

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

**THE NETHERLANDS**

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**A. GENERAL**

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

The current source of law for divorce in the Netherlands is the Dutch Civil Code (Book 1 'Persons and Family Law', Title 9 'Dissolution of marriage', Articles 1:150-166, Title 10 'Decree of judicial separation and the dissolution of the marriage after judicial separation', Articles 1:168-183) and the Dutch Civil Procedural Code (Book 3, Title 6, Articles 814-827).

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

Since 1 October 1971 divorce in the Netherlands can only be granted on the ground of the irretrievable breakdown of the marriage (Article 1:151 of the Dutch Civil Code). Before the amendment of the law in 1971 four grounds existed for divorce (old Article 1:161): adultery, malicious fabrications, a conviction for certain criminal offences and cruelty. Under the Law of 6 May 1971 (in force from 1 October 1971) these four grounds of divorce have been replaced by the sole ground of the irretrievable breakdown of the marriage.

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

Several proposals to reform Dutch divorce law were made in the field of divorce proceedings. The entry into force of the present law on

divorce proceedings on 1 January 1993 did not put an end to the attempts to improve and, mostly, to simplify divorce proceedings and to make them less expensive. First of all, the Council of Ministers agreed to forward to Parliament for its reconsideration the communication entitled '*Compulsory representation in proceedings and the costs of proceedings*'. In this communication three options are presented in which, upon an application for divorce by both parties, compulsory representation is substituted by a divorce conciliator (a lawyer or a notary).<sup>1</sup> A bill to that effect, entitled '*Divorce without Legal Representation*', which made divorce by agreement possible, was submitted to the Lower House in early 1994. The proposed provisions mainly boiled down to the following. If consent exists between the spouses as to the divorce and related arrangements, a divorce agreement with the assistance of a lawyer or a notary can be made. Subsequently, the spouses will submit a common claim to the court with the attached agreement signed by the lawyer or notary in which it is stated that consent exists between the spouses regarding separation and related arrangements. This bill provoked strong criticism on the part of the Bar and the judiciary. On the one hand, the criticism concerned the necessary remuneration for the compulsory services of the lawyer or notary, which was considered to be too low. On the other hand, the fact that the bill did not provide sufficient guarantees for the protection of the weaker party (in particular a child) was also criticised. After it became clear that the bill in its present form could also not receive the support of Parliament, it was withdrawn in March 1998.<sup>2</sup>

In November 1995 the State Secretary of Justice, after having taken into account the above-mentioned criticism, established a Commission for the Amendment of Divorce Proceedings under the chairmanship of Professor *J. de Ruiter* (*De Ruiter II Commission*). The Commission was entrusted with making recommendations for the simplification of divorce proceedings against the background of the possibilities offered by conciliation in matters concerning divorce and parental access to children. The Report of the *De Ruiter Commission* entitled '*Divorce by a*

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<sup>1</sup> Netherlands Government Gazette, (*Staatscourant*) 05.07.1993, no. 124.

<sup>2</sup> By a Letter from the State Secretary of Justice of 19.03.1998; *Kamerstukken Tweede Kamer*, 1997-1998, 23 616, no. 4.

*Different Route*<sup>3</sup> was presented to the State Secretary on 2 October 1996. In this report proposals were made regarding divorce without having to appear before a judge as well as conciliation in matters concerning parental access and its supervision.<sup>4</sup> If judicial intervention is assumed as a starting point, then the present divorce proceedings are efficient, and the Commission did not see the point of either its further simplification nor in saving on the costs of the judicial proceedings and legal aid. Judicial proceedings should remain available in the case of a disputed divorce. At the same time, for those spouses who have reached an agreement as to their divorce and its consequences, it should be possible to settle the matter out of court. In order to protect the interests of the possible weaker party and the children when there is an out of court divorce settlement, necessary safeguards should be built into the procedure. In this respect the Commission referred to the following safeguards:

- The parties must be assisted by at least one lawyer or attorney;
- It must always be possible for both spouses to have recourse to the judge;
- A divorce agreement must contain arrangements concerning certain matters, such as provisions with regard to children;
- A lawyer or notary must provide the possibility for a minor of 12 years or older to voice his or her opinion about matters which concern him or her. If a child older than 12 disagrees with the arrangements which have been made, he or she must be informed by a lawyer or notary as to the possibilities to have recourse to the Child Care and Protection Board or to the judge;
- Those persons providing legal assistance in the case of a divorce without the intervention of the judge must meet specific requirements as to academic qualifications and professional experience.

