

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

AUSTRIA

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A. GENERAL

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

The current source of Austrian divorce law is section 46 *et seq* Austrian Marriage Act (*Ehegesetz*).¹

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

The history of civil divorce legislation in Austria goes back to 1938. Until that time there was no divorce under Austrian private law, and it was only possible to obtain a decree of judicial separation (*Scheidung von Tisch und Bett*); such a decree did not dissolve the marriage, however, and Catholics were unable to remarry.² The first civil divorce legislation to be enacted, the Austrian Marriage Act 1938, was based on the principle of fault, but it also provided for divorce on the ground of irretrievable breakdown.³ Austrian divorce law was reformed in 1978, when divorce on the ground of irretrievable breakdown was widened⁴ and divorce by consent was introduced.⁵ The most recent

¹ *DRGBl* (Reich Law Gazette) I No. 807/1938, last amended by the *BGBl* (Federal Law Gazette) I No. 135/2000. All Austrian legislation is posted on the Internet (see <http://www.ris.bka.gv.at>).

² Kerschner, *Familienrecht*, 2000, marg. No. 2/107.

³ Berka, *Scheidung und Scheidungsreform*, 2000, p. 65.

⁴ In particular section 55(3) Austrian Marriage Act was introduced which grants divorce after a six-year period of separation irrespective of any hardship for the respondent. For details see Question 44.

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amendment, in 1999, further diminished divorce based on fault by abolishing adultery and the refusal to have children as so-called 'absolute' grounds for divorce.⁶

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

At the moment there are no proposals to reform Austrian divorce law. As mentioned in Question 2, the most recent reform was in 1999.

B. GROUNDS FOR DIVORCE

I. General

4. *What are the grounds for divorce?*

The grounds for divorce are governed by section 49 *et seq* Austrian Marriage Act. Austrian divorce law provides for divorce on three grounds:

- Section 49 Austrian Marriage Act: Divorce on the ground of fault
- Sections 50–55 Austrian Marriage Act: Divorce on the grounds of irretrievable breakdown
- Section 55a Austrian Marriage Act: Divorce by consent

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

Divorce Statistics for 2000⁷

Total number of divorces	19,552
Under section 55 Austrian Marriage Act (separation)	769

⁵ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 442.

⁶ These grounds led to a divorce irrespective of any breakdown of the marriage. Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 92. For further details see Question 34.

⁷ Source: Austrian Annual Statistics (*Statistisches Jahrbuch Österreichs*) 2002.

Under section 55a Austrian Marriage Act (by consent)	17,420
Under other sections	1,363

6. *How frequently are divorce applications refused?*

No statistics are available in Austria.⁸

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

Section 46(1) Austrian Marriage Act states that a marriage may only be dissolved by a judicial decision. In other words a divorce requires a court order and may not be obtained through an administrative procedure.

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

District courts (*Bezirksgerichte*) have jurisdiction over divorce proceedings, under sections 49 (2) (2b) and 104a Jurisdiction Act⁹ (*Jurisdiktionsnorm*). Divorce by consent takes place in so-called 'non-contentious proceedings', under sections 220–228 Non-contentious Proceedings Act¹⁰ (*Außerstreitgesetz*), while divorces on all other grounds are heard in 'contentious proceedings' according to section 460 Code of Civil Procedure (*Zivilprozessordnung*).¹¹

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?)*

⁸ Response to a telephone inquiry by the Family Law Department of the Ministry of Justice (02.11.2002).

⁹ The Jurisdiction Act, *RGBl* (Imperial Law Gazette) No. 111/1895, governs the jurisdiction of the Austrian courts.

¹⁰ *RGBl* (Imperial Law Gazette) No. 208/1854.

¹¹ *RGBl* (Imperial Law Gazette) No. 1895/113.

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Divorce proceedings must always be initiated by a petition; this is called a lawsuit (*Klage*) in contentious proceedings¹² and an request (*Antrag*) in non-contentious proceedings. In addition, the ordinary rules of civil procedure in contentious, respectively in non-contentious, proceedings will apply: the application to the court need not be in writing, it may even be oral,¹³ sections 434 Code of Civil Procedure and 4 (1) Non-contentious Proceedings Act.

In principle, anyone can seek a divorce in person, and legal representation is not prescribed by law. However, if a spouse wishes to be represented he or she must choose a lawyer locally if two lawyers have their offices within the area of the competent court, section 29 (1) Code of Civil Procedure¹⁴ (*Zivilprozessordnung*) and section 220 (2) Non-contentious Proceedings Act.

Sections 460 (6a) Code of Civil Procedure and 222(1) Non-contentious Proceedings Act require the judge to inform a spouse who lacks legal representation as to appropriate counselling services. Such a spouse may request a stay in the divorce proceedings in order to seek legal advice.

10. When does the divorce finally dissolve the marriage?

Pursuant to section 46 Austrian Marriage Act the marriage is dissolved when the judgment (in contentious proceedings) or the court order (in non-contentious proceedings) takes effect.

If under your system the sole ground for divorce is the irretrievable breakdown of marriage answer part II only. If not, answer part III only.

III. Multiple grounds for divorce

¹² See Fasching, *Lehrbuch des österreichischen Zivilprozeßrechts*, 2nd Edition, 1990, marg. No. 2330.

¹³ The oral institution of contentious proceedings is only admitted if the petitioner is not represented by a lawyer, section 434 (1) Code of Civil Procedure.

¹⁴ *RGBl* (Imperial Law Gazette) No. 1895/113.

1. Divorce by consent

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

The relevant source is section 55a Austrian Marriage Act. As already mentioned, divorce by consent was introduced in 1978. The intention behind the legislation was that divorce by consent should be conditional on irretrievable breakdown, as shown by section 55a (1). This provision requires that each spouse makes a declaration conceding that an irretrievable breakdown has occurred. The question as to whether the court is bound by the spouses' concession is controversial.¹⁵ In the interest of an expeditious and easy procedure, divorce proceedings under section 55a Austrian Marriage Act are non-contentious.¹⁶

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?

Spouses seeking a divorce by consent must file a joint application for divorce (*gemeinsamer Scheidungsantrag*) under section 55a (1) Austrian

¹⁵ This view is taken by Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, pp. 450 *et seq*; Schwimann in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55a Austrian Marriage Act marg. No. 6 *et seq*; Pichler in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 55a Austrian Marriage Act marg. No. 2a; Judgment of 25.04.1979, Vienna Regional Court (Landesgericht für Zivilrechtssachen), *EFSlg.* 34.020. It is opposed by Holzhammer & Holzhammer, *Ehe und Familie*, 2nd Edition, 2001, pp. 31 *et seq*; Simotta, *Das Zerrüttungsgeständnis im Verfahren über die einvernehmliche Scheidung*, Kralik-Festschrift, 1986, pp. 329 *et seq*; Konecny, 'Wiederaufnahme im Außerstreitverfahren, insbesondere im Verfahren zur einvernehmlichen Scheidung' (1983) *Juristische Blätter* 30 (1983); Aicher, *Ehescheidung und Scheidungsfolgen*, in Floretta (ed.), *Das neue Ehe- und Kindschaftsrecht*, 1979, pp. 107 *et seq*; Mänhardt, 'Die Scheidung im Einvernehmen' in: Ostheim (ed.), *Schwerpunkte der Familienrechtsreform 1977/1978*, 1979, pp. 128 *et seq*; Judgment of 15.07.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 41.261; cf. Verschraegen, *Die Einverständliche Scheidung in rechtsvergleichender Sicht*, 1991, pp. 463 *et seq*.

¹⁶ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 138.

Marriage Act. The interpretation of the term 'joint' is controversial. Some authors¹⁷ take it to mean 'simultaneous' while the majority¹⁸ regard it as sufficient that one spouse should file the application and the other consents thereto.

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

Section 55a Austrian Marriage Act establishes that the 'matrimonial partnership' (*eheliche Lebensgemeinschaft*) must have ceased to exist for at least six months. The question which has to be answered is thus whether such a breakdown requires a separation. A crucial indication of the breakdown in this connection is that the relationship of the spouses is no longer determined by a 'matrimonial frame of mind'.¹⁹ Thus even if there is no physical (the spouses still share the same dwelling), the 'matrimonial partnership' may still have dissolved, because the spouses, for instance, no longer spend any time together or have no community of mind. In short, a period of separation is not required but the breakdown of the 'matrimonial partnership' – which may also be evidenced by a separation²⁰ – must have persisted for at least six months.

¹⁷ Aicher, 'Ehescheidung und Scheidungsfolgen' in: Floretta (ed.), *Das neue Ehe- und Kindschaftsrecht*, 1979, p. 115; Mänhardt, 'Die Scheidung im Einvernehmen' in: Ostheim (ed.), *Schwerpunkte der Familienrechtsreform 1977/1978*, 1979, p. 127.

¹⁸ Schwimann in Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55a Austrian Marriage Act marg. No. 3; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 55a Austrian Marriage Act marg. No. 3; Judgment of 17.05.1988, Vienna Court of Appeals (Oberlandesgericht) *EFSlg.* 57.178.

¹⁹ Schwimann in Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55a Austrian Marriage Act, marg. No. 4; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 55a Austrian Marriage Act, marg. No. 1; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 138. This opinion is supported by the case law, e.g., Judgment of 21.02.1979, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 34.016; Judgment of 25.04.1979, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 34.019; Judgment of 09.05.1984, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 46.214 and Judgment of 13.02.1986, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 51.628.

²⁰ Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 55a Austrian Marriage Act marg. No. 1.

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

To obtain a divorce under section 55a Austrian Marriage Act, the 'matrimonial partnership' must have been dissolved for at least six months, so, by implication, the marriage must have been in existence for at least six months.²¹

26. Is a minimum age of the spouses required?

Under section 1(1) Austrian Marriage Act spouses must be aged at least 18 in order to be able to marry. However, under section 1(2) Austrian Marriage Act the court may pronounce a person capable of marriage even at the age of 16, if the other spouse-to-be has attained the age of majority (in Austria, at 18 years)²² and he or she appears to be sufficiently mature to marry. The marriageable age is thus 18, and under certain circumstances 16, implying that the minimum ages for divorce will also be 18, respectively 16. Section 2a Code of Civil Procedure in connection with section 220(1) Non-contentious Proceedings Act explicitly state that restrictions on the capacity to conduct legal proceedings (which normally exist between the ages of 14 and 18)²³ do not apply to divorce.²⁴

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

There are no requirements as to attempts at conciliation or mediation, nor any information meetings.

However, section 223 Non-contentious Proceedings Act provides for a maximum six-month stay in the proceedings if the court finds that

²¹ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55a Austrian Marriage Act, marg. No. 5; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 55a Austrian Marriage Act marg. No. 1.

²² Section 21(2) General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) of 11.06.1811, JGS (Judicial Law Gazette) No. 946/1811.

²³ Section 2 Code of Civil Procedure.

²⁴ Fasching, *Lehrbuch des österreichischen Zivilprozeßrechts*, 2nd Edition, 1990, marg. No. 348, 2329.

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there is any possibility of restoring the marital relationship. In such a case the court must adjourn the proceedings *ex officio*.²⁵ After the expiry of this period the procedure can only be resumed at the request of the spouses. However, this form of adjournment is rarely used by the Austrian courts.²⁶

Besides, the judge must draw the spouses' attention to mediation and conciliation services, if this seems appropriate. However, it is up to the parties whether to make use of such alternative procedures. If they wish to do so the court must adjourn the divorce proceedings upon their joint request, sections 460(7a) Code of Civil Procedure and 222(1) Non-contentious Proceedings Act.²⁷

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

After having filed a joint petition for divorce with the district court - as set out in the answer to Question 9 - the spouses and their representatives are summoned to appear in court for an oral hearing, section 221(1) Non-contentious Proceedings Act. During the hearing the spouses are questioned and any agreements are recorded.²⁸ No specific number of hearings is prescribed. If a party fails to appear on the a date of the hearing the divorce application is deemed to have been withdrawn without waiving the claim, section 221(2) Non-contentious Proceedings Act.

²⁵ Kerschner, *Familienrecht*, 2000, marg. No. 2/124.

²⁶ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 142.

²⁷ The only other provision on mediation is section 99 Austrian Marriage Act which states that a mediator is obliged to observe confidentiality with regard to the matters which become known to him/her whilst attempting to reach agreement between the spouses, and that the term of limitation and other periods for the enforcement of claims in connection with the divorce are suspended by mediation. It should also be noted that the Austrian Ministry of Justice is planning to introduce legislation regulating the framework for mediation. The main aim is to improve the standards of mediation training and services. Further information is provided at <http://www.bmj.gv.at/vorhaben/index.php?st=1&th=3&sth=3&set=show&pj=20>. The draft bill may be retrieved at <http://www.bmj.gv.at/gesetzes/detail.php?id=17>.

²⁸ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 142.

If an agreement has been reached with or without mediation, the marriage is dissolved by court order (*Beschluss*).²⁹ Pursuant to section 226(1) Non-contentious Proceedings Act such an order must state the reasons upon which it is based. A dissatisfied spouse may file an appeal against the divorce order under section 227(2) Non-contentious Proceedings Act. Moreover, as long as the divorce order is not final, each spouse is entitled to withdraw the divorce petition. In the event of such a withdrawal a court order that has already been issued loses its effect without having been expressly cancelled, section 224 Non-contentious Proceedings Act.

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?*

Under section 55a(2) Austrian Marriage Act the spouses must reach a written agreement with regard to the consequences of the divorce. This must cover the following matters unless a final court order already exists concerning one issue or another (*e.g.* custody), section 55a(3) Austrian Marriage Act:

the principal place of residence or custody of the children;³⁰ contact with the children (visiting times, etc);³¹ maintenance of the children of both spouses who are unable to provide for themselves;³² the setting of matrimonial property,³³ which will include the necessary arrangements in the event that one spouse works in gainful employment of the other,³⁴ the division of the matrimonial property (dwellings, cars, etc.) and savings;³⁵ maintenance of a spouse.³⁶

²⁹ Schwimann in Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55a Austrian Marriage Act, marg. No. 16.

³⁰ See Section 177 General Austrian Civil Code.

³¹ See section 148 General Austrian Civil Code.

³² See section 140 General Austrian Civil Code.

³³ This may also be reached by a renunciation of any mutual property claims by the spouses. Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 138.

³⁴ See section 98 General Austrian Civil Code. Some authors are of the opinion that agreements on compensation under section 98 General Austrian Civil Code do not fall under section 55a(2) Austrian Marriage Act. Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55a Austrian Marriage

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All arrangements relating to children require the approval of the custody court, but the lack of such approval does not prevent the divorce order, section 55a(3) Austrian Marriage Act. As to contact with the children, spouses may also agree to reserve this issue for later determination, section 55a(2) last sentence Austrian Marriage Act.

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

This is dealt with by the answer to Question 29, except for the last part of the question. In legal terms the agreement corresponds to a settlement within the meaning of section 1380 General Civil Code (*Allgemeines bürgerliches Gesetzbuch*), i.e. a private contract which is binding on the spouses.³⁷ Under section 55a(2) Austrian Marriage Act the spouses must submit this contract to the court or reach an agreement before the court.

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

The arrangements for the principal place of residence or custody of any children, contact with the children (visiting times, etc.) and the maintenance of dependent children of both spouses must be approved

Act, marg. No. 9; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 55a Austrian Marriage Act, marg. No. 5. In contrast, Koziol & Welsch, *Grundriss des Bürgerlichen Rechts* vol. I, 12th Edition, 2002, p. 451; Aicher, 'Ehescheidung und Scheidungsfolgen', in: Floretta (ed.), *Das neue Ehe- und Kindschaftsrecht*, 1979, p. 113; Mänhardt, in: Ostheim (ed.), *Schwerpunkte der Familienrechtsreform 1977/1978*, 1979, p. 133.

³⁵ Section 81 *et seq* Austrian Marriage Act; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 138.

³⁶ This may also be fulfilled by renouncing any reciprocal maintenance claims. See Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 138.

³⁷ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55a Austrian Marriage Act, marg. No. 12; Judgment of 02.02.1984, Austrian Supreme Court (Oberster Gerichtshof), *EvBl* 1985/22; Judgment of 20.03.1985, Oberster Gerichtshof, *SZ* 58/43; Judgment of 20.12.1988, Oberster Gerichtshof, *EFSlg.* 57.181.

by the custody court. However, the pronouncement of the divorce does not depend on such approval, section 55a(3) Austrian Marriage Act.³⁸

Moreover, the entire agreement is subject to contract law and may thus be scrutinized for conformity with the latter, for instance, with regard to error, fraud, legal incapacity or violation of good morals (*bonos mores*), in particular usury. The invalidity of the agreement, however, does not affect the finality of the divorce decree.³⁹

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

During divorce proceedings on other grounds spouses may file a joint petition for divorce by mutual consent with the same court, under sections 114a(3) Jurisdiction Act, 460(10) Code of Civil Procedure.⁴⁰ This results in the suspension of the proceedings on other grounds. If the spouses are divorced on the ground of mutual consent, the divorce action based on other grounds is considered to have been withdrawn. If, on the other hand, the spouses withdraw their joint petition for divorce by consent or the court dismisses this petition, the suspended

³⁸ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55a Austrian Marriage Act, marg. No. 9 and 11. For a detailed account see Stabentheiner, 'Scheidungsvergleich und pflegschaftsgerichtliche Genehmigung', *RZ*, 1991, 250; Breycha, 'Sind nicht genehmigte Vergleiche im Pflegschaftsverfahren wirklich schwebend unwirksam?', *RZ*, 1992, 86; Judgment of 29.08.1995, Oberster Gerichtshof, *SZ* 68/146; Judgment of 30.06.1998, Oberster Gerichtshof, *EvBl* 1998/202.

