granted in the above-mentioned judgment of the Supreme Court.³²

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 maintenance granted is determined on the basis of a spouse's need for maintenance and the other spouse's ability to pay on the basis of what is reasonable, also taking other circumstances into account, Marriage Code Chapter 6 section 7. Normally, maintenance following divorce only runs for a transitional period. The spouse in need of maintenance cannot expect to maintain the same standard of living as prior to the divorce. This is a consequence of the main principle that the economic ties between the spouses cease upon divorce. Also, it has been held that a change in the standard of living upon divorce is not a result of the marriage as such – which in Swedish law is the requirement for all maintenance after divorce – but of the living conditions that prevailed during the marriage! According to Agell, the Supreme Court judgment from 1998,³³ denying a sick woman's claim for maintenance after 28 years of marriage on the basis that she had been suffering from ill-health all through the marriage, confirms this position.³⁴ A more generous position might, according to Agell, be taken where the wife's work at home has contributed to the husband's successful career.³⁵

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?*

³² NJA 1983, p. 826.

³³ NJA 1998, p. 238, see Question 66.

³⁴ A. Agell, 'Nordisk äktenskapsrätt. En jämförande studie av dansk, finsk, norsk, isländsk och svensk äktenskapsrätt med diskussion av reformbehov och harmoniseringsmöjligheter', in: *Nordic Law on Marriage. A comparative study on Danish, Finnish, Norwegian, Icelandic and Swedish law on marriage with discussions on the need of reform and possibilities of harmonisation*, (forthcoming), Chapter 3, p. 17.

³⁵ A. Agell, *Äktenskap, Samboende, Partnerskap* 1998, p. 64.

The amount of maintenance awarded depends on the needs of the claimant and on the respondent's ability to pay taking into consideration what is reasonable and the circumstances of the case, Marriage Code Chapter 6 section 7. No other guidance is given in the law. In the *travaux préparatoires*, and also in the legal literature, it is recommended that guidance be sought from other fields of law.³⁶ In particular the model contained in the Code for Parents and Children, Chapter 7 section 3 for determining the amount of maintenance to a child is recommended. The use of that model also finds support in case law.³⁷ According to this model, the maintenance debtor has the right to reserve for his or her own expenses an amount corresponding to 120 per cent of the so-called basic amount provided for in the National Insurance Act.³⁸ His or her housing expenses are also to be taken into account, in accordance with what is considered reasonable. If there are exceptional reasons, the maintenance debtor may also reserve a sum for a new spouse. Likewise, the debtor has a right to reserve a sum for the maintenance of his or her cohabitee, but only on condition that they have a child together. In addition, the maintenance debtor may retain a certain amount of money for each child living in his or her household whom he or she has the duty to support.

71. *What costs other than the normal costs of life may be demanded by the claimant? (e.g. Necessary further professional qualifications? Costs of health insurance? Costs of insurance for age or disability?)*

The purpose of maintenance granted for a transitional period of time is to enable the needy spouse to acquire the necessary education for employment or an opportunity to find gainful employment. In addition to the normal costs of life, other costs related to education may be taken into consideration. In 1998, a provision was added to the Marriage Code Chapter 6 section 7 according to which the court, when assessing a spouse's need for maintenance after divorce, shall take into consideration his or her need for economic support in order to acquire pension insurance, normally an old age-pension. This provision is primarily aimed at situations where a marriage of long duration has

³⁶ L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, p.133; A. Agell, *Underhåll till make och barn*, 1988, pp. 121-123.

³⁷ See, e.g., the judgment of the appellate court in NJA 1998, p. 238.

³⁸ In 2002, the basic amount was 37,900 Swedish crowns, i.e., around € 4,000.

ended and the other spouse has difficulties in supporting himself or herself. – Health insurances of a private nature are unusual in the Swedish system and it is most unlikely that a spouse after divorce would be obliged to contribute to the acquisition of such an insurance for the other spouse.

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

There are no explicit limits in Swedish law. In practice, however, where maintenance is granted it is normally a complementary sum in addition to other sources of income that the claimant has or can obtain. The maintenance payments which are granted are usually small, ranging from 2,000 to 8,000 Swedish crowns per month.³⁹ Today, these sums could be slightly higher. Also after a long marriage, maintenance normally amounts to no more than securing – together with other sources of income – a minimal economic existence for the needy spouse, meaning that a spouse must tolerate a considerable reduction in his/her standard of living.⁴⁰ Post-divorce maintenance of a higher value is unusual.