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<sup>3</sup> Commissie Herziening Scheidingsprocedure (Commissie-De Ruiters), *Anders Scheiden*, 02.10.1996.

<sup>4</sup> On the Report see De Bruijn-Lückers, 'De zakke partij, bij 'anders scheiden', *FJR* 1996, p. 193 and Von Brucken Fock, 'Is anders scheiden ook behoorlijk scheiden?', *FJR* 1996, p. 229-239.

In order to settle disputes relating to parental access to children the Commission has offered possibilities of conciliation in matters of parental access and its supervision.

In reaction to the above-mentioned proposals<sup>5</sup> the State Secretary stated that it was too early to start the legislative process that would introduce extra-judicial divorce. The first step, according to her, should be experiments accompanied by research into conciliation in divorce and parental access matters, aimed at testing how the necessary safeguards for extra-judicial divorce can be implemented in practice. To this end, in July 1998 she set up the Supervisory Commission on Divorce Conciliation, which was charged with supervising these experiments. The experiments started in the spring of 1999 in Amsterdam, Leeuwarden, Den Bosch and The Hague. They came down to an offer of free of charge conciliation by a judge before or during the divorce proceedings (the so-called court-annexed experiment). After an interim extension the experiments ended on 1 July 2001. The results of the experiments have been included in the evaluation report entitled 'Conciliation in Action' prepared by the Free University of Amsterdam and the Verwey-Jonker Institute in Utrecht,<sup>6</sup> and they demonstrate that mediation instead of judicial proceedings turned out to be a success.

In particular, the results of divorce conciliation turned out to be very positive. Most of the participants were very satisfied. Conciliation is not considered to be an easy solution, but it does provide satisfaction if it works. Parties have the impression that they have made the arrangements themselves and consider it important that divorce matters can be settled without a quarrel. More than three-quarters of all conciliation efforts ended with an agreement on all relevant issues. It also transpired that one year after the conclusion of the agreements 60 per cent had been duly carried out.<sup>7</sup>

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<sup>5</sup> Letter of 11.07.1997, *Kamerstukken Tweede Kamer*, 1996-1997, 25 451, no. 1 and *Kamerstukken Tweede Kamer*, 1997-1998, 23 616, no. 4.

<sup>6</sup> B.E.S. Chin-A-Fat, M.J. Steketee, *Evaluatie Experimenten scheidings- en omgangsbemiddeling*, 2001.

<sup>7</sup> B.E.S. Chin-A-Fat, M.J. Steketee, *Evaluatie Experimenten scheidings- en omgangsbemiddeling*, 2001, p. 12-15 and 69-138.

The evaluation report also demonstrates a positive effect on the settlement of problems relating to parental access to children. In more than half of the cases where parents had resorted to conciliation, arrangements had been agreed upon, communication had been improved and the relationship with the children had benefited. Most of the parents were very satisfied with the conciliation procedure as such and the vast majority would opt for this instead of judicial proceedings.<sup>8</sup> In the report it was recommended:

- To stimulate conciliation at the earliest possible phase, preferably before the commencement of judicial proceedings;
- To establish by law that the judge has the power to refer the parents to conciliation in every proceeding regarding parental access upon the application of both parents or by virtue of their consent;
- To provide a possibility for minors of 12 years of age and older to make their opinion known;
- To remunerate conciliation for a maximum duration of 10 hours.<sup>9</sup>

## **B. GROUNDS FOR DIVORCE**

### **I. General**

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

Since 1 October 1971 divorce in the Netherlands can only be granted on the ground of the irretrievable breakdown of the marriage (Article 1:151 Dutch Civil Code). This applies to an application for divorce by one or both spouses. Divorce by consent is possible as long as it is based on the ground of irretrievable breakdown. According to Article 1:154 Dutch Civil Code divorce shall be granted at the joint request of the spouses if the request is based on their mutual consent that the

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<sup>8</sup> B.E.S. Chin-A-Fat, M.J. Steketee, *Evaluatie Experimenten scheidings- en omgangsbemiddeling*, 2001, p. 16-20.