³⁹ Koziol & Welser, *Grundriss des Bürgerlichen Rechts* vol. I, 12th Edition, 2002, pp. 451 *et seq* with further references; Hoyer, 'Gesetzlicher Unterhalt nach einverständlicher Scheidung?', *JBl*, 1986, 772.

⁴⁰ As already mentioned in the answer to Question 8, divorces on the ground of mutual consent are heard in non-contentious proceedings, whereas those on other grounds in contentious proceedings.

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proceedings on other grounds are only resumed if one spouse so requests.⁴¹

However, it is not possible to convert divorce proceedings on the ground of mutual consent into proceedings based on other grounds, section 42(1)(4) Jurisdiction Act.

2. Divorce on grounds of fault/matrimonial offence

33. What are the fault grounds for divorce?

The fault grounds for divorce are governed by section 49 Austrian Marriage Act in the form of a general clause with two standard examples. Under the general clause a spouse may request a divorce if the other has culpably disrupted the marriage by an aggravated matrimonial offence or through disgraceful or immoral behaviour, so that a reconciliation cannot be expected. The demonstrative examples are adultery and the infliction of physical violence and severe mental cruelty.

Divorce under section 49 Austrian Marriage Act may only be obtained if the culpable behaviour has caused the irretrievable breakdown of the marriage. Irretrievable breakdown is defined as a loss of matrimonial community⁴² which will be apparent if the emotional, mental and physical community between the spouses has ceased to exist (objective element)⁴³ and at least one spouse is aware of this (the subjective element).⁴⁴ Case law has established that an irretrievable

⁴¹ Fasching, *Lehrbuch des österreichischen Zivilprozeßrechts*, 2nd Edition, 1990, marg. No. 2364; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 145.

⁴² Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, section 49 Austrian Marriage Act, 1997, marg. No. 2.

⁴³ For case law see the Judgment of 13.04.1989, Oberster Gerichtshof, *EFSlg.* 60.177; Judgment of 22.02.1990, Oberster Gerichtshof, *EFSlg.* 63.383; Judgment of 04.09.1992, Oberster Gerichtshof, *EFSlg.* 69.215.

⁴⁴ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 443; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 96; Pichler in Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 49 Austrian Marriage Act, marg. No. 1, 3; Judgment of 24.05.1977, Oberster Gerichtshof, *RZ*, 1978, 85 No. 43; Judgment of 30.04.1980,

breakdown occurs where the petitioner has once and for all lost marital conviction due to the offending behaviour of the other spouse.⁴⁵ The question as to whether a matrimonial offence is a ground for divorce if an irretrievable breakdown has already occurred before the offence was committed is controversial.⁴⁶

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

As stated above, adultery is included as an example of an aggravated matrimonial offence, section 49 Austrian Marriage Act. Before the reform of 1999 adultery was always a ground for divorce, irrespective of any breakdown of the marital relationship.⁴⁷ Since then adultery has been a ground for divorce only if it has resulted in an irretrievable breakdown. The definition of adultery, however, has not changed: it is defined as extramarital sexual intercourse (coitus) by one spouse with a third party (not the other spouse)⁴⁸ of the opposite sex. This

Oberster Gerichtshof, *JB1*, 1981, 36; Judgment of 03.03.1990, Oberster Gerichtshof, *RZ*, 1990, 177 No. 78; Judgment of 30.01.1997, Oberster Gerichtshof, *SZ* 70/19. Against this differentiation between the objective and subjective elements see Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 9 Austrian Marriage Act marg. No. 2.

⁴⁵ Judgment of 24.09.1958, Oberster Gerichtshof, *EvBl* 1959/34; Judgment of 02.10.1963, Oberster Gerichtshof, *SZ* 36/124; Judgment of 27.01.1987, Oberster Gerichtshof, *EFSlg.* 54.388; Judgment of 13.04.1989, Oberster Gerichtshof, *EFSlg.* 60.187; Judgment of 07.02.1990, Oberster Gerichtshof, *EFSlg.* 63.384.

⁴⁶ Against that position see Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 49 Austrian Marriage Act, marg. No. 3 and, e.g., Judgment of 30.03.1979, Oberster Gerichtshof, *EFSlg.* 34.051; Judgment of 04.06.1987, Oberster Gerichtshof, *EFSlg.* 54.396; Judgment of 17.09.1996, Oberster Gerichtshof, *EFSlg.* 81.628; Judgment of 16.11.1999, Oberster Gerichtshof, *EFSlg.* 90.284; for such a position see Schwimann in Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, section 49 Austrian Marriage Act, marg. No. 4 and, e.g., Judgment of 27.01.1983, Oberster Gerichtshof, *EFSlg.* 43.635; Judgment of 13.04.1983, Oberster Gerichtshof, *EFSlg.* 43.637; Judgment of 22.04.1984, Oberster Gerichtshof, *EFSlg.* 46.181; Judgment of 29.09.1987, Oberster Gerichtshof, *EFSlg.* 54.395; Judgment of 18.01.1989, Oberster Gerichtshof, *EFSlg.* 60.188; Judgment of 20.04.1989, Oberster Gerichtshof, *EFSlg.* 60.192.

⁴⁷ See Question 2. Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 94.

⁴⁸ Judgment of 06.04.1960, Oberster Gerichtshof, *EvBl* 1960/272; Judgment of 13.07.1982, Oberster Gerichtshof, *EFSlg.* 41.172; Judgment of 14.03.1983, Oberlandesgericht Wien, *EFSlg.* 43.596; Judgment of 23.11.1989, Oberster Gerichtshof, *EFSlg.* 60.133.

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intercourse must take place during the marriage and must be culpably committed, i.e. not under duress and when not in the full possession of one's faculties (e.g. not when suffering from a mental disorder).⁴⁹

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

As mentioned under Question 33, the infliction of physical violence and severe mental cruelty are specifically enumerated as grounds for fault-based divorce in section 49 Austrian Marriage Act. Thus, injury as a consequence of physical violence or severe mental cruelty may provide a ground for divorce.

A false accusation may be regarded as the infliction of severe mental injury. It may also be deemed to constitute disgraceful or immoral behaviour which are also grounds for divorce under section 49 Austrian Marriage Act. In other words, a false accusation is a ground for divorce if the definition of fault-based divorce provided in section 49 Austrian Marriage Act is fulfilled (culpable disruption of the marriage excluding any reasonable prospect of a reconciliation).⁵⁰

36. *Is an intentional fault required?*

No; section 49 sentence 3 Austrian Marriage Act requires culpable behaviour. This comprises intentional as well as negligent behaviour.⁵¹

⁴⁹ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 47 Austrian Marriage Act, marg. No. 1; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 47 Ehegesetz marg. No. 1.

⁵⁰ See also Question 33.

⁵¹ Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 49 Ehegesetz marg. No. 1; Schwind, *Kommentar zum österreichischen Eherecht*, 2nd Edition, 1980, p. 203; Judgment of 14.07.1986, Oberster Gerichtshof, *EFSlg.* 51.600; Judgment of 05.05.1980, Oberlandesgericht Wien, *EFSlg.* 36.293; Judgment of 17.03.1987, Oberlandesgericht Wien, *EFSlg.* 54.336. A study on the doctrine of fault in the Austrian Marriage Act is found in Berka, *Scheidung und Scheidungsreform 2000*, 2000, pp. 67 *et seq.*

37. *Should the fault be offensive to the other spouse? Does the prior fault of one spouse deprive the guilty / fault based nature of the shortcomings of the other?*

The answer to the first question is definitely in the affirmative. As mentioned under Question 33 offensive behaviour forms part of the definition of the fault grounds.

Under section 49 sentence 3 Austrian Marriage Act a spouse may not obtain a divorce if he himself/she herself has committed a marital offence so that the divorce petition is not morally justified. The extent to which a petition under the aforesaid provision is held not to be morally justified very much depends on whether there is a connection between the offence of the other spouse and the petitioner's own offence.⁵² Under the case law of the Austrian Supreme Court, section 49 sentence 3 Austrian Marriage Act only excludes such divorce claims when they are based on offences committed in response to a marital offence by the claimant. Offences committed in response to others require a close temporal and causal connection with the offence of the other spouse.⁵³ Thus, for example, a divorce action by a husband will be unjustified if the alleged fault is based on his wife preventing him from entering the matrimonial home in response to his returning drunk from an assignation with another woman and insulting his wife.⁵⁴

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

There are no rules which make obtaining a divorce on the ground of fault conditional on the duration of the marriage.⁵⁵

⁵² Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 49 Austrian Marriage Act marg. No. 25 *et seq.*; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 49 Austrian Marriage Act, marg. No. 4 *et seq.*

⁵³ Judgment of 29.08.1996, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 81.603.

⁵⁴ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 105.

⁵⁵ In contrast to the absence of rules on the duration of the marriage as regards divorce on the grounds of fault/matrimonial offence there are such rules within the

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

Under section 56 Austrian Marriage Act there is no right to obtain a divorce on grounds of fault/matrimonial offence if the innocent spouse's behaviour indicates that he or she has forgiven the other spouse's offence or has not considered the offence as resulting in an irretrievable breakdown. In essence, in order to forgive an offence, the innocent spouse must know all the facts thereof and his or her behaviour must indicate an unreserved intention to continue the marriage;⁵⁶ however, suspensive conditions and time-limits are possible.⁵⁷ A reconciliation is irrevocable.⁵⁸

40. *How is the fault proved?*

There are no specific provisions governing the proof of fault in divorce proceedings, so the normal rules of evidence will apply, sections 292 *et seq* Code of Civil Procedure. Under the Austrian Code of Civil Procedure the following forms of evidence are admissible: documentary evidence, sections 292–319 Code of Civil Procedure; witness evidence, sections 320–350 Code of Civil Procedure; expert evidence, sections 351–367 Code of Civil Procedure; inspection by the judge (site visits, etc.), sections 368–370 Code of Civil Procedure; evidence given by the parties in person, sections 371–383 Code of Civil Procedure.

context of divorce on the grounds of irretrievable breakdown and/or separation; See Question 46.

⁵⁶ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 107; Judgment of 02.03.1988, Oberster Gerichtshof, *EFSlg.* 57.185; Judgment of 30.06.1988, Oberster Gerichtshof, *EFSlg.* 57.186; Judgment of 15.12.1988, Oberster Gerichtshof, *EFSlg.* 57.187; Judgment of 22.02.1990, Oberster Gerichtshof, *EFSlg.* 63.430.

⁵⁷ Gruber, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 56 Austrian Marriage Act, marg. No. 5; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 56 Austrian Marriage Act, marg. No. 3.

⁵⁸ Gruber, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 56 Austrian Marriage Act, marg. No. 2; Judgment of 27.08.1990, Oberlandesgericht Wien, *EFSlg.* 63.424.

Whether this enumeration is final or merely exemplary is a matter of disagreement. Case law speaks of a final interpretation whereby other evidence is therefore inadmissible,⁵⁹ as do some legal authorities.⁶⁰ The majority view, however, is that the list is exemplary and that all forms of evidence may be used to prove the facts.⁶¹ Having said this, the dispute is of no practical importance, since almost all evidentiary means fit into one of the five forms set out in the Code of Civil Procedure.⁶²

The best means of proving fault is probably that of naming witnesses or producing documents (photographs, letters, hotel bills, etc.), sections 371-383 Code of Civil Procedure.

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

No such attempts or meetings are required. Yet, under section 460(7) Code of Civil Procedure the court must attempt to achieve a reconciliation at the initial hearing, and must continue to do so throughout the proceedings if a reconciliation appears to be feasible. However, this provision is seldom applied in practice.⁶³

If reconciliation seems to be impossible, the judge must draw the spouses' attention to appropriate mediation and conciliation services, under section 460(7a) Code of Civil Procedure. However, it is up to the parties whether to make use of such alternative procedures. If they

⁵⁹ Judgment of 07.07.1950, Oberster Gerichtshof, *JBl*, 1950, 507 and Judgment of 04.01.1950, Oberster Gerichtshof, *SZ* 23/1.

⁶⁰ *E.g.*, Holzhammer, *Österreichisches Zivilprozeßrecht*, 2nd Edition, 1976, pp. 238, 252.

⁶¹ Fasching, *Lehrbuch des österreichischen Zivilprozeßrechts*, 2nd Edition, 1990, marg. No. 925 with further references.

⁶² Ballon, *Einführung in das österr. Zivilprozeßrecht – Streitiges Verfahren*, 9th Edition, 1999, marg. No. 216; Fasching, *Lehrbuch des österreichischen Zivilprozeßrechts*, 2nd Edition, 1990, marg. No. 925.

⁶³ Holzhammer, in: Buchegger & Deixler-Hübner & Holzhammer, *Praktisches Zivilprozeßrecht*, vol. I, 5th Edition, 1997, p. 431.

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wish to do so the court must adjourn the divorce proceedings at their joint request.⁶⁴

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

There is no hardship clause in the case of divorce on the grounds of fault/matrimonial offence.⁶⁵ Only in respect of divorce on the grounds of irretrievable breakdown and/or separation does a hardship clause exist.⁶⁶

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

This is possible under section 60(3) Austrian Marriage Act which states that even in the absence of a counterclaim the judge has to rule on the fault of the claimant, if the respondent so requests. However, such a ruling is only possible if the marriage is dissolved on the grounds of fault/matrimonial offence on the part of the respondent and if it would also have been possible for the latter to petition on the grounds of fault/matrimonial offence at the time of the petition or later. Even if at that time the respondent had already lost his or her right to apply

⁶⁴ The only other provision on mediation is section 99 Austrian Marriage Act which states that a mediator is obliged to observe confidentiality with regard to the matters which have become known to him/her whilst attempting to reach agreement between the spouses, and that the term of limitation and other periods for the enforcement of claims in connection with the divorce are suspended by mediation. It should also be noted that the Austrian Ministry of Justice is planning to introduce legislation regulating the framework for mediation. The main aim is to improve standards of mediation training and services. Further information is provided at <http://www.bmj.gv.at/vorhaben/index.php?st=1&th=3&sth=3&set=show&pj=20>. The draft bill may be retrieved at <http://www.bmj.gv.at/gesetzes/detail.php?id=17>.

⁶⁵ The only means of resisting a divorce on such grounds is to rely on section 49, sentence 3 Austrian Marriage Act. See Question 37. However, this provision is not a hardship clause and is only applicable in the case of fault/matrimonial offences by *both* spouses.

⁶⁶ See *infra* Question 54.

for a divorce (because of reconciliation, etc.), such a request may nevertheless be considered for reasons of equity.⁶⁷

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?*

Sections 50 to 55 Austrian Marriage Act distinguish the following grounds of irretrievable breakdown:

(a) Section 50 Austrian Marriage Act – Behaviour due to mental disturbance

Under section 50 Austrian Marriage Act a spouse may apply for a divorce if the marriage has broken down irretrievably due to the behaviour of his or her mentally deranged partner. The breakdown must be such that there is no reasonable prospect of restoring the marital union.⁶⁸ Examples of mental disturbance are hysteria,⁶⁹ drug addiction⁷⁰ and general mental problems on a lower level (depression, confusion, etc.).⁷¹ Yet, under section 50 Austrian Marriage Act the ground for divorce is not the mental disturbance itself but the resulting behaviour which may not be regarded as a fault/matrimonial offence, solely because the spouse in question is

⁶⁷ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 60 Austrian Marriage Act, marg. No. 22 *et seq*; Judgment of 23.11.1982, Oberster Gerichtshof, *EFSlg.* 41.280; Judgment of 26.03.1985, Oberster Gerichtshof, *EFSlg.* 48.826; Judgment of 19.11.1986, Oberster Gerichtshof, *EFSlg.* 51.657.

⁶⁸ Judgment of 10.11.1977, Oberster Gerichtshof, *EFSlg.* 29.557; Judgment of 30.07.1992, Oberster Gerichtshof, *EFSlg.* 69.234; Judgment of 30.06.1981, Oberlandesgericht Wien, *EFSlg.* 38.730.

⁶⁹ Judgment of 10.10.1982, Oberster Gerichtshof, *EFSlg.* 41.219; Judgment of 24.05.1989, Oberster Gerichtshof, *EFSlg.* 60.205.

⁷⁰ Judgment of 05.05.1971, Oberster Gerichtshof, *SZ* 44/66; Judgment of 22.03.1990, Oberster Gerichtshof, *EFSlg.* 63.399; Judgment of 30.07.1992, Oberster Gerichtshof, *EFSlg.* 69.233.