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

Maintenance can be determined through an agreement between the spouses or through a judgment by a court. The law provides no automatic (*ex lege*) reduction. On the other hand, it is common that the agreement between the spouses contains a clause according to which the level of the payments will reduce after a certain period of time. Further, according to the Marriage Code Chapter 6 section 11, a judgment or an agreement concerning maintenance may be adjusted by the court if there are reasons to do so in view of changed circumstances. Normally, this adjustment results in a reduction in the level of the maintenance payments or in a termination of the duty to

³⁹ A. Agell, *Äktenskap, Samboende, Partnerskap* 1998, p. 62.

⁴⁰ A. Agell, *Äktenskap, Samboende, Partnerskap*, 1998, p. 64 and A. Agell, 'Nordisk äktenskapsrätt. En jämförande studie av dansk, finsk, norsk, isländsk och svensk äktenskapsrätt med diskussion av reformbehov och harmoniseringsmöjligheter', in: *Nordic Law on Marriage. A comparative study on Danish, Finnish, Norwegian, Icelandic and Swedish law on marriage with discussions on the need of reform and possibilities of harmonisation*, (forthcoming), Chapter 3, pp. 20-21.

maintain. Only where there are extraordinary reasons to do so may maintenance payments following divorce be raised above the highest amount previously determined.

74. *In which way is the maintenance to be paid (Periodical payments? Payment in kind? Lump sum?)?*

According to the Marriage Code Chapter 6 section 8, maintenance payments following divorce shall be made periodically. However, according to the same provision, if there are special reasons to do so, such as the need to acquire pension insurance for the spouse in need of maintenance, the court may decide that the payment is to be made in the form of a lump sum. It is also considered possible to combine periodical payments with a lump-sum payment. In practice, maintenance is normally ordered to be paid on a monthly basis and in advance.

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

The starting point is that maintenance is to be paid periodically, see Question 74. If, however, there are special reasons to do so, the court may decide that the payment is to be made in the form of a lump sum. The Marriage Code Chapter 6 section 8 explicitly mentions the need to acquire pension insurance for a spouse in need of maintenance as a reason for ordering a lump-sum payment. In the legal literature, the spouse's need to acquire a new home or household property are given as other examples of situations where a lump-sum payment can be justified.⁴¹ A lump-sum payment is also recommended in situations where the spouses want to settle their mutual relations once and for all, and in situations where there is reason to suspect that the debtor will not pay voluntarily. Both spouses, and indeed one of them, are free to opt for a lump-sum payment in Court. – The spouses are free to agree on both the form and the amount of the maintenance payments.

⁴¹ L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, p. 145; A. Agell, 'Nordisk äktenskapsrätt. En jämförande studie av dansk, finsk, norsk, isländsk och svensk äktenskapsrätt med diskussion av reformbehov och harmoniseringsmöjligheter', in: *Nordic Law on Marriage. A comparative study on Danish, Finnish, Norwegian, Icelandic and Swedish law on marriage with discussions on the need of reform and possibilities of harmonisation*, (forthcoming), Chapter 3, p. 21.

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

Yes. The amount of maintenance payable in *Swedish currency* is adjusted annually (1 February) in accordance with the Act (1966:680) concerning the Adjustment of Maintenance Payments in Certain Cases. The adjustment follows changes in monetary value. An indexation takes place when changes in the monetary value have reached a certain level as laid down by the Act.⁴²

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

If the parties cannot agree on an adjustment, it is necessary to initiate court proceedings and to allow the court to decide the matter. According to the Marriage Code Chapter 6 section 11, both an agreement and a judgment on maintenance may be adjusted by the court if there are reasons to do so due to changed circumstances. For the period prior to the commencement of the proceedings, an adjustment contested by either spouse may only result in a reduction or cancellation of payments not yet made. Only if there are extraordinary reasons to do so may maintenance payments following divorce be raised above the highest amount previously determined for such payments. A maintenance payment in the form of a lump sum may not be adjusted if either party contests the adjustment.

In a judgment delivered by the Supreme Court in 1984,⁴³ the Court's adjustment of a maintenance decree following divorce resulted in a termination of the (former) husband's duty to maintain his (former) wife. At the time of the original judgment from 1966, the wife had had no income of her own having been the 'homemaker' during the 24-year marriage. Later on the wife had been able to acquire a part-time job which gave her a certain income and she was now entitled to a pension. She had also inherited property from her mother, providing her with additional income. In the Court's opinion, the wife was now able to support herself whereas the husband's ability to pay maintenance was questionable (his living expenses had increased).