<sup>9</sup> B.E.S. Chin-A-Fat, M.J. Steketee, *Evaluatie Experimenten scheidings- en omgangsbemiddeling*, 2001, p. 215-222.

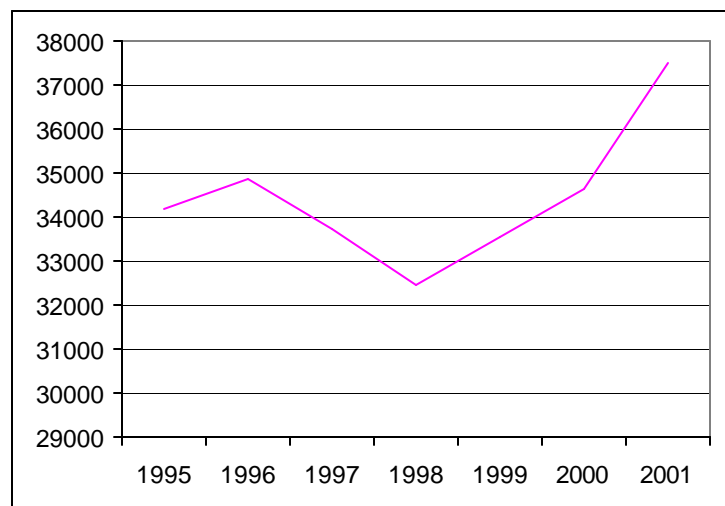
marriage has irretrievably broken down. Each spouse has a right to withdraw the request up until judgment is pronounced. Thus, 'divorce by consent' does not as such exist as an autonomous ground for divorce under Dutch law.

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

Divorce can only be granted when the marriage has irretrievably broken down. It can be seen that there was an increase in the divorce rate between 1995 and 2001. In particular, since 1998 the number of divorces has been steadily increasing. However, in percentage terms the growth is very small.<sup>10</sup>

*Divorce rate 1995-2001<sup>11</sup>*

| 1995   | 1996   | 1997   | 1998   | 1999   | 2000   | 2001   |
|--------|--------|--------|--------|--------|--------|--------|
| 34,170 | 34,871 | 33,740 | 32,459 | 33,571 | 34,650 | 37,505 |



<sup>10</sup> 34,170 in 1995 amounts to 37% of the total number of dissolved marriages. 37,505 in 2001 amounts to 39% of the total number of dissolved marriages.

<sup>11</sup> See *Centraal Bureau voor de Statistiek*, <http://statline.cbs.nl>

6. *How frequently are divorce applications refused?*

No statistics are available. However, it hardly occurs that divorce applications are refused. If one of the spouses states that the marriage has irretrievably broken down and if both spouses have lived separately for a considerable period of time the judge will grant the divorce even if the other spouse is denied the irretrievable breakdown of the marriage.

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

The three forms of separation – divorce, decree of judicial separation and dissolution of a marriage after judicial separation – can only be obtained through judicial proceedings. This procedure is a legal claim, to which not only the general rules on legal claims apply (Articles 261-291 Dutch Civil Procedural Code), but also special rules for separation procedures, as laid down in Articles 815-827 Dutch Civil Procedural Code. The procedural rules are identical for all three forms of separation, which means that Articles 815-827 form a uniform regulation.