⁷¹ Established case law, *e.g.*, Judgment of 03.11.1950, Oberster Gerichtshof, *SZ* 23/313; Judgment of 03.02.1954, Oberster Gerichtshof, *SZ* 27/23; Judgment of 22.03.1990, Oberster Gerichtshof, *EFSlg.* 63.399; Judgment of 30.07.1992, Oberster Gerichtshof, *EFSlg.* 69.233.

unable to understand the consequences of his or her behaviour.⁷² As in the case of fault-based divorce under section 49 Austrian Marriage Act,⁷³ established case law assumes an irretrievable breakdown where the petitioner has irrecoverably lost his or her marital conviction due to the behaviour of the other spouse.⁷⁴

(b) Section 51 Austrian Marriage Act – Mental illness

Pursuant to section 51 Austrian Marriage Act a spouse may seek a divorce if the other spouse is mentally ill and the illness has reached a gravity that has extinguished the spouses' community of minds,⁷⁵ without any reasonable prospect of restoration.⁷⁶ No specific form of behaviour is required by section 51 Austrian Marriage Act, as the mental illness itself is sufficient for a divorce. Community of minds is defined as the ability to communicate with the spouse at a rational and emotional level⁷⁷ (to share thoughts, to react in an appropriate way, etc.)⁷⁸ A mental illness is any anomaly which causes the loss of the necessary community of minds, e.g. schizophrenia.⁷⁹

⁷² Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 446; Holzhammer & Holzhammer, *Ehe und Familie*, 2nd Edition, 2001, pp. 25 *et seq*; Judgment of 03.02.1954, Oberster Gerichtshof, *SZ* 27/23; Judgment of 02.10.1963, Oberster Gerichtshof, *SZ* 36/124; Judgment of 06.11.1982, Oberster Gerichtshof, *EFSlg.* 41.218; Judgment of 14.07.1987, Oberster Gerichtshof, *EFSlg.* 54.410; Judgment of 27.11.1991, Oberster Gerichtshof, *EFSlg.* 66.240.

⁷³ See Question 33.

⁷⁴ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 50 Austrian Marriage Act, marg. No. 2; Judgment of 14.01.1970, Oberster Gerichtshof, *EFSlg.* 13.862; Judgment of 11.07.1974, Oberster Gerichtshof, *EvBl* 1975/91.

⁷⁵ Judgment of 10.09.1952, Oberster Gerichtshof, *SZ* 25/238.

⁷⁶ Judgment of 08.06.1977, Oberlandesgericht Linz, *EFSlg.* 29.564.

⁷⁷ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 51 Austrian Marriage Act, marg. No. 2.

⁷⁸ See Judgment of 18.01.1978, Oberlandesgericht Wien, *EFSlg.* 31.680; Judgment of 21.11.1979, Oberlandesgericht Wien, *EFSlg.* 33.985.

⁷⁹ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 51 Austrian Marriage Act, marg. No. 3; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 111; Judgment of 10.09.1952, Oberster Gerichtshof, *SZ* 25/238.

(c) Section 52 Austrian Marriage Act – Infectious or repulsive illness

This ground enables a spouse to obtain a divorce if the other spouse suffers from a serious infectious or repulsive illness, and if there is no reasonable prospect of it being cured or eliminated in the foreseeable future. Although not expressly mentioned in section 52 Austrian Marriage Act, to obtain a divorce on such grounds an irretrievable breakdown is necessary and must have been caused by the infectious or repulsive illness.⁸⁰ Similar to sections 49⁸¹ and 50 Austrian Marriage Act, the predominant view assumes that there is an irretrievable breakdown where the petitioner has once and for all (definitely, incurably) lost his or her marital conviction due to the illness of his or her partner.⁸² The illness must therefore be serious and chronic, and a temporary illness may not be cited as a ground for divorce under section 52 Austrian Marriage Act.⁸³ In order to assess whether an illness is repulsive an objective standard must be applied.⁸⁴ Examples of serious, chronic diseases are: AIDS, venereal disease, leprosy and tuberculosis. An unbearable odour caused by skin cancer or psoriasis is an example of a repulsive illness.⁸⁵

(d) Section 55 Austrian Marriage Act – Break up of the ‘domestic community’

⁸⁰ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, section 52 Ehegesetz marg. No. 1 (1997).

⁸¹ See Question 36.

⁸² Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 52 Austrian Marriage Act marg. No. 2; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 52 Ehegesetz marg. No. 5; Schwind, *Kommentar zum österreichischen Eherecht*, 2nd Edition, 1980, p. 223 *et seq.* In contrast Gschnitzer & Faistenberger, *Österreichisches Familienrecht*, 2nd Edition, 1979, p. 40; Kerschner, *Zum Unterhalt nach Scheidung nach neuem Recht*, *JBl*, 1979, 561, fn 5.

⁸³ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 52 Austrian Marriage Act, marg. No. 3

⁸⁴ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 52 Austrian Marriage Act, marg. No. 4.

⁸⁵ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 52 Austrian Marriage Act, marg. No. 4 with more examples.

Under section 55(1) Austrian Marriage Act a spouse may obtain a divorce if the ‘domestic community’ (*häusliche Gemeinschaft*) has ceased to exist for a period of three years *and* the marriage has broken down irretrievably. Views as to the question of when the ‘domestic community’ terminates vary widely. While some authors purport that the community is always dissolved if the spouses have separated,⁸⁶ the prevailing case law -in addition to separation- also takes into account the abandonment of shared economic resources and the ceasing of sexual relations.⁸⁷ However, case law indicates that sexual relations alone do not suffice to maintain the ‘domestic community’.⁸⁸ If the spouses inhabit the same dwelling, the ‘domestic community’ may nevertheless be dissolved if they use different rooms and there is little personal contact.⁸⁹ Whether separation is a mere objective criterion or whether at least one spouse must also show the intention to terminate the ‘domestic community’ (subjective criterion) is a matter of controversy.⁹⁰ The prevailing view denies that the ‘domestic

⁸⁶ Schwind, *Kommentar zum österreichischen Eherecht*, 2nd Edition, 1980, p. 231 *et seq*; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 55 Austrian Marriage Act, marg. No. 2; Koziol & Welser, *Grundriss des Bürgerlichen Rechts* vol. I, 12th Edition, 2002, p. 455; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 114. In contrast Kerschner, *Familienrecht*, 2000, marg. No. 2/122; Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55 Austrian Marriage Act marg. No. 7

⁸⁷ Judgment of 07.03.1985, Oberster Gerichtshof, *EFSlg.* 48.789; Judgment of 28.09.1989, Oberster Gerichtshof, *EFSlg.* 60.215; Judgment of 28.09.1989, Oberster Gerichtshof, *EFSlg.* 60.218; Judgment of 28.02.1990, Oberster Gerichtshof, *EFSlg.* 63.404.

⁸⁸ Judgment of 19.02.1986, Oberlandesgericht Wien, *EFSlg.* 51.620; Judgment of 06.10.1987, Oberlandesgericht Wien, *EFSlg.* 54.429; Judgment of 28.02.1990, Oberster Gerichtshof, *EFSlg.* 63.404; Judgment of 31.03.1999, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 90.295.

⁸⁹ Judgment of 24.01.1984, Oberlandesgericht Wien, *EFSlg.* 46.207; Judgment of 02.09.1985, Oberlandesgericht Wien, *EFSlg.* 48.787 and Judgment of 31.03.1999, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 90.294.

⁹⁰ For a mere objective test see: Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 447; Schwind, *Kommentar zum österreichischen Eherecht*, 2nd Edition, 1980, p. 278; Judgment of 25.06.1974, Oberster Gerichtshof, *EFSlg.* 22.795; Judgment of 21.06.1950, Oberster Gerichtshof, *SZ* 23/205. *Contra* Kerschner, *Familienrecht*, 2000, marg. No. 2/122; Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55 Ehegesetz marg. No. 7; Judgment of 02.02.1949, Oberster Gerichtshof, *JBl.* 1949, 238; Judgment of 29.03.1950, Oberster Gerichtshof, *SZ* 23/84; Judgment of 17.11.1981, Oberster Gerichtshof, *SZ* 54/170;

community' has broken up when the spouses are separated due to external circumstances, *e.g.* occupational reasons, hospitalization, imprisonment, etc.⁹¹

The period of three years runs from the termination of the 'domestic community' and begins anew in the event of a reconciliation.⁹² Occasional visits do not, however, restore the community.⁹³ In the above-mentioned cases of separation by external circumstances the three-year period does not run before at least one spouse has lost his or her desire to resume the common household.⁹⁴

In addition to the requirement of a three-year break up of the 'domestic community' a divorce under section 55(1) Austrian Marriage Act may only be granted if the marriage has irretrievably broken down irretrievably. As under sections 49, 50 and 52 Austrian Marriage Act this is the case if the emotional, mental and physical community between the spouses has ceased to exist; yet established case law considers it as sufficient if the petitioner has definitely lost his or her marital conviction.⁹⁵ Section 55(1) last sentence Austrian Marriage Act stresses the fact that the breakdown must be irretrievable: thus, even if the spouses have separated for a period of three years the court has to

Judgment of 28.08.1986, Oberster Gerichtshof, *EFSlg.* 51.621; Judgment of 17.03.1998, Oberster Gerichtshof, *JBl* 593 (1998) requiring the intention to dissolve the domestic community.

⁹¹ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55 Austrian Marriage Act marg. No. 10; Kerschner, *Familienrecht*, 2000, marg. No. 2/12; Judgment of 10.05.1947, Oberster Gerichtshof, *EFSlg.* 2.523; Judgment of 11.06.1981, Oberster Gerichtshof, *EFSlg.* 38.738; Judgment of 28.08.1986, Oberster Gerichtshof, *EFSlg.* 51.621; Judgment of 28.02.1990, Oberster Gerichtshof, *EFSlg.* 63.405; Judgment of 26.02.1998, Oberster Gerichtshof, *SZ* 71/43.

⁹² Judgment of 19.02.1986, Oberlandesgericht Wien, *EFSlg.* 51.619; Judgment of 17.09.1999, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 90.302.

⁹³ Judgment of 05.07.1995, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 78.647.

⁹⁴ Established case law: Judgment of 17.11.1981, Oberster Gerichtshof, *SZ* 54/170; Judgment of 28.08.1986, Oberster Gerichtshof, *EFSlg.* 51.621; Judgment of 28.08.1985, Oberster Gerichtshof, *EFSlg.* 51.622; Judgment of 28.02.1990, Oberster Gerichtshof, *EFSlg.* 63.405.

⁹⁵ Established case law, *e.g.* Judgment of 30.04.1980, Oberster Gerichtshof, *EFSlg.* 36.360; Judgment of 16.12.1982, Oberster Gerichtshof, *EFSlg.* 41.243. See Question 33.

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dismiss the petition for divorce if it reaches the conclusion that there is a reasonable prospect of resuming the matrimonial community.

The respondent has a right to object to the divorce under section 55(2) Austrian Marriage Act: at his or her request the divorce petition must be rejected if the petitioner is entirely or predominantly responsible for the irretrievable breakdown and the divorce would result in greater hardship for the respondent than would a dismissal for the petitioner.⁹⁶

However, if the 'domestic community' has already been dissolved for a period of six years, the marriage will be dissolved irrespective of any hardship or prospect of restoration, section 55(3) Austrian Marriage Act. According to the prevailing view, it is not even necessary to assess whether the marriage has broken down (the so-called 'absolute' ground for divorce):⁹⁷ § 3 is considered as an irrebuttable presumption of the irretrievable breakdown.⁹⁸

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

Divorce on the grounds of irretrievable breakdown and separation under sections 50 to 55 Austrian Marriage Act is truly non-fault based. A spouse's fault is only taken into consideration under the hardship clause of section 55(2) Austrian Marriage Act. This provision gives the respondent a right to object to the divorce under section 55(1) Austrian

⁹⁶ For details see Question 54.

⁹⁷ Unanimous case law, e.g., Judgment of 25.09.1979, Oberster Gerichtshof, SZ52/140; Judgment of 22.09.1980, Oberster Gerichtshof, EFSlg. 38.755; Judgment of 17.02.1982, Oberster Gerichtshof, EFSlg. 41.257; Judgment of 21.05.1985, Oberster Gerichtshof, EFSlg. 48.799; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 55 Austrian Marriage Act marg. No. 9; Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55 Austrian Marriage Act, marg. No. 23; Holzhammer & Holzhammer, *Ehe und Familie*, 2nd Edition, 2001, p. 27; Hinteregger, *Familienrecht*, 2nd Edition, 2001, p. 90. In contrast Hopf & Kathrein, *Eherecht – Kurzkomentar*, 1997, pp. 230 *et seq*; Aicher, 'Ehescheidung und Scheidungsfolgen', in: Floretta (ed.), *Das neue Ehe- und Kindschaftsrecht*, 1979 p. 102 *et seq*; Ent, 'Die Eherechtsreform 1978', *Österreichische Notariats-Zeitung*, 1979, 122; Schwind, *Kommentar zum österreichischen Eherecht*, 2nd Edition, 1980, p. 127.

⁹⁸ Kerschner, *Familienrecht*, 2000, marg. No. 2/123; Kerschner, *Zum Unterhalt nach Scheidung nach neuem Recht*, JBl, 1979, 561.

Marriage Act, if the petitioner is entirely or predominantly responsible for the irretrievable breakdown and the divorce would result in greater hardship for the respondent than would a dismissal for the petitioner.⁹⁹

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

To obtain a divorce under sections 50 to 52 Austrian Marriage Act no particular duration of the marriage is required. Section 55(1) Austrian Marriage Act requires a break up of the 'domestic community' for three years, while section 55(3) Austrian Marriage Act requires a six-year break up. Therefore, the marriage must have been in existence for either three or six years at least, depending on the provision applied.

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

Under section 55(1) Austrian Marriage Act the break up of the 'domestic community', which is usually tantamount to separation,¹⁰⁰ must last for at least three years, and under section 55(3) Austrian Marriage Act for at least six years.

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

Section 55(1) Austrian Marriage Act imposes two independent conditions for obtaining a divorce: irretrievable breakdown of the marriage *and* a break up of the 'domestic community' (i.e. usually separation) for at least three years.¹⁰¹ Separation on its own is thus not sufficient evidence of an irretrievable breakdown under this provision. However, if the 'domestic community' has already ceased to exist for at least six years, irretrievable breakdown does not require proof under section 55(3) Austrian Marriage Act; it is rather irrebuttably presumed (the so-called 'absolute' ground for divorce).¹⁰²

⁹⁹ For details see Question 54.

¹⁰⁰ See Question 44.

¹⁰¹ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55 Austrian Marriage Act, marg. No. 4. *also* Question 44.

¹⁰² For references see the end of Question 44.

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

Under section 55 (1) Austrian Marriage Act irretrievable breakdown of the marriage and a break up of the ‘domestic community’ (i.e. usually separation) must be proved independently.¹⁰³ Nevertheless the following questions have been answered, since separation is a condition for divorce and may even be considered as circumstantial evidence of the irretrievable breakdown.

(a) Which circumstances suspend the term of separation?

As indicated in the answer to Question 44, this is a question of defining the break up of the common household which arises in particular if separated spouses still have albeit restricted contact. Case law has established that a reconciliation suspends the term of separation,¹⁰⁴ while occasional visits or incidental sexual intercourse do not,¹⁰⁵ nor does assistance in minor housekeeping matters.¹⁰⁶ However, the dividing-line between the break up of the common household and its re-establishment is somewhat blurred.¹⁰⁷ The Austrian Supreme Court, for instance, considered that the ‘domestic community’ had been maintained where the wife regularly prepared meals for her husband and did his laundry even though he did not stay overnight and did not take any notice of her.¹⁰⁸ Similarly, the Supreme Court denied that there had been a break up of the ‘domestic community’ where a husband lived only two to three days a week with his wife and the remaining time with his girlfriend.¹⁰⁹

¹⁰³ See Questions 44 and 48.

¹⁰⁴ Judgment of 19.02.1986, Oberlandesgericht Wien, *EFSlg.* 51.619; Judgment of 17.09.1999, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 90.302.

¹⁰⁵ Judgement of 16.11.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 41.299; Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 448; Kerschner, *Familienrecht*, 2000, marg. No. 2/122.

¹⁰⁶ Judgment of 08.10.1987, Oberster Gerichtshof, *EFSlg.* 54.430.

¹⁰⁷ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55 Austrian Marriage Act, marg. No. 11.

¹⁰⁸ Judgement of 11.04.1951, Oberster Gerichtshof, *SZ* 24/101.

¹⁰⁹ Judgement of 01.09.1982, Oberster Gerichtshof, *EFSlg.* 41.238.

(b) Does the separation need to be intentional?

As already mentioned in Question 44, it is a matter of controversy whether separation is a mere objective criterion or whether at least one spouse must also show the intention to terminate the 'domestic community' (subjective criterion).¹¹⁰ The prevailing view denies a break up of the 'domestic community' if spouses are separated due to external circumstances, e.g. occupational reasons, hospitalization, imprisonment, etc.¹¹¹ In these cases the term of the separation does not run unless at least one spouse loses his or her desire to resume the common household.¹¹²

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

This is not required, as the 'domestic community' may even be dissolved if the spouses inhabit the same dwelling, but occupy separate rooms although common areas remain for reasons of

¹¹⁰ For a mere objective test see: Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 447; Schwind, *Kommentar zum österreichischen Eherecht*, 2nd Edition, 1980, p. 278; Judgment of 25.06.1974, Oberster Gerichtshof, *EFSlg.* 22.795; Judgment of June 21, 1950, Oberster Gerichtshof, *SZ* 23/205. *Contra* Kerschner, *Familienrecht*, 2000, marg. No. 2/122; Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55 Austrian Marriage Act marg. No. 7; Judgment of 02.02.1949, Oberster Gerichtshof, *JBl*, 1949, 238; Judgment of 29.03.1950, Oberster Gerichtshof, *SZ* 23/84; Judgment of 17.07.1974, Oberlandesgericht Wien, *EFSlg.* 22.794; Judgment of 17.11.1981, Oberster Gerichtshof, *SZ* 54/170; Judgment of 28.08.1986, Oberster Gerichtshof, *EFSlg.* 51.621; Judgment of 17.03.1998, Oberster Gerichtshof, *JBl*, 1998, 593 requiring an intention to dissolve the domestic community.