⁴² A. Agell, *Underhåll till barn och make*, 1988, pp. 127-135.

⁴³ NJA 1984, p. 487.

There were, in the Court's opinion, no extraordinary reasons for a continued duty to pay maintenance. – Also in another Supreme Court judgment⁴⁴ a judgment on maintenance after divorce stipulating a lifelong duty for the husband to maintain the wife was adjusted due to changed circumstances. At the time of the original judgment in 1975, the wife (then 51 years of age) had had no income of her own. Considering that she had now (for some years) been entitled to an old-age pension, her need for maintenance had in the Court's opinion changed to such an extent that there was accordingly a reason to reduce the level of the maintenance payments from the husband. It was irrelevant for the outcome of the case that the former husband did have the ability to pay the maintenance determined earlier.

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?

Before a spouse can be obliged to maintain the other spouse after divorce it must be established that the debtor has the ability to pay and that the creditor requires maintenance, in addition to certain other conditions, Marriage Code Chapter 6 section 7. There are no special rules concerning a spouse's right to retain a certain amount of property when assessing the extent of his or her duty to support the other spouse after divorce. However, as also stated under Question 70, guidance may be sought from Chapter 7 section 3 in the Code of Parents and Children, dealing with a parent's duty to maintain his or her children. According to that model, the maintenance debtor has the right to reserve for his or her own expenses an amount corresponding to 120 per cent of the so-called basic amount provided for in the National Insurance Act. (In 2002, the basic amount was 37,900 Swedish crowns, i.e., around € 4,000) His or her housing expenses are also to be taken into account, in accordance with what is considered reasonable. If there are exceptional circumstances, the maintenance debtor may also reserve a sum for a new spouse or for a cohabitee, on condition that the maintenance debtor has a child together with the cohabitee. In

⁴⁴ NJA 1993, p. 474.

addition, the maintenance debtor may retain a certain amount of money for each child living in his or her household whom he or she has the duty to support. – In the legal literature, it has also been considered possible to use other standards. According to one standard, the debtor must always be able to retain for his or her own use an amount corresponding to what, according to the annual calculations of the National Taxation Board, is necessary for so-called ‘minimum existence’. According to another standard, the debtor must always be entitled to retain an amount corresponding to municipal social allowance.⁴⁵

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 spouses’ duty to support each other continues until the divorce; separation is not relevant from the point of view of Swedish law. Since the spouses during the marriage have the right to the same standard of living, an increase in one spouse’s income may well increase the extent of his or her duty to maintain the other spouse. – When assessing the right to maintenance following divorce, decisive for the amount to be paid is, on the one hand, a spouse’s need for maintenance and, on the other, the other spouse’s ability to pay. If the question in b) relates to an increase of the debtor’s income *after* maintenance has already been decided upon (through an agreement or a judgment), the question arises whether this increase amounts to such a change in the circumstances that there is reason to adjust the amount of maintenance. According to the Marriage Code Chapter 6 section 11, only if there are extraordinary reasons to do so may maintenance payments following divorce be raised above the previously determined highest amount. The idea behind this limitation is that the maintenance creditor should normally not be able to benefit from improvements in the debtor’s economic situation after divorce.⁴⁶

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

⁴⁵ L. Tottie, *Äktenskapsbalken och promulgationslag, m.m.*, p. 133.

⁴⁶ A. Agell, *Äktenskap, Samboende, Partnerskap*, 1998, p. 59.

The maintenance debtor's own debts decrease his or her ability to maintain the other spouse and, as a result, also liability to pay maintenance. Similarly, the maintenance creditor's debts may increase his or her need for maintenance. In other respects, the maintenance creditor's debts are not relevant in this context.

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?

Swedish law is silent with respect to factors which may be taken into account when assessing a spouse's ability to pay maintenance to the other spouse after divorce. A debtor may, however, always rely on his or her legal duty to pay maintenance to his or her children. In respect of reductions to which the debtor may be entitled when assessing his or her ability to pay maintenance, it is recommended that guidance be sought from Chapter 7 section 3 in the Children and Parents Code (see Question 70). According to this provision, where there are special reasons the debtor may also deduct a sum for the maintenance of his or her (new) spouse. The debtor similarly has the right to deduct a sum for the maintenance of his or her cohabitee on condition that they have a joint child.⁴⁷ Stepchildren are not included.