Relevant as well is the 'Regulation of Cases Involving Separation Procedures',<sup>12</sup> containing rules of a more practical nature, such as the way in which claims and defences have to be served and provisional measures have to be applied for, and the terms of the judgment. The Regulation entered into force on 1 January 2001 and is applicable on a national basis. Before this date each of the 19 district courts (*arrondissementsrechtbanken*) had their own case regulations containing regional rules. These regional regulations now have to be in conformity with the national model. In this way the Regulation of Cases Involving Separation Procedures on the one hand avoids regional arbitrariness and, on the other, provides simplification and

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<sup>12</sup> <http://www.rechtspraak.nl>

elucidation as far as the procedural rules of separation are concerned.<sup>13</sup> The Regulation is as much a source of law as the Dutch Civil Procedural Code. The same role is played by the 'Uniform Regulation of the Courts of Appeal Involving Claim Procedures in Family Law Cases'<sup>14</sup> in appeal cases, as is the case in the district courts under the 'Regulation of Cases Involving Separation Procedures'. Unlike the latter regulation which is used in the district courts, the former regulation used in the appellate courts is applicable not only in separation procedures, but also in all family law procedures.

Since divorce is the most frequent form of separation, and also the central topic of this research, for practical purposes only the divorce procedure will be mentioned below, but it must be remembered that the procedures for both judicial separation and the dissolution of a marriage after judicial separation are identical to the divorce procedure.

The divorce procedure consists of two phases: a first written phase and a second oral phase, which is the actual hearing. Once the two phases have been completed, the procedure concludes with the judgment, which is referred to as a court order. As will be apparent below, different procedural requirements apply respectively to a procedure initiated by a sole application for divorce and a procedure initiated by a joint application. The first phase of the procedure is initiated by a claim, both in the case of a unilateral and a joint application for divorce (Article 1:150 Dutch Civil Code). The procedure commences with the service of the claim to the registry of the competent court (see question 8). In the case of an application for divorce by one spouse only, the claim should also be served upon the other spouse by a bailiff (Article 816, § 1 Dutch Civil Procedural Code). With respect to its contents, the claim must meet the requirements laid down in Article 278 in conjunction with Article 815 § 1 Dutch Civil Procedural Code. In practice, a 'divorce agreement' is usually attached to a joint claim. This agreement contains the mutual consent of both parties with respect to the main consequences of the divorce, such as maintenance and the

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<sup>13</sup> H.J. Snijders, M. Ynzonides and G.J. Meijer, *Nederlands burgerlijk procesrecht*, 2002, no. 354.

<sup>14</sup> <http://www.rechtspraak.nl>



costs of caring and educating minors, consequences which would generally result from mediation.<sup>15</sup> The contents of the divorce agreement can be included in the court's judgment, in whole or in part (Article 819 Dutch Civil Procedural Code). In the case of a sole claim by one spouse, the other spouse can, in response to the claim, submit a statement of defence. The defence can contain a counter-claim, for example: an independent application for divorce or judicial separation, possibly combined with an application for so-called ancillary measures, about which more will be said below (Article 282, § 4 in conjunction with Article 816, § 4 Dutch Civil Procedural Code). After the first written phase, in principle the hearing takes place (Article 279 Dutch Civil Procedural Code). The assignation of a sole claim without a hearing will only take place subject to the cumulative conditions that there is no need to hear minor children and that the defence has not been served on time<sup>16</sup> (Article 818, § 1 Dutch Civil Procedural Code). Article 279 Dutch Civil Procedural Code implies that in the case of a joint application, the claim can be assigned without a hearing. And generally, in the case of these frequently occurring joint claims, the assignation will take place, within four weeks, without a hearing, subject to the condition that there is no need to hear minor children.

The procedure concludes with the court order, preferably containing determinations not only concerning the divorce but also provisional and ancillary measures. It is appropriate to mention the following:

In the case of divorce and judicial separation every spouse can request provisional measures (Article 821 Dutch Civil Procedural Code). The procedure for requesting provisional measures is, like the separation procedure itself, initiated by a claim. This claim is, according to Article 3.2 of the Regulation, an independent claim and can therefore not be inserted in the separation (counter-)claim. The claim can be served before, during or after the separation procedure, up until the

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<sup>15</sup> C.M. van Eerdenburg, *Bemiddeling als alternatief voor een gerechtelijke echtscheidingsprocedure*, *FJR* 2001, p. 27; B. Chin-A-Fat/ M. Steketeer, *Evaluatie experimenten scheidings- en omgangsbemiddeling*, *FJR* 2001, p. 296-302; J. van Raak-Kuiper, *Mediation en rechterlijke bemiddeling in familiezaken*, *FJR* 2002, p. 43-49. See also on the mediation experiments: above Question 3.