¹¹¹ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55 Austrian Marriage Act, marg. No. 10; Kerschner, *Familienrecht*, 2000, marg. No. 2/122; Judgment of 10.05.1947, Oberster Gerichtshof, *EFSlg.* 2.523; Judgment of 11.06.1981, Oberster Gerichtshof, *EFSlg.* 38.738; Judgment of 28.08.1986, Oberster Gerichtshof, *EFSlg.* 51.621; Judgment of 28.02.1990, Oberster Gerichtshof, *EFSlg.* 63.405; Judgment of 26.02.1998, Oberster Gerichtshof, *SZ* 71/43.

¹¹² Established case law: Judgment of 17.11.1981, Oberster Gerichtshof, *SZ* 54/170; Judgment of 28.08.1986, Oberster Gerichtshof, *EFSlg.* 51.621; Judgment of 28.08.1985, Oberster Gerichtshof, *EFSlg.* 51.622; Judgment of 28.08.1990, Oberster Gerichtshof, *EFSlg.* 63.405.

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practicality.¹¹³ For details as to the termination of the 'domestic community' see Question 44.

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

No such attempts or meetings are required. See also Question 41.

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

No such periods are required.

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?*

The spouses are not obliged to reach an agreement or to make a proposal on certain subjects, but they may do so. For example, none of the provisions regarding post-divorce spousal maintenance are mandatory,¹¹⁴ so the spouses are free to reach a settlement on this issue.¹¹⁵ They may also reach an agreement on the maintenance and custody of children,¹¹⁶ as well as on the division of matrimonial property (dwellings, cars, etc.) and savings.¹¹⁷

If the spouses wish to come to an agreement on the custody of the children, they must do so within a reasonable time after the divorce has become effective; otherwise this matter is determined by the competent court, under section 177a(1) General Austrian Civil Code.

¹¹³ Judgment of 29.04.1982, Oberster Gerichtshof, *EFSlg.* 41.226; Judgment of 20.03.1982, Oberster Gerichtshof, *EFSlg.* 41.234; Judgment of 06.10.1982, Oberster Gerichtshof, *EFSlg.* 41.237; Judgment of 08.10.1987, Oberster Gerichtshof, *EFSlg.* 54.431; Judgment of 24.01.1984, Oberlandesgericht Wien, *EFSlg.* 46.207; Judgment of 02.09.1985, Oberlandesgericht Wien, *EFSlg.* 48.787 and Judgment of 31.03.1999, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 90.294; Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55 Austrian Marriage Act, marg. No. 9 with further references to case law.

¹¹⁴ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 167.

¹¹⁵ Section 80 Austrian Marriage Act.

¹¹⁶ Section 177 General Austrian Civil Code.

¹¹⁷ Section 85 Austrian Marriage Act.

On the other hand, as to maintenance and the division of the matrimonial property and savings, there will only be a judicial decision if a party has submitted these issues to the competent court: maintenance must generally be claimed in contentious proceedings,¹¹⁸ whereas the division of matrimonial property and savings in non-contentious proceedings.¹¹⁹ Pursuant to section 95 Austrian Marriage Act the latter must be initiated within one year after the divorce has become final.

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

The agreement on post-divorce spousal maintenance is subject to the rules of contract law, and may thus be scrutinized, for instance, with regard to legal incapacity or the violation of good morals (*bonos mores*).¹²⁰ Agreements relating to the maintenance and custody of children require the approval of the custody court, which is given if the agreement corresponds with the interests and well-being of the child.¹²¹ The mutually agreed division of the matrimonial property (dwellings, cars, etc.) and savings is also subject to contract law and may thus be scrutinized for conformity with the latter.¹²²

¹¹⁸ Only minors have to claim maintenance in non-contentious proceedings, section 21 General Austrian Civil Code in connection with section 49(2) No. 2, 2c Jurisdiction Act. Dolinar, *Österreichisches Außerstreitverfahrensrecht*, 1982, pp. 40 *et seq.* Whether this is also true for minor spouses is a matter of controversy. See Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. I, 3rd Edition, 2000, section 175 General Austrian Civil Code, marg. No. 2; Judgement of 20.06.1990, Oberster Gerichtshof, *EFSlg.* 62.863; Judgement, of 05.07.1995, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 78.158. But see Edlbacher, 'Kann eine Ehefrau unter 18 Jahren selbständig ihren Unterhaltsanspruch geltend machen?' *ÖA*, 1984, 56.

¹¹⁹ Sections 229 - 235 Non-contentious Proceedings Act.

¹²⁰ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 168.

¹²¹ Section 177(3) General Austrian Civil Code as to custody; section 154(3) General Austrian Civil Code as to maintenance. Without judicial approval the maintenance agreement is only binding between the spouses, but not as against the child. Koziol & Welser, *Grundriss des Bürgerlichen Rechts* vol. I, 12th Edition, 2002, pp. 470 *et seq.*

¹²² Koziol & Welser, *Grundriss des Bürgerlichen Rechts* vol. I, 12th Edition, 2002, pp. 470 *et seq.*

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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, may the competent authority invoke this on its own motion?*

As to the relevance of hardship one has to distinguish between the grounds of irretrievable breakdown under sections 50 to 52 Austrian Marriage Act, i.e. behaviour due to mental disturbance, mental illness and infectious or repulsive illness, on the one hand, and divorce due to the break up of the 'domestic community' under section 55 Austrian Marriage Act on the other.

(a) Divorce under sections 50 to 52 Austrian Marriage Act

The divorce application may be rejected under the hardship clause of section 54 Austrian Marriage Act. This provision states that the marriage may not be dissolved under section 50 (behaviour due to mental disturbance), section 51 (mental illness) and section 52 (infectious or repulsive illness) if the divorce application is morally unjustified. The second sentence of section 54 Austrian Marriage Act defines the circumstances under which a divorce application would be morally unjustified, that is if the dissolution of the marriage would result in exceptional hardship for the other spouse. This depends on the circumstances, namely the length of the marriage, the spouses' age and the cause of the illness.

The courts' interpretation of section 54 Austrian Marriage Act is restrictive,¹²³ meaning that exceptional hardship must be established,¹²⁴ going beyond that which is occasioned by the divorce proceedings.¹²⁵

¹²³ Judgment of 12.01.1989, Oberster Gerichtshof, *EFSlg.* 60.211; Schwimann in Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 54 Austrian Marriage Act, marg. No. 2 with further examples of case law.

¹²⁴ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 54 Austrian Marriage Act, marg. No. 2.

¹²⁵ Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 54 Austrian Marriage Act, marg. No. 3; Judgment of 30.06.1978, Oberlandesgericht Wien, *EFSlg.* 31.682; Judgment of 26.06.1978, Oberlandesgericht Wien, *EFSlg.* 31.685; Judgment of 04.11.1981, Oberlandesgericht Wien, *EFSlg.* 38.735.

However, the courts also apply section 54 Austrian Marriage Act to cases in which the respondent is not exposed to exceptional hardship but where his or her illness was caused or inflicted by the petitioner.¹²⁶ On the other hand, the hardship clause of section 54 Austrian Marriage Act is not applicable where a separation has lasted six years or more.¹²⁷ Neither a long marriage,¹²⁸ the age of the spouse who is ill,¹²⁹ the existence of children¹³⁰ or purely economic disadvantages¹³¹ are deemed to constitute severe hardships. Section 54 Austrian Marriage Act is mandatory¹³² and must thus be invoked by the competent court on its own motion.

(b) Divorce under section 55 Austrian Marriage Act

Under section 55(2) Austrian Marriage Act a divorce application pursuant to § 1 of that section (divorce on the ground of a break up of the 'domestic community' for at least three years)¹³³ must be refused if the petitioner is entirely or predominantly responsible for the irretrievable breakdown and the divorce would result in greater hardship for the respondent than would a dismissal for the petitioner. The second sentence of this paragraph prescribes that when weighing these issues the court must consider all the circumstances of the case, and particularly the length of the marital union, the welfare of the

¹²⁶ Judgment of 05.05.1971, Oberster Gerichtshof, *SZ* 44/66; Judgment of 06.03.1979, Oberster Gerichtshof, *EFSlg.* 33.994; Judgment of 27.01.1999 Oberlandesgericht Wien, *EFSlg.* 46.199; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 113.

¹²⁷ Section 55(3) Austrian Marriage Act, Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 447; Judgment of 24.01.1985, Oberster Gerichtshof, *JB1*, 1985, 489; Judgment of 26.02.1998, Oberster Gerichtshof, *SZ* 71/43. See Question 44.

¹²⁸ Judgment of 17.10.1951, Oberster Gerichtshof, *SZ* 24/275.

¹²⁹ Judgment of 12.01.1989, Oberster Gerichtshof, *EFSlg.* 60.213.

¹³⁰ Judgment of 31.05.1961, Oberster Gerichtshof, *EvBl* 1961/364.

¹³¹ Judgment of 30.05.1987, Oberster Gerichtshof, *EFSlg.* 54.423; Judgment of 12.01.1989, Oberster Gerichtshof, *EFSlg.* 60.212; different is the case of a severe economic predicament (Judgment of 17.01.1951, Oberster Gerichtshof, *SZ* 24/275).

¹³² Judgment of 19.11.1987, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 53.650; Judgment of 12.01.1989, Oberster Gerichtshof, *EFSlg.* 60.214; Holzhammer & Holzhammer, *Ehe und Familie*, 2nd Edition, 2001, p. 26; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 113.

¹³³ See Question 44.

children and the length of the break up of the 'domestic community'.¹³⁴ Unlike section 54 Austrian Marriage Act, the hardship clause of section 55(2) Austrian Marriage Act is only invoked at the request of the respondent. On the other hand, as in section 54 Austrian Marriage Act the interpretation of hardship is also restrictive, so that exceptional hardship, going beyond that occasioned by the divorce proceedings, must thus be demonstrated.¹³⁵

Owing to the fact that a marriage must be dissolved if the separation lasts for six or more years,¹³⁶ section 55(2) Austrian Marriage Act ought only to be applied if a divorce at the time of the petition (after three years) would cause considerably greater hardship than one in three years' time (after a total of six years).¹³⁷ The right to object to the divorce under section 55(2) Austrian Marriage Act is thus intended to give the respondent the necessary time to adjust.¹³⁸ Section 55(2) Austrian Marriage Act is only applicable if the hardship suffered by the respondent as a result of the divorce would clearly exceed that which the petitioner would suffer from a dismissal,¹³⁹ whereby consideration must be given to the subjective circumstances of the marriage in question and not to its abstract nature.¹⁴⁰ Under section

¹³⁴ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 115; Judgment of 14.12.1984, Oberster Gerichtshof, *EFSlg.* 46.212; Judgment of 30.01.1980, Oberster Gerichtshof, *RZ*, 1981, 109 No. 28; Judgment of 13.10.1982, Oberster Gerichtshof, *EvBl* 1983/30.

¹³⁵ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55 Austrian Marriage Act, marg. No. 20; case law in Judgment of 01.03.1979, Oberster Gerichtshof, *SZ* 52/29; Judgment of 03.06.1981, Oberster Gerichtshof, *EvBl* 1982/194; Judgment of 18.05.1989, Oberster Gerichtshof, *EFSlg.* 60.223; Judgment of 07.02.1989, Oberster Gerichtshof, *EFSlg.* 60.225.

¹³⁶ See section 55(3) Austrian Marriage Act and Question 44.

¹³⁷ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol I, 2nd Edition, 1997, section 55 Austrian Marriage Act, marg. No. 19.

¹³⁸ Judgment of 24.02.1982, Oberster Gerichtshof, *EFSlg.* 41.249; Judgment of 25.10.1983, Oberster Gerichtshof, *EFSlg.* 43.655; Judgment of 10.08.1989, Oberlandesgericht Wien, *EFSlg.* 60.221.

¹³⁹ If the hardship is equal for each spouse, the marriage must be dissolved, Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 115; Judgment of 11.09.1996, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 81.634 and Hinteregger, *Familienrecht*, 2nd Edition, 2001, p. 90.

¹⁴⁰ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55 Austrian Marriage Act, marg. No. 20.

55(2) Austrian Marriage Act a marriage may not be dissolved, for instance, if there is a danger that the dissolution would have grave consequences for the respondent's health.¹⁴¹ Religious differences,¹⁴² high blood pressure¹⁴³ and diabetes,¹⁴⁴ however, do not constitute sufficient hardship. The dismissal of a divorce application under section 55(2) Austrian Marriage Act for economic reasons is only granted by way of exception;¹⁴⁵ here, consideration must, for instance, be given to the effect on the respondent's entitlement to a widow's pension.¹⁴⁶

C. SPOUSAL MAINTENANCE AFTER DIVORCE

I. General

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

The current source of private law for the maintenance of spouses after divorce in Austria is section 66 *et seq* Austrian Marriage Act.

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

The Austrian private law of maintenance is still essentially based on the principle of fault¹⁴⁷ and the existence and extent of a maintenance

¹⁴¹ Judgment of 10.06.1980, Oberster Gerichtshof, *EvBl* 1981/10.

¹⁴² Judgment of 02.12.1981, Oberster Gerichtshof, *EFSlg.* 38.753; Judgment of 22.02.1983, Oberlandesgericht Wien, *EFSlg.* 43.661.

¹⁴³ Judgment of 24.02.1982, Oberster Gerichtshof, *EFSlg.* 41.256.

¹⁴⁴ Judgment of 26.03.1985, Oberlandesgericht Wien, *EFSlg.* 48.797; further examples provided by Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 55 Austrian Marriage Act, marg. No. 22.

¹⁴⁵ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 448; Berka, *Scheidung und Scheidungsreform 2000*, 2000, p. 64.

¹⁴⁶ Judgment of 11.09.1996, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 81.635; Judgment of 12.10.1998, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 87.467; Kerschner, *Familienrecht*, 2000, marg. No. 2/122.

¹⁴⁷ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 149.

claim depends on the type of divorce (e.g. fault, separation).¹⁴⁸ Prior to the 1999 reform the main principle was that the guilty or predominantly guilty party had no entitlement to maintenance from his or her former spouse. The Matrimonial Law Amendment Act 1999 (*Eherechts-Änderungsgesetz*), Federal Law Gazette (*Bundesgesetzblatt*) 1999/125, introduced a right to maintenance even for guilty or predominantly guilty spouses under certain circumstances (e.g. responsibility for the children's upbringing).¹⁴⁹ As a result, a guilty spouse may now be obliged to pay maintenance.¹⁵⁰

Another important principle of maintenance law is the non-binding character of the provisions relating to maintenance, meaning that private maintenance agreements have precedence.¹⁵¹ Finally, maintenance can be granted for reasons of equity under certain circumstances.¹⁵²

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

No reforms are planned. As mentioned Question 56, the most recent reform was in 1999.

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

The law grants maintenance to the former spouse under the following provisions:

- Divorce on the ground of fault:
Sections 66, 67, 68 and 68a Austrian Marriage Act
- Divorce on the ground of irretrievable breakdown:

¹⁴⁸ A good overview of maintenance claims arising from different grounds of divorce is provided by Kerschner, *Familienrecht*, 2000, marg. No. 2/132.

¹⁴⁹ Sections 68a and 69b Austrian Marriage Act.

¹⁵⁰ A discussion of the new non-fault-based maintenance is found in Ferrari, 'Verschuldensunabhängiger Scheidungsunterhalt nach den §§ 68a und 69b Ehegesetz', in: Ferrari & Hopf (ed.), *Eherechtsreform in Österreich*, 2000, pp. 37 *et seq.* See Question 62.

¹⁵¹ See Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 167.

¹⁵² See, e.g., section 68 Austrian Marriage Act and the corresponding explanation *infra* under Question 62.

- Sections 69 and 69b referring to 68a Austrian Marriage Act
- Divorce by consent: Primary agreement, otherwise, Sections 69a(2) and 69b Austrian Marriage Act

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?*

To answer this question it is necessary to clarify the relationship between the provisions relating to post-divorce maintenance and those concerning the division of matrimonial property. On closer inspection a connection emerges. Section 66 Austrian Marriage Act states that the guilty party must pay maintenance to the other spouse under certain circumstances.¹⁵³ The maintenance payable by the guilty party is reduced if he or she would have difficulty in supporting him or herself and if the other spouse is capable of supporting him or herself from his or her own income and property.¹⁵⁴ The term 'property' means divided property, insofar as the matrimonial property must already have been divided between the parties. Under these circumstances, then, the rules regarding matrimonial property law (distribution of property) may fulfil the function of providing support.

However, the property of the guilty spouse also fulfils a supportfunction. As has been said, under section 66 Austrian Marriage Act the guilty party is obliged to pay maintenance to the other spouse. In order to be able to do so, the guilty party must also have recourse to his or her own property, and must therefore use the distributed matrimonial property.¹⁵⁵ The fact that the guilty spouse must use distributed property to meet his or her support obligations¹⁵⁶

¹⁵³ For further details see Question 62.