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

Yes, where all the other conditions for the granting of maintenance are fulfilled and this is considered to be reasonable. The use of capital assets can be reasonable in particular in situations where maintenance is granted in the form of a lump sum.

83. Can a 'fictional' income be taken into account where the debtor is refusing possible and reasonable gainful employment or where he or she deliberately gave up such employment?

In principle, a divorced spouse is free to organise his or her employment and income, as he or she thinks fit. However, according

⁴⁷ There is no legal obligation under Swedish law for cohabitees to maintain each other.

to the *travaux préparatoires* to the 1978 law reform, it cannot be acceptable that a person deliberately gives up gainful employment or reduces his or her income in order to avoid paying maintenance to a former spouse. Decisive for assessing such a situation shall be the circumstances of the case in question.⁴⁸

Such a situation was touched upon by the Supreme Court in a judgment from 1972.⁴⁹ In that case, the wife demanded an adjustment to a previous agreement where she had agreed to a certain lump-sum payment (after a marriage which had lasted eighteen years and where two children had been born) and renounced her right to maintenance following divorce. The husband had subsequently given up his earlier leading position in business and had started a private enterprise, his income being greatly reduced as a result. He had not been able to find employment corresponding to his earlier position. In the opinion of the Supreme Court, the husband's difficulties were connected with temporary changes in the market and, in the long run, he could be expected to earn a considerable income. The agreement was adjusted and the former wife was granted the requested maintenance on a monthly basis.

In another case,⁵⁰ the husband claimed an adjustment to an earlier judgment on maintenance, on the ground that he no longer had the ability to pay since he had moved to another part of Sweden together with his new wife and, as a result, had had to leave his earlier profitable employment. (The new wife had profitable employment in the new locality.) In the Supreme Court's opinion, the debtor's decision to give up his former employment and to move to a place where his chances of finding gainful employment were limited could not justify a reduction or termination of his duty to post-divorce payments for the former wife. (This decision was, however, not unanimous.)

⁴⁸ Proposition 1978/79:12 Underhåll till barn och fränskilda, m.m., p. 189; L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, pp. 134-136; and A. Agell, *Äktenskap, Samboende, Partnerskap*, 1998, p. 67.

⁴⁹ NJA 1972, p. 22.

⁵⁰ NJA 1976, p. 609.

Sweden

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

When assessing a spouse's ability to pay maintenance, *all* of his or her sources of income are taken into consideration, social security benefits included.

85. *In respect of the debtor's ability to pay, does the income (means) of his or her new spouse, registered partner or de facto partner have to be taken into account?*

No. The income of the debtor's new spouse or partner could only affect the maintenance obligation *in a negative sense*, i.e., in cases where the new spouse or partner lacks any income or has very little income. In such a situation, the debtor's duty to maintain his or her new spouse or registered partner (or a cohabitee with whom the debtor has a joint child) takes precedence over his or her duties towards an ex-spouse.⁵¹

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

86. *In what way will the claimant's own income reduce his 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 hand from employment which goes beyond what is reasonably expected?*

Any income, irrespective of its source, is taken into consideration when assessing the claimant's need for maintenance. 'Reasonable expectations' in respect of a lack of employment are relevant in this connection.

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

⁵¹ A. Agell, *Äktenskap, Samboende, Partnerskap* 1998, p. 66.

The starting point is that after divorce each spouse is responsible for his or her own support, Marriage Code Chapter 6 section 7. From this it follows that a spouse who lacks gainful employment is required to seek such employment. Normally, maintenance is only granted for a transitional period. The purpose of this is to provide for the spouse while he or she is looking for employment or educating himself/herself in order to be able to find gainful employment. Normally, only old age or illness will 'free' a spouse from the duty to seek gainful employment after divorce. On the other hand, illness which is not connected with the marriage as such, will not in itself suffice as a ground to grant that spouse maintenance following divorce.⁵²

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

Yes, to the extent that it seems reasonable. When assessing the need for maintenance, all of the claimant's resources will be taken into consideration. What a spouse receives upon the division of the marital property is taken into consideration as well as all profits from capital belonging to him or her, e.g., income from letting property.