¹⁵⁴ Section 67(2) Austrian Marriage Act; see also Question 60.

¹⁵⁵ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 38; Judgment of 18.07.1985, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 48.867.

¹⁵⁶ The assets must only be realised by the guilty spouse if this is reasonable; Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 39; Judgment of 17.06.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 40.229; Judgment of 18.07.1985, Landesgericht für

represents another link between the rules relating to post-divorce maintenance and those of other matrimonial property law.

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

Provisions on the distribution of property or pension rights influence post-divorce maintenance. Under section 66 Austrian Marriage Act the guilty party must make maintenance payments to the other spouse if the latter's income from property and from such gainful employment as may reasonably be expected of him/her is insufficient for his or her needs. Pension¹⁵⁷ and social security payments¹⁵⁸ such as unemployment insurance benefits¹⁵⁹ or unemployment assistance benefits¹⁶⁰ are included in the income and reduce the maintenance payments by the guilty spouse. In the same way income derived from property reduces the maintenance payments. Pension expectations do not form part of the income, because they do not constitute actual income.¹⁶¹

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?

Zivilrechtssachen Wien, *EFSlg.* 48.867; without this restriction see the Judgment of 20.12.1978, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 31.753.

¹⁵⁷ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 24; Gitschthaler, *Unterhaltsrecht – Die gesamte Oberster Gerichtshof-Rechtsprechung der letzten 25 Jahre samt Anmerkungen*, 2001, marg. No. 691; Judgment of 15.09.1970, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 13.978; Judgment of 08.04.1971, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 16.013.

¹⁵⁸ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 160; Hop & Kathrein, *Eherecht*, 1997, pp. 259 *et seq.*; Judgment of 06.09.1957, Oberster Gerichtshof, *SZ* 68/157; Judgment of 12.10.1995, Oberster Gerichtshof, *EFSlg.* 78.705.

¹⁵⁹ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 151.

¹⁶⁰ Judgment of 23.04.1996, Oberster Gerichtshof, *EFSlg.* 81.671.

¹⁶¹ Income only consists of amounts actually received, *see* Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 158.

Compensation for the divorced spouse may be claimed in addition to maintenance payments if there are sufficient legal grounds. For instance, if one former spouse has physically injured the other, then he or she may claim compensation for bodily harm. It is not possible for a divorced spouse to claim compensation instead of maintenance because post-divorce maintenance is seen as a consequence of the matrimonial duty of support¹⁶² and not as compensation.

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

There are indeed several maintenance claims according to the type of divorce:

(a) Maintenance and divorce on the ground of fault

In accordance with section 66 Austrian Marriage Act the sole or predominantly guilty¹⁶³ party must pay maintenance, the amount of which depends on the spouses' financial circumstances. The guilty party must pay maintenance to the other spouse only to the extent that the latter's income from property and from such gainful employment as he or she may reasonably be expected to accept is insufficient. The innocent spouse is not obliged to sell his or her assets and only the income therefrom is offset against maintenance.¹⁶⁴

As mentioned above, the guilty spouse must pay sufficient maintenance to support the other spouse in the style to which he or

¹⁶² Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act marg. No. 1; Judgment of 31.01.1951, Oberster Gerichtshof, *EvBl* 1951/93; Judgment of 14.12.1982, Oberster Gerichtshof, *EvBl* 1983/55.

¹⁶³ Fault must be included in the judgment, Zankl in Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 2.

¹⁶⁴ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 453; Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 29; Judgment of 28.10.1986, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 51.692; Judgment of 29.12.1989, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 60.306.

she has been accustomed. The amount of the maintenance thus depends on the spouses' previous financial circumstances (at the time of the divorce).¹⁶⁵

If both spouses are equally to blame for the breakdown of the marriage neither, in principle, is entitled to maintenance. Nevertheless, if one spouse is unable to support him or herself then the other may be obliged to pay maintenance if this is held to be equitable under the circumstances, section 68 Austrian Marriage Act.¹⁶⁶ Such maintenance merely represents a contribution to the other spouse's income, so the payments are modest.¹⁶⁷ Case law indicates that 15% of the annual net income is regarded as equitable.¹⁶⁸

In addition to these fault-based maintenance claims the matrimonial law reform of 1999¹⁶⁹ also introduced *non-fault-based maintenance claims under section 68a Austrian Marriage Act*. It is thus possible for the court to order maintenance payments even to a guilty spouse.¹⁷⁰ Maintenance under this provision may be awarded if it would be unreasonable to expect the guilty spouse to support him or herself because of the present care of common children (§ 1) or because he or she had to care for common children or relatives during the marriage and thus now lacks the possibility to earn a living (§ 2). § 2 enumerates the grounds which make it unreasonable for the spouse to maintain him or herself, *e.g.* the lack of vocational training, the length of the matrimonial community, age and health.

The amount of maintenance payable under section 68a Austrian does not depend on the financial circumstances of the spouse against whom

¹⁶⁵ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 11.

¹⁶⁶ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 454.

¹⁶⁷ Judgment of 23.05.1979, Oberster Gerichtshof, *EFSlg.* 34.992; Judgment of 09.07.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 41.330; Judgment of 27.08.1987, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 54.511.

¹⁶⁸ Judgment of 18.11.1988, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 57.274; Judgment of 27.01.1994, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 75.590.

¹⁶⁹ See Question 56.

¹⁷⁰ Berka, *Scheidung und Scheidungsreform 2000*, 2000, p. 195; Kerschner, *Familienrecht*, 2000, marg. No. 2/139; Schwimann, *Familienrecht*, 4th Edition, 2002, pp. 34 *et seq.*

the claim is made,¹⁷¹ but on the needs of the claimant.¹⁷² Hence, this is a new category of maintenance claim under Austrian divorce law.¹⁷³

The maintenance award under section 68a is reduced or zero-rated if it would be inequitable (when the needy spouse has committed grave matrimonial offences or is responsible for his or her hardship; with regard to 68a(2) Austrian Marriage Act, consideration must also be given to a brief marriage).¹⁷⁴

(b) Maintenance and divorce on the ground of irretrievable breakdown
Where divorce is on the ground of irretrievable breakdown the maintenance claim generally depends on whether the court finds that one of the spouses is at fault. However, apart from these subsequently listed types of maintenance also the above-mentioned new, non-fault-based maintenance under section 68a Austrian Marriage Act is applicable in the case of irretrievable breakdown.¹⁷⁵

(i) Maintenance and divorce under sections 50–52 Austrian Marriage Act with a ruling as to fault. If the marriage was dissolved only on a ground provided for by sections 50–52 Austrian Marriage Act and the judgment contains a ruling as to fault, then the provisions relating to divorce on the ground of fault are applicable.¹⁷⁶

(ii) Maintenance and divorce under section 55 Austrian Marriage Act with a ruling as to fault: Where the marriage is dissolved under section 55 Austrian Marriage Act with a ruling as to,¹⁷⁷ post-divorce maintenance is granted under

¹⁷¹ Section 66 Austrian Marriage Act.

¹⁷² Berka, *Scheidung und Scheidungsreform 2000*, 2000, p. 187 *et seq.*

¹⁷³ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 153 a.

¹⁷⁴ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 455; Hinteregger, *Familienrecht*, 2nd Edition, 2001, p. 102; Holzhammer & Holzhammer, *Ehe und Familie*, 2nd Edition, 2001, p. 38 *et seq.*

¹⁷⁵ Section 69b Austrian Marriage Act refers to section 68a Austrian Marriage Act.

¹⁷⁶ See section 69(1) Austrian Marriage Act. Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 455; Kerschner, *Familienrecht*, 2000, marg. No. 2/135.

¹⁷⁷ A respondent's petition according to section 61(3) is necessary.

section 94 General Austrian Civil Code.¹⁷⁸ The maintenance claim¹⁷⁹ thus corresponds to that which would have been made if the marriage were still extant,¹⁸⁰ as though it had not been dissolved.¹⁸¹ This is an advantage for the spouse who ran the household during the marriage, because he or she is not obliged to seek gainful employment,¹⁸² reasonable or otherwise.¹⁸³ Maintenance under section 69(2) Austrian Marriage Act must always cover voluntary health insurance contributions.¹⁸⁴ Prevailing doctrine and case law consider these contributions to be the minimum level of the maintenance award.¹⁸⁵

(iii) Maintenance and divorce under sections 50–52 and 55 Austrian Marriage Act without a ruling as to fault: If the judgment does not contain a ruling as to fault, the spouse petitioning for divorce must pay maintenance to the other spouse under section 69(3) Austrian Marriage Act insofar as this is equitable¹⁸⁶ with regard to the needs, assets and earning capacity of the divorced spouses and the relatives eligible for maintenance.¹⁸⁷

¹⁷⁸ Section 69(2) Austrian Marriage Act. Details of this provision may be found in Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, section 94 General Austrian Civil Code (1997) and Schwimann, *Unterhaltsrecht*, 2nd Edition, p. 115 et seq. (1999).

¹⁷⁹ Only by the respondent, see Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 69 Austrian Marriage Act, marg. No. 3.

¹⁸⁰ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 156.

¹⁸¹ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 69 Austrian Marriage Act, marg. No. 3.

¹⁸² Judgment of 05.03.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 41.334; Judgment of 27.04.1984, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 46.311.

¹⁸³ Maintenance is however limited by the abuse of a legal right. See Koziol & Welser, *Grundriss des Bürgerlichen Rechts* vol. I, 12th Edition, 2002, p. 455; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 156.

¹⁸⁴ Section 69(2) 2nd sentence Austrian Marriage Act.

¹⁸⁵ Kerschner, *Zum Unterhalt nach Scheidung nach neuem Recht*, *JBl*, 1979 565 et seq.; Judgment of 04.07.1984, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 46.321; Judgment of 22.06.1993, Oberster Gerichtshof, *RZ*, 1994, 222 No. 65.

¹⁸⁶ Judgment of 05.09.1991, Oberster Gerichtshof, *EFSlg.* 66.487/12; Judgment of 23.03.1995, Oberster Gerichtshof, *SZ* 68/57.

¹⁸⁷ See Section 71 Austrian Marriage Act.

(c) Maintenance and divorce by consent

Post-divorce maintenance in the case of divorce by consent is not regulated by the law because the maintenance agreement is a condition for such a divorce.¹⁸⁸ However, in the case of an invalid agreement section 69a(2) Austrian Marriage Act contains a provision corresponding to section 69(3) Austrian Marriage Act while section 69b Austrian Marriage Act refers to the non-fault-based maintenance under section 68a Austrian Marriage Act.¹⁸⁹

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

Neither the General Austrian Civil Code nor the Austrian Marriage Act contain explicit provisions obliging the spouses to provide each other or the competent authority with information on their income and assets. Hence, different opinions are held. According to the predominant view¹⁹⁰ a legal maintenance claim does not in principle oblige the debtor to provide information concerning his or her income and assets.¹⁹¹ However, when initiating legal proceedings the creditor must claim a certain amount of maintenance in accordance with section 66 *et seq* Austrian Marriage Act. Now, if the respondent raises the objection that the claimed amount exceeds his or her financial capacity, he or she has to produce evidence by furnishing the

¹⁸⁸ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 456. See Question 29.

¹⁸⁹ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 457.

¹⁹⁰ Fasching, *Kommentar zu den Zivilprozeßgesetzen*, vol. II, 1962, p. 92 *et seq*. Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 156. Judgment of 20.04.1949, Oberster Gerichtshof, *SZ* 22/58; Judgment of 23.01.1962, Oberster Gerichtshof, *SZ* 35/14; Judgment of 18.12.1980, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 36.679.

¹⁹¹ The situation is different concerning maintenance agreements which may at least implicitly comprise the debtor's duty to provide information on his or her assets, e.g., an agreement requiring the debtor to pay a certain percentage of his or her constantly changing income. Fasching, *Kommentar zu den Zivilprozeßgesetzen*, vol. II, 1962, p. 92 *et seq*.

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appropriate information concerning his or her assets. Otherwise the respondent will be held liable to pay the full amount.¹⁹²

In contrast to this opinion, Harrer-Hörzinger assumes that the debtor is obliged under substantive law to provide adequate information concerning his or her assets to the other spouse owing to the reciprocal duties of the (former) spouses.¹⁹³ The claim for information must be made according to Article 42 Code of Civil Procedure Introduction Act under which the creditor petitions the court to order the debtor to submit information on his or her income and assets within a specified period of time.¹⁹⁴ If the debtor fails to comply, the claim must be enforced under Austrian enforcement law, the relevant provision being section 354 Enforcement Code (*Exekutionsordnung*).¹⁹⁵ in order to induce the debtor to provide the creditor with the required information, the court may threaten the latter with a fine or a term of imprisonment which may subsequently be enforced. However, even Harrer-Hörzinger denies an obligation to provide information to the competent authority.

II. Conditions under which maintenance is paid

64. *Do such 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 raising of children? Please explain.*

The conditions for granting maintenance depend on the nature of the maintenance claim and thus on the type of divorce. Hence, this question has already been answered under Question 62.

¹⁹² Fasching, *Kommentar zu den Zivilprozeßgesetzen*, vol. II, 1962, p. 92 *et seq.*

¹⁹³ Harrer-Hörzinger, 'Zur Auskunftspflicht zwischen dem Unterhaltsschuldner und dem Unterhaltsberechtigten', in: Harrer & Zitta (ed.), *Familie und Recht*, 1992, p. 47 *et seq.*

¹⁹⁴ Harrer-Hörzinger, *Zur Auskunftspflicht zwischen dem Unterhaltsschuldner und dem Unterhaltsberechtigten*, in: Harrer & Zitta (ed.), *Familie und Recht*, 1992, p. 50. *Contra* Hopf/Kathrein, *Eherecht*, 1993, p. 66.

¹⁹⁵ *RGBl* (Imperial Law Gazette) 1896/79.

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

Under section 66 Austrian Marriage Act (divorce on the ground of fault) the reproachable behaviour or fault on the part of the debtor during the marriage, which led to the divorce, gives rise to the spouse's maintenance duty. His or her behaviour is thus the basis for the maintenance claim.

The same applies to a divorce under sections 50–52 Austrian Marriage Act with a ruling as to fault. A ruling on the fault of a spouse may only be made if this spouse has behaved in a reproachable or culpable manner. Within this category of divorce one spouse's behaviour is thus likewise the basis of the maintenance payments.¹⁹⁶

A divorce under sections 50–52 and 55 Austrian Marriage Act without a ruling as to fault is also possible, because such a ruling can only be made upon the application of the petitioner.¹⁹⁷ In this special case it is possible for reproachable behaviour or fault on the part of a spouse to result in different maintenance claims, depending on whether or not an application for a ruling as to the fault has been made.

As already explained, a non-fault-based maintenance award is also possible under certain circumstances.¹⁹⁸ Here, maintenance does not depend on reproachable behaviour or fault on the part of the debtor during the marriage.

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

There are no explicit provisions relating to this issue. The fact that a spouse was obliged by the marriage to terminate his or her employment would be relevant to the question as to whether it would be reasonable to expect him/her to resume his or her former

¹⁹⁶ This also applies to a divorce under section 55 Austrian Marriage Act with a ruling as to fault.

¹⁹⁷ See section 61(2 and 3) Austrian Marriage Act.

¹⁹⁸ Section 68a Austrian Marriage Act.

employment.¹⁹⁹ Generally speaking, it is not relevant whether the lack of means has been caused by the marriage, as this must be established when the divorce has legal effect;²⁰⁰ the only possible objection to this view would be an abuse of a legal right. Such a situation might arise if a spouse squanders his or her income and assets in order to obtain maintenance. However, this interpretation lacks a sound theoretical basis.

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

Recent case law has established that maintenance during marriage under section 94 General Austrian Civil Code ends when the divorce judgment enters into legal force.²⁰¹ Thereafter non-matrimonial maintenance may be granted. Since such maintenance may only be granted in the case of a lack of means, the claimant's lack of means must exist at the moment when the divorce judgment enters into effect.

III. Content and extent of the maintenance claim

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

Under section 1480 General Austrian Civil Code claims for annual payments in arrears²⁰² under civil law lapse after three years. The entitlement itself falls under the statute of limitations after 30 years if it has not been enforced.²⁰³ Section 1481 General Austrian Civil Code specifies exceptions to the principle established by section 1480, and

¹⁹⁹ The answer to Question 87 explains that the resumption of employment is regarded as more reasonable than taking up new employment.

²⁰⁰ For details see Question 67.

²⁰¹ Judgment of 07.07.1978, Oberster Gerichtshof, *EFSlg.* 30.637; Judgment of 16.12.1981, Oberster Gerichtshof, *JBl*, 1984, 198; Judgment of 24.11.1982, Oberster Gerichtshof, *EFSlg.* 41.935; Judgment of 10.11.1988, Oberster Gerichtshof, *SZ* 61/242. See also Zankl in Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 6.

²⁰² Maintenance is explicitly mentioned.

²⁰³ Mader, in: Schwimann, *Praxiskommentar zum ABGB*, vol. VII, 2nd Edition, 1997, section 1480 General Austrian Civil Code marg. No. 11.

states that obligations based on family and personal law are excluded from the statute of limitations.²⁰⁴ Annual demands (maintenance) fall under the limitation after three years.²⁰⁵ Section 1481 General Austrian Civil Code does not modify this provision in any way, but excludes the entitlement itself from the statute of limitations. In short, the maintenance claim itself does not fall under the statute of limitations,²⁰⁶ although outstanding maintenance payments will lapse after three years.²⁰⁷

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?*

In the case of a divorce under section 66 Austrian Marriage Act, the spouse at fault must pay maintenance to the other spouse and this maintenance must be sufficient to maintain his or her previous standard of living. Under Austrian legal doctrine and case law, the standard of living as defined by section 94 General Austrian Civil Code²⁰⁸ is determinative;²⁰⁹ in other words, maintenance depends on the standard of living last enjoyed by the spouses during the marriage (at the time of the divorce).²¹⁰ The standard of living is subject to objective criteria.²¹¹ Neither very extravagant²¹² nor frugal living

²⁰⁴ Schubert, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 1481 General Austrian Civil Code marg. No. 1.

²⁰⁵ Judgment of 26.06.1992, Oberster Gerichtshof, SZ 65/98.

²⁰⁶ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 71.

²⁰⁷ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 159; Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 155.

²⁰⁸ Maintenance during marriage.

²⁰⁹ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 11; Judgment of 25.02.1981, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 38.806; Judgment of 29.08.1986, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 51.674; Judgment of 09.03.1990, Oberlandesgericht Wien, *EFSlg.* 63.509.

²¹⁰ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 11; Gitschthaler, *Unterhaltsrecht*, 2001, marg. No. 684.

²¹¹ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 12.

²¹² Living 'in the lap of luxury'.

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conditions are taken into consideration. The amount of maintenance payable during and after the marriage does not fundamentally differ.²¹³

Post-divorce maintenance under sections 50–52 and section 55 Austrian Marriage Act with a ruling as to fault is also in accordance with section 94 General Austrian Civil Code.²¹⁴

In the case of post-divorce maintenance under sections 50–52 and section 55 Austrian Marriage Act without a ruling as to fault, the spouse who petitions for divorce must pay maintenance to the other spouse under section 69(3) Austrian Marriage Act, insofar as this is equitable with regard to the needs, assets and earnings of the divorced spouses and relatives entitled to maintenance.

The non-fault-based maintenance entitlement under section 68a Austrian Marriage Act is limited to the needs of the petitioner. As mentioned above, this form of claim represents a new category in Austrian maintenance law.²¹⁵ The provision in question takes its cue from section 1578(1) second sentence German Civil Code (*Bürgerliches Gesetzbuch*). The amount of the maintenance claim is a matter of controversy.²¹⁶ Following the German practice,²¹⁷ Ferrari proposes granting maintenance to a spouse which is sufficient to sustain the standard of living he or she would have enjoyed had he or she not married.²¹⁸ Due to the fact that section 68a Austrian Marriage Act came into being with the reform of 1999, there is not yet any case law.

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?*

²¹³ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 159.

²¹⁴ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 455.

²¹⁵ See Question 62.

²¹⁶ Schwimann, *Familienrecht*, 4th Edition, 2002, p. 35.

²¹⁷ See Berka, *Scheidung und Scheidungsreform 2000*, 2000, p. 187 *et seq.*

²¹⁸ Ferrari, in: Ferrari & Hopf (eds.), *Eherechtsreform in Österreich*, 2000, p. 55 *et seq.*

In Austria there is no model prescribed by law.²¹⁹ Case law calculates the amount of maintenance according to guidelines²²⁰ expressed in percentages. A spouse with no income receives 33% of the other spouse's net income;²²¹ and a spouse with an income receives 40% of the common income less his or her own income.²²² If the debtor is also obliged to meet other maintenance claims, the former spouse's claim is reduced by 3–4% per child²²³ and by 1–3% for the new spouse in an existing marriage.²²⁴

The amount of the new non-fault-based maintenance claim under section 68a Austrian Marriage Act is expected to be 20–25% of the spouse's net income.²²⁵

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?)*

²¹⁹ Gitschthaler, *Unterhaltsrecht*, 2001, marg. No. 685.

²²⁰ These guidelines may not be used in all cases in the same way. See Gitschthaler, *Unterhaltsrecht*, 2001, marg. No. 685.

²²¹ Established case law, e.g., Judgment of 26.09.1991, Oberster Gerichtshof, *EFSlg.* 66.475; Judgment of 27.04.1999, Oberster Gerichtshof, *EFSlg.* 90.390; Zankl, in: Schwimann, *Praxiskommentar zum ABGB* vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 56; for more examples see Gitschthaler, *Unterhaltsrecht*, 2001, marg. No. 686.

²²² Established case law, e.g., Judgment of 11.11.1991, Oberster Gerichtshof, *EFSlg.* 66.478; Judgment of 14.04.1992, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 69.292. Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 159; Schwimann, *Familienrecht*, 4th Edition, 2002, p. 33.

²²³ Established case law, e.g., Judgment of 30.11.1984, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 46.300; Judgment of 08.04.1987, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 54.505; Judgment of 09.03.1990, Oberlandesgericht Wien, *EFSlg.* 63.508; Judgment of 23.03.1993, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 72.361.

²²⁴ Established case law, e.g., Judgment of 22.02.1984, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 46.298; Judgment of 05.03.1987, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 54.506; Judgment of 26.09.1991, Oberster Gerichtshof, *EFSlg.* 66.475; Judgment of 22.09.1993, Oberster Gerichtshof, *EFSlg.* 72.362. See also Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 158.

²²⁵ Schwimann, *Familienrecht*, 4th Edition, 2002, p. 35.

As has been said, the debtor must pay the recipient spouse maintenance which is sufficient to meet his or her needs as defined by the spouses' former living standards.²²⁶ A spouse may claim higher maintenance payments over and above normal living expenses to meet additional expenses due to illness²²⁷ if that illness has not been caused by gross negligence.²²⁸ Higher maintenance payments are also possible if preventive medicine is necessary.²²⁹ Legal opinion is divided as to whether premiums for accident and health insurance should be included in maintenance;²³⁰ the cost of life insurance premiums is not included.²³¹ As far as pension entitlements are concerned, that of the recipient spouse is in the amount of the maintenance claim.²³² The entitlement only exists if the insured spouse is obliged to grant maintenance²³³ to the other under a court order, settlement or contractual obligation.²³⁴

Case law has established that maintenance also covers necessary legal costs including lawyers' fees.²³⁵

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

²²⁶ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 119.

²²⁷ Judgment of 07.12.1965, Oberlandesgericht Wien, *EFSlg.* 5.239; Judgment of 24.10.1973, Oberlandesgericht Wien, *EFSlg.* 20.528.

²²⁸ Section 73(2) Austrian Marriage Act.

²²⁹ Judgment of 07.12.1965, Oberlandesgericht Wien, *EFSlg.* 5.239; Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 14.

²³⁰ For this position see Grillberger, *Österreichisches Sozialrecht*, 5th Edition, 2001, p. 32; Judgment of 06.03.1981, Oberlandesgericht Wien, *EFSlg.* 37.583; against, see the Judgment of 11.12.1986, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 50.206; on this question see also Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 223. In the case of a divorce under section 55 Austrian Marriage Act (break up of the 'domestic community'), under section 69(2) 2^d sentence Austrian Marriage Act maintenance includes health insurance premiums for the accused spouse.

²³¹ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 115.

²³² Section 258(4) General Social Insurance Act (*Allgemeines Sozialversicherungsgesetz*).

²³³ At the time of his or her demise.

²³⁴ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 225.

²³⁵ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 116.

There is no provision which places a ceiling on a spouse's maintenance claim. As stated above, the court awards maintenance according to percentages which only have the character of guidelines.²³⁶ There is no precedent as to an absolute limit on maintenance payments. Case law has expressly pronounced that there is no luxury limit for spouses with reference to maintenance.²³⁷

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

In principle maintenance is not reduced after a certain time. Maintenance is adjusted to changing circumstances.²³⁸ Maintenance under section 68a Austrian Marriage Act (non-fault-based maintenance claim) is only granted for a limited period. Maintenance under § 1 of this section is awarded until the youngest child reaches the age of five; under § 2 the limitation in time is three years. It should also be noted that the court may extend limited periods or award maintenance for unlimited periods.²³⁹

Similarly, maintenance under section 68 Austrian Marriage Act (fault on the part of both spouses) may be awarded for limited periods, for instance for the time until the entitled spouse is again able to support him or herself.²⁴⁰

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

Under section 70(1) Austrian Marriage Act maintenance must be paid in regular instalments. The payments must be made once a month, in

²³⁶ See Question 70.

²³⁷ Judgment of 16.01.1979, Oberster Gerichtshof, *SZ* 52/6; Judgment of 27.04.1999, Oberster Gerichtshof, *JBl*, 1999, 725 and *EFSI*g. 90.386.

²³⁸ For details see Question 77.

²³⁹ See section 68a Austrian Marriage Act and Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 153 a.

²⁴⁰ Zankl, in: Schwimann, *Praxiskommentar zum ABGE*, vol. I, 2nd Edition, 1997, section 68 Austrian Marriage Act, marg. No. 11.

advance.²⁴¹ Payment in kind is not permitted as post-divorce maintenance;²⁴² hence maintenance must be paid in a monetary form.²⁴³ Under section 70(2) Austrian Marriage Act a lump sum may be awarded at the request of the claimant on reasonable grounds. The payment of a lump sum may not place an inequitable burden on the debtor. Reasonable grounds for the payment of a lump sum include a change of residence by the debtor which represents an obstacle to the maintenance claim or increases the capital requirements of the creditor.²⁴⁴ As stated above the payment of a lump sum may only be ordered if this is not inequitable for the debtor. A lump-sum payment will be inequitable if it places the financial position of the debtor at risk or if the disposal of the assets would only be possible at a considerable loss.²⁴⁵ It should be noted that a lump-sum payment may always be agreed upon by the former spouses and that once in effect it represents a final settlement of the maintenance claim.²⁴⁶

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?*

Lump-sum payments may not be imposed by a court order unless a party instigates an action to obtain such a payment. As already mentioned in the answer to Question 74, only the creditor has the right to opt for payment by a lump sum on reasonable grounds. However, it

²⁴¹ Kerschner, *Familienrecht*, 2000, marg. No. 2/140; Judgment of 28.01.1992, Oberster Gerichtshof, *EFSlg.* 69.163.

²⁴² During the marriage maintenance must be paid either in kind or in money. For details see section 94(3) General Austrian Civil Code and Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, pp. 147 *et seq.*

²⁴³ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 158; Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 70 Austrian Marriage Act marg. No. 1; Koziol & Welsch, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 457.

²⁴⁴ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 70 Austrian Marriage Act, marg. No. 4.

²⁴⁵ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 70 Austrian Marriage Act, marg. No. 4.

²⁴⁶ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 164; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 158.

is irrelevant whether these grounds relate to the creditor or the debtor.²⁴⁷

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

There are no explicit rules providing for the automatic indexation of maintenance. There will clearly be indexation if the parties agree to a stable value clause.²⁴⁸ Where there is no such agreement the case law indicates that the *rebus sic stantibus* clause should be applied. To put it succinctly,²⁴⁹ this clause is applied in the event of a substantial change in circumstances; a change in the facts is relevant.²⁵⁰ According to some case law a marked depreciation of the currency²⁵¹ constitutes a change in circumstances²⁵² and must be taken into consideration in determining the amount of maintenance. Although a substantial decline in the value of the currency must be taken into consideration, case law does not require indexation unless the purchasing power of the support payments has undergone a severe decline from its level at the time when the maintenance was last fixed.²⁵³

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

²⁴⁷ Zankl, in: Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 164; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 158.

²⁴⁸ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 47; Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 167; Judgment of 23.03.1978, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 31.728; Judgment of 22.05.1979, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 34.080; Judgment of 22.05.1985, Oberster Gerichtshof, *EFSlg.* 48.862; Judgment of 04.11.1981, Oberster Gerichtshof, *SZ* 54/159; Judgment of 12.12.1980, Oberster Gerichtshof, *JBl*, 1983, 91 note Pfersmann.

²⁴⁹ For details see Question 77.

²⁵⁰ Judgment of 30.04.1980, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 36.398.

²⁵¹ A 5% decline is not sufficient in this respect; Judgment of 25.06.1968, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 10.369.

²⁵² See, e.g., the Judgment of 05.10.1977, Oberster Gerichtshof, *EFSlg.* 29.634; Judgment of 04.11.1981, Oberster Gerichtshof, *SZ* 54/159.

²⁵³ Judgment of 04.11.1981, Oberster Gerichtshof, *SZ* 54/159; for more information see Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 46 *et seq.*

As indicated in the answer to Question 76, changing circumstances may be reflected in the application of the *rebus sic stantibus* clause. A judgment's validity only extends to the circumstances considered in that judgment; hence a reassessment of the maintenance is possible, when there is a change in the substantive legal situation.²⁵⁴ According to prevailing doctrine²⁵⁵ and case law²⁵⁶ maintenance arrangements (by judgment or agreement) are subject to the *rebus sic stantibus* clause, but it is possible for the spouses expressly to exclude the application thereof.²⁵⁷ The application of the *rebus sic stantibus* clause is conditional on a change in the circumstances on which the judgment's facts or the maintenance settlement were based.²⁵⁸ Changes only have to be considered if they are serious²⁵⁹ and permanent.²⁶⁰

The *rebus sic stantibus* clause applies to changes in the legal position,²⁶¹ case law²⁶² and the circumstances.²⁶³ Changes which must be

²⁵⁴ Judgment of 02.07.1958, Oberster Gerichtshof, *EvBl* 1958/323; Judgment of 12.06.1979, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 34.075.

²⁵⁵ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 43; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 169; Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 166.

²⁵⁶ Judgment of 28.12.1989, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 59.481; Judgment of 12.09.1990, Oberster Gerichtshof, *EFSlg.* 62.568; Judgment of 12.11.1996, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 79.855; Judgment of 08.03.1996, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 81.863; Judgment of 20.09.1998, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 87.514.

²⁵⁷ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 169; Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, pp. 166 *et seq.*

²⁵⁸ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act marg. No. 44 with examples of case law.

²⁵⁹ Judgment of 20.12.1978, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 31.730; Judgment of 31.08.1988, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 57.250.

²⁶⁰ Judgment of 19.10.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 41.308.

²⁶¹ Case law cited in the Judgment of 12.06.1979, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 34.073; Judgment of 30.04.1980, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 36.398.

²⁶² This is controversial. See Rummel, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* vol. I, 3rd Edition, 2000, section 901 General Austrian Civil Code, marg. No. 8 a.

²⁶³ Judgment of 19.03.1970, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 13.970; Judgment of 30.04.1980, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 36.398.

considered are: the birth of an illegitimate child;²⁶⁴ a need for additional medication;²⁶⁵ and particularly any changes in income and assets.²⁶⁶

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?*

Section 67 § 1 Austrian Marriage Act provides for the retention of a certain amount by the debtor.²⁶⁷ In the event that the full payment due would endanger²⁶⁸ the debtor's ability to support him or herself in reasonable comfort,²⁶⁹ he or she must pay only such maintenance as is equitable taking into account the needs, the income and the assets of the former spouses. If the debtor is also obliged to pay maintenance to an unmarried minor or, in the case of remarriage, to his or her new spouse, the needs and economic circumstances of these persons must also be taken into consideration. § 2 states that the debtor is exempted from paying any maintenance to the other spouse under these circumstances if the creditor is capable of supporting him or herself from the income derived from his or her assets.

Reasonable maintenance is defined as that amount which could be claimed by the debtor if he or she were the creditor of a debtor who is

²⁶⁴ Judgment of 26.11.1968, Landesgericht für Zivilrechtssachen Wien, *EFSI*g. 10.368.

²⁶⁵ Judgment of 03.11.1970, Landesgericht für Zivilrechtssachen Wien, *EFSI*g. 13.977.

²⁶⁶ Judgment of 19.03.1970, Landesgericht für Zivilrechtssachen Wien, *EFSI*g. 13.970; Judgment of 11.05.1976, Landesgericht für Zivilrechtssachen Wien, *EFSI*g. 27.492; Judgment of 28.01.1980, Landesgericht für Zivilrechtssachen Wien, *EFSI*g. 36.409; Judgment of 08.08.1985, Landesgericht für Zivilrechtssachen Wien, *EFSI*g. 48.857; Judgment of 30.05.1986, Landesgericht für Zivilrechtssachen Wien, *EFSI*g. 51.682; Judgment of 22.09.1993, Oberster Gerichtshof, *EFSI*g. 72.348; Judgment of 19.12.1990, Oberster Gerichtshof, *RZ*, 1991, 231 No. 72.

²⁶⁷ The applicability of this provision does not depend on the provision under which maintenance is awarded.

²⁶⁸ Endangerment is sufficient and actual hardship is not necessary, Zankl in Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 67 Austrian Marriage Act marg. No. 7.