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

Where the conditions for maintenance following divorce are fulfilled, the aforementioned types of obligations are taken into account as factors which increase the claimant's need for maintenance. It must be emphasized that under Swedish law post-divorce maintenance can only be granted where the claimant's need for maintenance is a result of the marriage, and not because, for example, he or she has extensive maintenance obligations because of children from an earlier relationship.

90. Are there social security benefits (e.g. income support, pensions) the claimant receives which exclude his need according to the legal rules and/or court practice? Where does the divorced spouse's duty to maintain

⁵² NJA 1998, p. 238, see Question 66.

rank in relation to the possibility for the claimant to seek social security benefits?

The social security benefits to which the claimant is entitled are taken into account when assessing his or her need for maintenance. This applies in particular to such benefits which replace the claimant's lack of income, e.g., sickness benefits, or are founded on earlier employment such as pension benefits. Also housing allowances are taken into account. On the other hand, according to the *travaux préparatoires* to the 1978 law reform, it may often be reasonable not to include such study grants which constitute a loan and which must later be repaid (to the State). Generally speaking, a spouse's duty to maintain the other spouse after divorce only takes precedence over general supplementary public allowances.⁵³

VI. Questions of priority of maintenance claims

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

Swedish law recognizes only two types of maintenance claims, namely those regarding parents' duty to maintain their children and those between spouses, during the marriage and also, under certain conditions, after divorce. There are no statutory rules on the priority of these claims. It is taken for granted, however, that a child's right to maintenance, at least to the extent that it is reasonable in relation to the child's needs, takes precedence over that of a spouse/divorced spouse. This position is supported not only in the legal literature but also in the *travaux préparatoires* to the 1978 reform of the law on maintenance.⁵⁴ On the other hand, it follows from the model established in the Code on Parents and Children Chapter 7 section 3 (see Question 70) that the maintenance debtor's new family has priority. In the application of

⁵³ L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, pp. 136-137; A. Agell, *Äktenskap, Samboende, Partnerskap*, 1998, p. 65, and A. Agell, 'Die Begründung und die Grenzen der Unterhaltspflicht unter erwachsenen Verwandten in Schweden', *Familiäre Solidarität – Die Begründung und die Grenzen der Unterhaltspflicht unter Verwandten im Europäischen Vergleich*, 1997, pp. 167-173.

⁵⁴ A. Agell, *Äktenskap, Samboende, Partnerskap*, 1998, p. 66; A. Agell, *Underhåll till barn och make*, 1988, pp. 123-124; Proposition 1978/79:12 *Underhåll till barn och fränskilda*, m.m., pp. 98, 189 and 427.

that provision, the new family consists of the debtor's children from a new union who lived together with the debtor and, where special reasons exist, also his or her new spouse or – even – cohabitee where there is a joint child.

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

No. Of relevance in this respect, in the absence of statutory rules, is again the provision in the Code on Parents and Children Chapter 7 section 3, see Question 91. When assessing the debtor's ability to pay, he or she may retain what is needed to support a new spouse (registered partner) if there are special reasons for allowing this. The same applies in respect of the debtor's cohabitee, on condition that there is a joint child. Although this provision deals with a parent's duty to pay maintenance to his or her child, it is held in the legal literature that it can also be applied by analogy to maintenance towards a former spouse. In practice this means that the new spouse/partner takes precedence over the divorced spouse.⁵⁵

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's claim?

Yes. Under Swedish law it is taken for granted that a child's right to maintenance, at least to the extent that the maintenance to be paid is reasonable in relation to the child's needs, takes precedence over that of a divorced spouse.⁵⁶

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

Under Swedish law, a parent's duty to maintain a child ceases when the child attains the age of eighteen years (the age of majority), Code on Parents and Children Chapter 7 section 1. If the child is attending school at that point of time or resumes schooling before the age of nineteen years, however, the parents shall remain responsible for the child's maintenance until the child attains the age of twenty-one for as

⁵⁵ A. Agell, *Äktenskap, Samboende, Partnerskap*, 1998, p. 66 and A. Agell, *Underhåll till barn och make*, 1988, p. 124.

⁵⁶ A. Agell, *Äktenskap, Samboende, Partnerskap*, 1998, p. 66.

long as his or her schooling continues. 'Schooling' means studies at primary, lower secondary or upper secondary level or other comparable basic education. Thus, after the child's twenty-first birthday, the child can no longer make any claims for future maintenance against the parent.

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

See Question 91. The duty to pay maintenance exists in Swedish law only in relation to children (under the age of twenty-one) and a person's spouse or former spouse (under certain conditions). Thus, this question has no relevance from the point of view of Swedish law.