²⁶⁹ In the light of his or her other obligations.

able to pay that amount.²⁷⁰ Other obligations are maintenance payments to relatives and children.²⁷¹ Some legal authors are also of the opinion that the term 'other obligations' also applies to legal and contractual obligations.²⁷² The second sentence of the provision in question ('... to grant maintenance to an *under-age unmarried* child ...') does not require the child to be an unmarried minor; the unanimous opinion is that the decisive issue is whether the child is entitled to maintenance from the debtor; in other words it is essential that the child should be unable to provide for itself.²⁷³ Under the law of equity the needs and living standards and conditions of both spouses must be taken into consideration.²⁷⁴

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

Under the *rebus sic stantibus* clause²⁷⁵ an increase in the debtor's income may only be taken into consideration once the amount of maintenance has already been calculated once. If this is so, then a major and permanent increase must be taken into account. If not, maintenance is granted according to the circumstances and living standards of the spouses, which include income. The purpose of the *rebus sic stantibus* clause is to recalculate maintenance entitlements; if maintenance has not yet been calculated, then initial calculation must take account of the financial circumstances of the former spouses. A major influence

²⁷⁰ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 67 Austrian Marriage Act, marg. No. 6.

²⁷¹ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 454.

²⁷² Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 454; Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 67 Austrian Marriage Act, marg. No. 8; Aicher, 'Ehescheidung und Scheidungsfolgen', in: Floretta (ed.), *Das neue Ehe- und Kindschaftsrecht*, 1979, p. 121 (fn 127).

²⁷³ Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 67 Austrian Marriage Act, marg. No. 1.

²⁷⁴ Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 67 Austrian Marriage Act marg. No. 4; see also Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 67 Austrian Marriage Act, marg. No. 12 *et seq.*

²⁷⁵ See Question 77.

on the amount of the future maintenance payments is naturally exercised by the timing of the order,²⁷⁶ namely at the end of the oral hearing by the court of first instance.²⁷⁷

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

A fundamental precondition of an obligation to pay maintenance is the debtor's ability to pay;²⁷⁸ a debtor who is not in a financial position to make the necessary maintenance payments is not legally obliged to do so.²⁷⁹

Some of the debtor's obligations reduce his or her maintenance payments, *e.g.* other maintenance obligations,²⁸⁰ legal obligations,²⁸¹ and loans taken out to maintain the debtor's ability to work²⁸² and economic existence.²⁸³ Other loans are not taken into consideration;²⁸⁴ neither are voluntarily assumed²⁸⁵ and 'exceptional'²⁸⁶ contractual obligations,²⁸⁷ voluntarily increased payments to other maintenance recipients,²⁸⁸ everyday expenses like clothing,²⁸⁹ rent for a dwelling,²⁹⁰ premiums for private supplementary insurance²⁹¹ etc.²⁹²

²⁷⁶ Judgment of 21.11.1985, Oberlandesgericht Wien, *EFSlg.* 47.484.

²⁷⁷ Judgment of 30.08.1985, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 47.480.

²⁷⁸ Established case law, *e.g.*, Judgment of 21.02.1978, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 31.724; Judgment of 18.05.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 41.303; Judgment of 19.04.1983, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 43.703.

²⁷⁹ Klang & Schwind, *Kommentar zum allgemeinen bürgerlichen Gesetzbuch*, vol. 1/1, 2nd Edition, 1964, p. 868.

²⁸⁰ Established case law, *e.g.* Judgment of 15.06.1987, Oberlandesgericht Linz, *EFSlg.* 31.757; Judgment of 08.04.1987, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 54.487.

²⁸¹ Judgment of 19.02.1974, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 22.892.

²⁸² Judgment of 18.04.1989, Oberster Gerichtshof, *EFSlg.* 60.313.

²⁸³ Judgment of 28.04.1983, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 43.738;

Judgment of 06.05.1986, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 51.696.

²⁸⁴ Judgment of 23.06.1980, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 36.422;

Judgment of 20.10.1989, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 60.311;

Judgment of 23.03.1993, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 72.360.

²⁸⁵ Judgment of 19.01.1984, Oberlandesgericht Wien, *EFSlg.* 46.834.

²⁸⁶ Judgment of 04.12.1984, Oberster Gerichtshof, *EFSlg.* 46.290.

²⁸⁷ Judgment of 19.02.1974, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 22.892.

²⁸⁸ Judgment of 18.07.1984, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 46.270.

²⁸⁹ Judgment of 30.11.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 41.950.

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?*

Under Austrian divorce law it is not possible for a debtor to rely on his or her moral obligations. As mentioned in the answer to Question 78, there is even disagreement as to whether contractual entitlements fall under the 'other obligations' referred to in section 67 Austrian Marriage Act. There are no maintenance entitlements on the part of a *de facto* partner or stepchild in Austria, so a spouse may only rely on legal, but not on moral obligations.

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

The debtor is primarily required – apart from his or her income – to use the income derived from his or her capital assets.²⁹³ The use of the assets themselves is required insofar as it is reasonable to expect the spouse liable to pay maintenance to do so.²⁹⁴ The extent to which it is reasonable for the liable spouse to use his or her capital assets depends on the specific circumstances.²⁹⁵ The sale of a dwelling would not be reasonable if, for example, the property is urgently needed as accommodation²⁹⁶ or in order to practise a profession (e.g. a lawyer or

²⁹⁰ Judgment of 31.03.1983, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 43.739.

²⁹¹ Judgment of 23.03.1993, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 72.360; Judgment of 16.11.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 41.325; Judgment of 24.02.1987, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 54.501.

²⁹² For more examples see Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 41.

²⁹³ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 39; Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 159; Judgment of 20.12.1984, Oberlandesgericht Wien, *EFSlg.* 46.831.

²⁹⁴ Zankl, in: Schwimann, *ibid.*; Judgment of 14.01.1970, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 13.984; Judgment of 18.07.1985, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 48.867; without this restriction see the Judgment of 20.12.1984, Oberlandesgericht Wien, *EFSlg.* 46.831.

²⁹⁵ Judgment of 18.10.1994, Oberster Gerichtshof, *EFSlg.* 73.940; Gitschthaler, *Unterhaltsrecht*, 2001, marg. No. 683.

²⁹⁶ Judgment of 14.01.1970, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 13.984.

physician).²⁹⁷ The debtor may also not be required to realise his or her entire capital assets in the short term; the assets must be so apportioned that they will be completely used up at the time when the debtor's death is statistically probable.²⁹⁸

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?*

As stated in the answer to Question 80, a basic condition of maintenance liability is the debtor's ability to pay. In the event that the debtor has no capital assets or is unwilling to work, he or she would thus not be obliged to pay maintenance. In order to prevent that situation, legal doctrine and case law have developed the so-called '*Anspannungsgrundsatz*'²⁹⁹ (roughly translated as the principle of strain) which is now codified by section 94 Austrian Marriage Act³⁰⁰ in conjunction with section 94 General Austrian Civil Code (maintenance during a righteous marriage). Under this principle, which also applies to post-divorce maintenance,³⁰¹ a spouse must accept reasonable gainful employment in order to fulfil his or her maintenance obligations.³⁰² If the debtor culpably infringes this duty (regardless of whether this is intentional or negligent),³⁰³ then his or her fictional (imputed) income must be taken into account.³⁰⁴ The test of negligence

²⁹⁷ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 39.

²⁹⁸ Klang & Schwind, *Kommentar zum allgemeinen bürgerlichen Gesetzbuch*, vol. I/1, 2nd Edition, 1964, pp. 872 *et seq.*

²⁹⁹ Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 94 General Austrian Civil Code, marg. No. 36 *et seq.*; the same view is taken by Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, pp. 61 *et seq.*; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 18.

³⁰⁰ Under section 94(1) the spouses meet their needs according to their abilities.

³⁰¹ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 33. Judgment of 09.04.1992, Oberster Gerichtshof, *EFSlg.* 69.275; Judgment of 22.09.1993, Oberster Gerichtshof, *EFSlg.* 72.342.

³⁰² Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 143.

³⁰³ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, pp. 143 *et seq.*

³⁰⁴ The deliberate abandonment of reasonable gainful employment is an infringement of the principle of strain; meaning that account must be taken of the notional

is the due diligence of a prudent spouse.³⁰⁵ Unemployment is treated as culpable only if it has arisen from an intention to deprive the recipient spouse of maintenance.³⁰⁶ The employment which it is reasonable to expect the debtor to accept depends on the latter's age, vocational training, and physical and mental situation.³⁰⁷ The actual conditions on the employment market are determinative.³⁰⁸

84. *Do 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?*

Where post-divorce maintenance is concerned the debtor's income is defined as any actually accrued sum that the spouse has at his or her disposal. In general, all kinds of pensions³⁰⁹ or other social benefits must be treated as the debtor's income;³¹⁰ the debtor must have recourse to all such sources of income in order to fulfil his or her maintenance obligations. These may include disability pensions,³¹¹ disabled war veterans' pensions,³¹² invalidity pensions,³¹³ job-seeker's allowances and unemployment assistance,³¹⁴ sick pay³¹⁵ and emergency

income. See the Judgment of 26.06.1991, Oberster Gerichtshof, *JBl*, 1992, 173 note Hans Hoyer.

³⁰⁵ Judgment of 02.05.1990, Oberster Gerichtshof, *SZ* 63/74; Judgment of 13.02.1986, Oberster Gerichtshof, *EFSlg.* 50.215; Judgment of 30.09.1987, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 53.053.

³⁰⁶ Judgment of 18.10.1990, Oberster Gerichtshof, *EFSlg.* 62.043; Judgment of 25.03.1992, Oberster Gerichtshof, *EFSlg.* 67.952.

³⁰⁷ See the case law cited in the Judgment of 03.06.1977, Oberlandesgericht Linz, *EFSlg.* 28.556; Judgment of 13.04.1984, Oberlandesgericht Wien, *EFSlg.* 44.873; Judgment of 21.11.1985, Oberlandesgericht Wien, *EFSlg.* 47.485 ; for details see Question 87.

³⁰⁸ Judgment of 10.10.1978, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 30.635; Judgment of 01.02., 1979, Oberlandesgericht Linz, *EFSlg.* 32.794.

³⁰⁹ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act marg. No. 35.

³¹⁰ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, pp. 135 *et seq* with many examples of case law and p. 158.

³¹¹ Judgment of 23.05.1985, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 47.929.

³¹² Judgment of 18.05.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 41.321; Judgment of 04.07.1985, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 47.496.

³¹³ Judgment of 30.05.1986, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 50.225; Judgment of 20.08.1987, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 53.437.

³¹⁴ Judgment of 14.04.1987, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 53.150; Judgment of 02.09.1987, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 53.455.

benefit payments.³¹⁶ In the event that the liable spouse does not receive welfare benefits due to his or her failure to apply for them, case law might recognize a duty on the part of the debtor to do so.³¹⁷

85. *In respect to 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, there are no corresponding provisions under Austrian divorce law.

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?*

Under section 66 Austrian Marriage Act the debtor is only obliged to pay maintenance to the other spouse if the latter's income from property and reasonable gainful employment is insufficient. The creditor's maintenance entitlement is thus reduced by his or her net income,³¹⁸ e.g. regular income and once-only payments,³¹⁹ unemployment benefit³²⁰ or unemployment assistance.³²¹ Also relevant is the question as to whether the income is derived from employment which can be reasonably expected of the debtor; only income from reasonable gainful employment must be taken into consideration. In the case of a divorce under section 55 Austrian Marriage Act with a ruling as to fault, the creditor is not obliged to seek reasonable gainful

³¹⁵ Judgment of 01.06.1983, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 42.909.

³¹⁶ Judgment of 21.06.1966, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 7.056. Contra Judgment of 07.05.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 41.320; Judgment of 18.07.1984, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 46.293.

³¹⁷ Judgment of January 15, 1981, Oberster Gerichtshof, *EFSlg.* 39.195.

³¹⁸ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 159.

³¹⁹ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 160.

³²⁰ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 160.

³²¹ Judgment of April 23, 1996, Oberster Gerichtshof, *EFSlg.* 81.671.

employment.³²² Only actual income from reasonable employment must be taken into account.³²³

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

There are many aspects to the question of what constitutes reasonable gainful employment. In the first instance it is necessary to ask whether it is possible for the spouse to find employment. In other words, the test is not that of the theoretical possibility but of the actual opportunities.³²⁴ In general a return to the claimant's previous occupation can more reasonably be expected than the commencement of a new form of employment.³²⁵ Continuation of employment after the divorce is regarded as reasonable.³²⁶ Other relevant aspects are age,³²⁷ physical and mental capacity,³²⁸ health,³²⁹ vocational education,³³⁰ previous employment,³³¹ children,³³² etc.³³³ If the spouse does not

³²² Schwimann, *Unterhaltsrecht*, 2nd Edition, p. 161 (1999); Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 69 Austrian Marriage Act, marg. No. 6; Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 455.

³²³ Judgment of 24.01.1985, Oberlandesgericht Wien, *EFSlg.* 47.479; Judgment of 12.09.1990, Oberster Gerichtshof, *EFSlg.* 63.250; Judgment of 06.09.1995, Oberster Gerichtshof, *SZ* 68/157.

³²⁴ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 16; Judgment of 13.02.1981, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 38.821; Judgment of 29.12.1989, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 60.305.

³²⁵ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, p. 455 (2002).

³²⁶ Judgment of 29.01.1991, Oberster Gerichtshof, *JBl*, 1991, 174 note Ferrari-Hofmann-Wellenhof.

³²⁷ Judgment of 02.03.1978, Oberlandesgericht Linz, *EFSlg.* 31.751; Judgment of 30.03.1983, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 43.733; Judgment of 28.12.1990, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 63.498.

³²⁸ Judgment of 08.04.1948, Landesgericht für Zivilrechtssachen Wien, *EvBl* 1948/410; Judgment of 03.10.1966, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 7.043.

³²⁹ Judgment of 02.03.1978, Oberlandesgericht Linz, *EFSlg.* 31.751.

³³⁰ Judgment of 02.03.1978, Oberlandesgericht Linz, *EFSlg.* 31.751.

³³¹ Judgment of 20.11.1986, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 51.687; Judgment of 16.06.1988, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 57.258.

³³² Judgment of 20.03.1984, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 46.292; Judgment of 22.09.1993, Oberster Gerichtshof, *EFSlg.* 72.340; Judgment of 08.06.1993, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 72.341.

engage in reasonable employment, a fictitious income is imputed³³⁴ and thus reduces the maintenance claim.

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

Under section 66 Austrian Marriage Act the claimant is only obliged to use the income from his or her capital assets,³³⁵ and is not obliged to realise his or her capital assets.³³⁶

Mention has already been made of section 67(2) Austrian Marriage Act³³⁷ under which the debtor is exempted from paying any maintenance to the other spouse if certain conditions are met³³⁸ and the creditor is capable of supporting him or herself from the income derived from 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?

Under section 66 Austrian Marriage Act the guilty spouse must pay the other spouse maintenance which is adequate to meet his or her needs.³³⁹ Consideration need not normally be given to the creditor's maintenance obligations in respect of third parties when determining his or her needs; in other words, only the creditor's needs may be

³³³ See Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 19 *et seq.*

³³⁴ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 453.

³³⁵ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 27; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 66 Austrian Marriage Act, marg. No. 1 Holzhammer & Holzhammer, *Ehe und Familie*, 2nd Edition, 2001, p. 34.

³³⁶ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 29; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 151; Hinteregger, *Familienrecht*, 2nd Edition, 2001, p. 100; Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 159.

³³⁷ See Question 78.

³³⁸ See Question 78.

³³⁹ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 14.

considered.³⁴⁰ However, the maintenance obligations of the creditor may increase his or her own needs if his or her own means are insufficient for him/her to support him or herself after meeting such obligations.³⁴¹ Since a claimant's maintenance obligations in respect of third parties may influence his or her needs, it may likewise affect the calculation of the claimant's income and assets.

Example: A and B are divorcing and B's maintenance amounts to €1,000 per month. B's monthly income amounts to €500. B's maintenance entitlement is thus €500. If B has a child from an earlier marriage for whom B must pay maintenance of €400 per month the total entitlement to support will be €900.

90. Are there social security benefits (e.g. income support or 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?

Under section 66 Austrian Marriage Act the claimant may only receive maintenance payments if his or her own income is insufficient. The question to answer is thus whether the definition of income includes social security benefits. It does indeed cover all kinds of welfare benefits,³⁴² including unemployment benefit,³⁴³ emergency benefit,³⁴⁴ maternity allowances, housing support, pension entitlements, apart from those relating to special needs³⁴⁵ (e.g. disability pensions, nursing

³⁴⁰ Judgment of 21.01.1965, Oberlandesgericht Linz, *EFSlg.* 5.229; Judgment of 16.09.1980, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 36.441; Klang & Schwind, *Kommentar zum allgemeinen bürgerlichen Gesetzbuch*, vol. I/1, 2nd Edition, 1964, p. 871.

³⁴¹ Judgment of 21.01.1965, Oberlandesgericht Linz, *EFSlg.* 5.229; Klang & Schwind, *Kommentar zum allgemeinen bürgerlichen Gesetzbuch*, vol. I/1, 2nd Edition, 1964, pp. 869, 874.

³⁴² Judgment of 06.09.1995, Oberster Gerichtshof, *SZ* 68/157; Judgment of 12.10.1995, Oberster Gerichtshof, *EFSlg.* 78.705.

³⁴³ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 160.

³⁴⁴ Judgment of 23.04.1996, Oberster Gerichtshof, *EFSlg.* 81.671; Judgment of 05.07.1991, Oberster Gerichtshof, *RZ*, 1992, 263 No. 87.

³⁴⁵ Judgment of 28.02.1991, Oberster Gerichtshof, *EFSlg.* 64.917; Judgment of 06.09.1995, Oberster Gerichtshof, *SZ* 68/157.

allowances).³⁴⁶ It should be noted, however, that case law is not always unanimous on this issue.³⁴⁷ Yet, there is no dispute as to the general fact that social security benefits rank ahead of the spouse's obligation to pay maintenance. According to its Judgment of 15 January 1981, SZ 54/6, it is even probable that the Austrian Supreme Court would assume an *obligation* on the part of the entitled spouse *to apply for* social security benefits.

VI. Questions of priority of maintenance claims

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

The priority of different maintenance claims results from the difference in their nature. This means that practice varies according to the grounds for divorce. A maintenance claim under section 66 Austrian Marriage Act may only be made if the marriage was dissolved on the ground of fault/matrimonial offence. In the case of divorce on the ground of separation, maintenance may be awarded under section 69(2) Austrian Marriage Act. Non-fault-based maintenance claims³⁴⁸ may be granted regardless of the grounds of dissolution.

The priority of different maintenance claims is provided by the answers to the questions *infra*.

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

With regard to the claim of a new spouse, prevailing doctrine³⁴⁹ and case law³⁵⁰ generally assumes the same rank for both claims. An

³⁴⁶ Schwimann, *Unterhaltsrecht*, 2nd Edition, p. 160 (1999); Hopf & Kathrein, *Eherecht*, 1997, pp. 259 *et seq.*

³⁴⁷ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg.No. 23 *et seq.*; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 151.

³⁴⁸ Section 68a Austrian Marriage Act.

³⁴⁹ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 454; Kerschner, *Familienrecht*, 2000, marg. No. 2/133; Zankl in Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 67 Austrian Marriage

exception to this principle is a maintenance claim under section 69(2) (maintenance due to divorce on the ground of a break up of the 'domestic community' with a ruling as to fault). In principle such a maintenance claim ranks ahead of that of a new spouse.³⁵¹ As has been said, a maintenance claim by a new spouse reduces the claim of the former spouse by 1–3%.³⁵² Registered partnerships do not exist under Austrian law.

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?*

This is a matter of dispute. Some authors take the view that the claim of a child has the same priority as that of the divorced spouse,³⁵³ and others that the claim of the child ranks ahead of the former spouse's claim.³⁵⁴

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

Reaching the age of majority does not influence an existing maintenance claim. The child's maintenance claim lapses only upon becoming able to support itself (e.g. gainful employment).³⁵⁵

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

Act, marg. No. 11. In contrast Schwind, *Kommentar zum österreichischen Eherecht*, 2nd Edition, 1980, p. 278: priority of the new spouse's claim.

³⁵⁰ Judgment of 10.05.1947, Oberster Gerichtshof, *JBl*, 1948, 163.

³⁵¹ Kerschner, *Familienrecht*, 2000, marg. No. 2/138; Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 456.

³⁵² See Question 70.

³⁵³ See, e.g. Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 67 Austrian Marriage Act, marg. No. 11.

³⁵⁴ Schwimann, *Familienrecht*, 4th Edition, 2002, p. 65; Schwind, *Kommentar zum österreichischen Eherecht*, 2nd Edition, 1980, p. 278; See also the view by Fenyves, 'Unterhalts- und vermögensrechtliche Vereinbarungen bei der Auflösung der Ehe aus zivilrechtlicher Sicht', in: Ruppe (ed.), *Handbuch der Familienverträge* 2nd Edition, 1985, p. 834 (fn 8).

³⁵⁵ Section 140(3) General Austrian Civil Code. See also Schwimann, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 140 General Austrian Civil Code, marg. No. 90 *et seq* and Kerschner, *Familienrecht*, 2000, marg. No. 2/75.

The divorced spouse's claim for maintenance ranks ahead of the claims of the debtor's adoptive parents, his or her own parents and his or her own grandparents.³⁵⁶

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?

Under section 71(1) first sentence Austrian Marriage Act the maintenance debtor (former spouse) is liable ahead of the creditor's relatives.³⁵⁷ In the event that the guilty spouse's ability to support him or herself in reasonable comfort would be endangered, the creditor's relatives are obliged to grant maintenance to the spouse.³⁵⁸ If there are no relatives obliged to grant maintenance, the entitled spouse must maintain him or herself by using his or her capital assets if this is equitable.³⁵⁹ In the absence of relatives and of capital assets, the other spouse must pay maintenance. However, his or her duty of maintenance is reduced according to equity in the light of his or her needs, capital assets and other obligations, as well as the capital assets and needs of the other maintenance creditors.³⁶⁰

The creditor's relatives are also liable if legal action against the debtor is excluded or is subject to significant obstacles in the home country,³⁶¹ e.g. unknown residence or frequent changes of employment.³⁶²

VII. Limitations and end of the maintenance obligation

³⁵⁶ Schwimann, *Familienrecht*, 4th Edition, 2002, p. 65.

³⁵⁷ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 71 Austrian Marriage Act, marg. No. 1.

³⁵⁸ Section 71(1) 2nd sentence Austrian Marriage Act.

³⁵⁹ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 160.

³⁶⁰ Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 160.

³⁶¹ Section 71(2) Austrian Marriage Act.

³⁶² Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 71 Austrian Marriage Act, marg. No. 5.

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?*

Under section 75 Austrian Marriage Act the maintenance obligation of the liable spouse extinguishes upon the claimant's remarriage.³⁶³ However, it is possible for the former spouses to agree that the maintenance entitlement shall not be terminated by the claimant's remarriage, so section 75 is not all-embracing.³⁶⁴ The fact that registered partnerships do not exist in Austrian family law has already been mentioned.³⁶⁵ There are no explicit rules governing the question as to whether maintenance claims are extinguished if the claimant enters into a *de facto* partnership.³⁶⁶ Prevailing doctrine is of the opinion that entering into a *de facto* partnership does not extinguish the entitlement to maintenance but merely suspends it.³⁶⁷ Recently, however, some authors have taken the view that there may be no entitlement to maintenance if the needs of the creditor are met within the *de facto* partnership.³⁶⁸

Following remarriage the maintenance claim only revives if the new marriage is annulled and the spouses acted in good faith with regard

³⁶³ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 458; Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 75 Austrian Marriage Act, marg. No. 1; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 75 Austrian Marriage Act, marg. No. 1; Holzhammer & Holzhammer, *Ehe und Familie*, 2nd Edition, 2001, p. 41; Judgment of 19.05.1954, Oberster Gerichtshof, *SZ* 27/134; Judgment of 15.06.1984, Landesgericht für Zivilrechtssachen Wien, *EFSJg* 46.304.

³⁶⁴ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 75 Austrian Marriage Act, marg. No. 3; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 163, 169.

³⁶⁵ See Question 92 at the end.

³⁶⁶ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 458; section 75 Austrian Marriage Act is not applied analogously, Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 75 Austrian Marriage Act, marg. No. 7.

³⁶⁷ Schwimann, *Familienrecht*, 4th Edition, 2002, p. 35; the same view is taken by Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, pp. 165 *et seq.*

³⁶⁸ Gimpel-Hinteregger, 'Der Unterhaltsanspruch des geschiedenen Ehegatten bei Eingehen einer Lebensgemeinschaft', in: Harrer & Zitta (ed.), *Familie und Recht*, 1992, p. 633; Binder, 'Die Problematik der Geschiedenen-Pensionsregelung', in: Harrer & Zitta (ed.), *Familie und Recht*, 1992, pp. 684 *et seq.*

to the ground for annulment.³⁶⁹ In the case of a *de facto* partnership the maintenance claim against the former spouse does not automatically revive upon the termination of the partnership but must be enforced by the entitled spouse.³⁷⁰

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?*

As mentioned in the answer to the previous question, entering into a *de facto* partnership suspends the claimant's maintenance claim insofar as the needs of the creditor are met within the *de facto* partnership. There are no rules as to the length of the partnership (long-term relationship). Prevailing case law defines a *de facto* partnership (informal relationship) as one in which two persons of a different sex cohabit, and which may be characterised as typical of marriage, e.g. the partners live together for better or worse, assist each other, etc.³⁷¹

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

In general the duration of the marriage has no effect on the maintenance claim. The only exception is to be found in the provision under section 68a(3) Austrian Marriage Act according to which non-fault-based maintenance is paid to a partner who, for example, has cared for a common child or relative.³⁷² In this case the entitlement is reduced or forfeited if, among other things, the marriage was of insufficient duration. The duration of the marriage is defined as the period between marriage and the filing of a divorce petition.³⁷³ Under

³⁶⁹ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 75 Austrian Marriage Act, marg. No. 6.

³⁷⁰ Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 12th Edition, 2002, p. 458; Schwimann, *Unterhaltsrecht*, 2nd Edition, 1999, p. 166; Judgment of 20.01.1991, Oberster Gerichtshof, *JBl*, 1991, 589.

³⁷¹ See the case law cited in the Judgment of 31.08.1988, Oberster Gerichtshof, *EFSlg.* 57.267; Judgment of 27.05.1988, Oberster Gerichtshof, *EFSlg.* 57.269; Judgment of 22.11.1990, Oberster Gerichtshof, *EFSlg.* 63.510; Judgment of 21.05.1996, Oberster Gerichtshof, *EFSlg.* 81.679.

³⁷² See Question 62.

³⁷³ Ferrari, in: Ferrari & Hopf (ed.), *Eherechtsreform in Österreich*, 2000, p. 53.

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German Supreme Court case law the duration of the marriage is insufficient if it has lasted for less than two years. A marriage which lasts longer than three years is never of insufficient duration in this context.³⁷⁴

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?

Under section 73(1) Austrian Marriage Act a needy claimant who is in such a position because of his or her own moral fault is only entitled to minimum maintenance. Moral fault is reproachable behaviour attributable to the spouse,³⁷⁵ e.g. alcoholism, avoidance of work, extravagance or gambling. Minimum maintenance is only sufficient to cover the absolute necessities of life.³⁷⁶

Pursuant to § 2 of that section additional needs caused by a creditor's intent or gross negligence establish no claim to increased maintenance.³⁷⁷

Section 74 Austrian Marriage Act includes a provision whereby the claimant's maintenance claim is forfeited if he or she commits a serious offence against the liable spouse after divorce or he or she behaves in a disgraceful or immoral way against the debtor's will. The entitled spouse loses his or her maintenance claim only in the case of particularly grave offences which must be more serious than those under section 49 Austrian Marriage Act,³⁷⁸ e.g. libelling the debtor,

³⁷⁴ Ferrari, in: Ferrari & Hopf (ed.), *Eherechtsreform in Österreich*, 2000, p. 53 with further references; Berka, *Scheidung und Scheidungsreform 2000*, 2000, p. 192, fn 928 with further references.

³⁷⁵ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 73 Austrian Marriage Act, marg. No. 3; Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 73 Austrian Marriage Act, marg. No. 1.

³⁷⁶ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 73 Austrian Marriage Act, marg. No. 4.

³⁷⁷ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 73 Austrian Marriage Act, marg. No. 5.

³⁷⁸ Judgment of 19.04.1977, Oberster Gerichtshof, *EFSlg.* 29.657; Judgment of 19.02.1988, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 85.857.

spreading untruths, serious abuse or assault.³⁷⁹ Disgraceful or immoral behaviour must constitute grave misconduct³⁸⁰ such as prostitution, procurement, alcoholism, drug abuse or drug trafficking.³⁸¹ Forfeiture results in a permanent loss of entitlement to maintenance in its entirety;³⁸² hence it cannot revive.³⁸³

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

In the event that the liable spouse dies, the obligation devolves upon his or her estate and heirs;³⁸⁴ the latter may obtain a reduction in the maintenance entitlement under certain circumstances.³⁸⁵ Under section 78(3) Austrian Marriage Act maintenance pursuant to section 68 Austrian Marriage Act³⁸⁶ expires with the debtor's death.³⁸⁷

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?

Under section 80 Austrian Marriage Act the spouses may enter into binding agreements on post-divorce maintenance. If such an agreement is reached before the divorce judgment enters into legal force, it cannot be made void because it facilitated the divorce or made it possible. The agreement is void, however, if it is based on a non-

³⁷⁹ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th Edition, 2001, marg. No. 162.

³⁸⁰ Judgment of 29.10.1969, Oberster Gerichtshof, *EvBl* 1970/126.

³⁸¹ See Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 74 Austrian Marriage Act, marg. No. 14.

³⁸² Judgment of 22.09.1970, Landesgericht für Zivilrechtssachen Wien, *EFSJg* 13.999.

³⁸³ Klang & Schwind, *Kommentar zum allgemeinen bürgerlichen Gesetzbuch* vol. 1/1, 2nd Edition, 1964, p. 898, fn 3.

³⁸⁴ Section 78(1) Austrian Marriage Act.

³⁸⁵ Section 78(2) Austrian Marriage Act. Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 78 Austrian Marriage Act, marg. No. 6 *et seq*; Judgment of 20.02.1992, Oberster Gerichtshof, *JBl*, 1992, 705.

³⁸⁶ See Question 62.

³⁸⁷ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 6th ed., 2001, marg. No. 164.

existent or obsolete ground for divorce.³⁸⁸ The agreement is void if it offends accepted moral standards in terms of its content or other circumstances, for instance, if maintenance is grossly disproportionate to the spouses' income and assets.

Under Austrian divorce law it is possible for the spouses to reach an agreement on maintenance before, after and during divorce proceedings³⁸⁹ The above limitations under section 80 Austrian Marriage Act must be borne in mind in respect of agreements which have entered into before the divorce judgment takes legal effect.

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

A spouse may agree to renounce his or her future right to maintenance. It is even possible for the spouses to agree upon a mutual renunciation of maintenance before the marriage;³⁹⁰ maintenance may be renounced on its merits.³⁹¹ The validity of such an agreement is likewise limited by morality.³⁹² For example, placing the creditor's ability to support him or herself at risk³⁹³ or transferring the maintenance duty on to a third party³⁹⁴ offends accepted moral standards. Another restriction on the right of renunciation is the *rebus*

³⁸⁸ The marriage could thus not have been dissolved, beyond this an offence against morality is necessary, Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 80 Austrian Marriage Act, marg. No. 9.

³⁸⁹ Fenyves, in: Ruppe (ed.), *Handbuch der Familienverträge*, 2nd Edition, 1985, pp. 845 *et seq*; Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 80 Austrian Marriage Act, marg. No. 6 *et seq*; as mentioned in Question 62, it is obligatory for the spouses to reach an agreement on maintenance in the case of divorce by consent.

³⁹⁰ Harrer & Heidinger, in: Schwimann, *Praxiskommentar zum ABGB*, vol. VII, 2nd Edition, 1997, section 1444 General Austrian Civil Code, marg. No. 28.

³⁹¹ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 66 Austrian Marriage Act, marg. No. 67; Judgment of 09.09.1953, Oberster Gerichtshof, SZ 26/222.

³⁹² Harrer & Heidinger, in: Schwimann, *Praxiskommentar zum ABGB*, vol. VII, 2nd Edition, 1997, section 1444 General Austrian Civil Code marg. No. 28.

³⁹³ Judgment of 20.03.1985, Oberster Gerichtshof, JBl, 1986, 777.

³⁹⁴ Harrer & Heidinger, in: Schwimann, *Praxiskommentar zum ABGB*, vol. VII, 2nd Edition, 1997, section 1444 General Austrian Civil Code, marg. No. 28.

sic stantibus clause (an obligation to consider significant changes in the circumstances).³⁹⁵

104. Is there a prescribed form for such agreements?

In principle, no specific form is prescribed, so such agreements may be concluded without using a given form.³⁹⁶ Agreements as to maintenance must, however, be notarised³⁹⁷ pursuant to section 1(1)(d) Compulsory Notarisation Act (*Notariatszwangsgesetz*) if they are based on gifts,³⁹⁸ or in other words if no counter-performance is required.³⁹⁹ If no counter-performance is required (whether or not this relates to capital assets)⁴⁰⁰ the agreement may be in return for the agreed renunciation.⁴⁰¹ Beyond this, it is essential that the agreement be made with the intention of donation.⁴⁰²

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

Approval by a competent authority is not required.

³⁹⁵ Judgment of 09.09.1953, Oberster Gerichtshof, *SZ* 26/222. For the *rebus sic stantibus* clause see Question 77.

³⁹⁶ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 80 Austrian Marriage Act, marg. No. 5; Kerschner, *Familienrecht* 2000, marg. No. 2/156; Fenyves, in Ruppe (ed.), *Handbuch der Familienverträge*, 2nd Edition, 1984, p. 847; constant jurisdiction Judgment of 09.09.1953, Oberster Gerichtshof, *SZ* 26/222; Judgment of 28.03.1956, Oberster Gerichtshof, *EvBl* 1956/311; Judgment of 08.01.1993, Oberster Gerichtshof, *JBl*, 1994, 56; Judgment of 25.08.1970, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 14.003.

³⁹⁷ A written agreement concluded before a notary public.

³⁹⁸ Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 80 Austrian Marriage Act, marg. No. 5.

³⁹⁹ Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, section 80 Austrian Marriage Act, marg. No. 1.

⁴⁰⁰ E.g., renouncing a ground for divorce.

⁴⁰¹ Pichler, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, vol. II, 2nd Edition, 1992, section 80 Austrian Marriage Act, marg. No. 3.

⁴⁰² Zankl, in: Schwimann, *Praxiskommentar zum ABGB*, vol. I, 2nd Edition, 1997, section 80 Austrian Marriage Act, marg. No. 5.

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