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?

See Question 95. No relatives of an ex-spouse (above the age of 18 or 21 when the parents' duty to maintain comes to an end) can have a duty to maintain him or her under Swedish law. The only other person who has such a duty is the claimant's current spouse, or, exceptionally, former spouse if there is an agreement or judgment establishing such a duty. What the claimant receives from the present or former spouse is naturally taken into consideration when assessing his or her need for maintenance. A new marriage by the claimant can involve such a change in the circumstances that an adjustment to a previous judgment or agreement can be made. See Question 97.

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?

In the 1978 law reform, the rule according to which the maintenance creditor's remarriage automatically (*ex lege*) extinguished his or her right to maintenance from the former spouse, was repealed. Since 1979, the effect of the claimant's remarriage is to be assessed in the same manner as the effect of changed circumstances in general, i.e.,

maintenance *may* in such a case be adjusted in accordance with the Marriage Code Chapter 6 section 11. The purpose of this law reform was to give a remarriage the same effect as cohabitation in marriage-like circumstances.⁵⁷ The spouses are, however, free to stipulate in an agreement that the right to maintenance ceases under certain given circumstances, such as the creditor's remarriage. In Swedish law, since 1995 a registered partnership has the same effect as a marriage.⁵⁸

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?

Cohabitation without marriage is in this respect given the same effect as the maintenance creditor's remarriage, i.e., it *may* lead to an adjustment of the previous agreement or judgment due to changed circumstances in accordance with the Marriage Code Chapter 6 section 11.

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

Under Swedish law, the granting of maintenance requires that there is a clear connection between the marriage as such and the spouse's need for maintenance following divorce, a position which was clearly confirmed by the Supreme Court in 1998.⁵⁹ The marriage itself must have decreased the needy spouse's opportunities for self-support, due to a long absence from the labour market when his or her contributions were needed at home. It would seem to follow from this requirement that a marriage's short duration goes against the granting of maintenance. This position is also confirmed by case law. Marriages that have lasted for less than five years have, as a rule, not resulted in

⁵⁷ Proposition 1978/79:12 *Underhåll till barn och fränskilda, m.m.*, pp. 71-72; A. Agell, *Underhåll till barn och make*, 1988, pp. 143-145; A. Agell, *Äktenskap, Samboende, Partnerskap*, p. 60.

⁵⁸ Legislation on registered partnerships entered into force in Sweden on 1 January, 1995.

⁵⁹ NJA 1998, p. 238, see Question 66.

Sweden

any duty to support the other spouse after divorce, not even where there was a real need for maintenance.⁶⁰

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 divorce ground?

No. The spouses' conduct during the marriage or the reason for the divorce are not given any relevance in Swedish law when assessing the right to maintenance.

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

Yes. This is considered so self-evident (as a general principle of law) that it is not explicitly laid down in (statutory) law.

VIII. Maintenance agreements

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

Yes. In practice, it is common that the spouses enter into an agreement on maintenance in advance; in such agreements the agreed maintenance is normally of a provisional character. Agreements on maintenance may also be concluded during the divorce proceedings – in that case they are often, at the request of the spouses, included in the divorce judgment. The spouses may also agree on maintenance after the divorce judgment.

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

Yes. However, according to the Marriage Code Chapter 6 section 11 the agreement may be adjusted by the court if the agreement is unreasonable in view of the circumstances which existed at the time of

⁶⁰ A. Agell, *Underhåll till barn och make*, 1988, pp. 107-108 (with references to case law) and L. Tottie, *Äktenskapsbalken och promulgationslag m.m.*, p. 138.

its conclusion and the overall circumstances. Likewise, according to the same section, the agreement may be adjusted by the court if there is reason to do so in view of circumstances having changed. In one case,⁶¹ the agreement between the spouses on maintenance after divorce was declared invalid on general contractual grounds ('tro och heder'; faith and credit), since the husband had failed to produce relevant information on his ability to pay maintenance. In the agreement, the wife had renounced her right to maintenance.

104. Is there a prescribed form for such agreements?

No, but in practice such agreements are normally concluded in written form. Agreements on maintenance are also often, at the request of the spouses, included in the divorce judgment. To be enforceable, the maintenance agreement must have been concluded in writing and witnessed by two persons, Code of Execution Chapter 3 section 19.

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

No.

⁶¹ NJA 1961, p. 124, see Question 63.