<sup>16</sup> The time-limit for the defence is specified in Article 4.1 of the Regulation. In ordinary cases the time-limit is six weeks after the service by a bailiff's notification.

registration of the court order in the register of births, deaths and marriages, which then deprives provisional measures of their force (Article 826 Dutch Civil Procedural Code). Provisional measures concern, among other things, the use of the marital home, the custody of minor children to one of the parents, the visiting rights of the other parent and maintenance (Article 822-823 Dutch Civil Procedural Code). Provisional measures are pronounced by a court order against which any appeal or other means of recourse are not possible (an appeal in cassation in the interest of the law being an exception) (Article 824 Dutch Civil Procedural Code).

The matters which are provisionally settled by such provisional measures can also be finally determined in so-called ancillary measures. The procedure for ancillary measures is also initiated by a claim. Sometimes this claim is inserted in the separation claim, sometimes it is an independent claim, served during a pending separation procedure or even, as has been allowed by the Supreme Court,<sup>17</sup> on appeal against the court order under which the separation was pronounced.<sup>18</sup>

Although, in principle, in the Netherlands a divorce can only be obtained by means of judicial proceedings, a possibility does exist, however, to obtain a divorce without the intervention of the courts and theoretically even within 24 hours. Since 1 April 2001, the Act Opening Marriage to Same-Sex Couples has provided the possibility to easily transform a registered partnership into a marriage and vice versa. Apart from divorce, a marriage is also regarded as having been dissolved when it is transformed into a registered partnership (Articles 1:149 and 1:77a). Upon the request of both spouses, the civil status registrar draws up an act of transformation. Subsequently, the registered partners can dissolve their partnership by mutual consent. Their declaration must reach the civil status registrar within at least three months after the conclusion of the agreement in order to be

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<sup>17</sup> Supreme Court, 07.04.2000, *NJ* 2000, 377.

<sup>18</sup> Although partly out of date since the new Dutch Code of Civil Procedure entered into force on 01.01.2002 and since the introduction of the Regulation a year before, still informative on provisional measures and ancillary measures is: H. Lenters, *De rol van de rechter in de echtscheidingsprocedure*, 1993, p. 66-126.

registered (Article 1:80d(3)). However, if one so wishes, it is possible to register the agreement on the same day that the transformation of the marriage into a registered partnership has taken place. Therefore, theoretically, a 'lightning divorce' can be attained in one day. This expedited form of 'divorce' has recently led to new discussions. It has been argued that this possibility, which was underestimated by the Government, will encourage divorce because spouses may use this possibility impulsively and as a knee-jerk reaction. In many cases, they would not seriously consider the consequences. This would especially harm the interests of their children. On the other hand, spouses may make use of 'lightning divorces' for another reason. In principle, the law requires the permission of the court if the spouses wish to change their matrimonial property regime during their marriage (Article 1:119). This permission will only be granted if, after an investigation by the court, the creditors of the spouses will not be placed in a disadvantageous position with regard to their claims. If the spouses use the possibility of a 'lightning divorce' and if they subsequently remarry and enter into a prenuptial agreement, which contains a more profitable matrimonial regime for both of them, the aim of the judicial permission, that is to protect creditors, is thereby circumvented. No figures are available as yet, but the head of Civil Registration in Amsterdam has confirmed that several spouses made use of this possibility immediately after the entry into force of the Act Opening Marriage for Same-Sex Partners for this reason.

It is clear that the above-mentioned procedure represents the first step in the direction of a divorce without judicial proceedings, to a greater or lesser degree as the Commission for the Amendment of Divorce Proceedings advised in 1996.<sup>19</sup> In reaction to the latest increase in the divorce rate and especially the presumed increase in 'lightning divorces' in the Netherlands, the State Secretary of Justice acknowledged that the number of dissolutions of registered partnerships after the transformation of a marriage into a registered partnership has indeed increased.<sup>20</sup> She reaffirmed her previously

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<sup>19</sup> *Commissie De Ruiter, Anders Scheiden*, 02.10. 1996, Chapter 3.3.

<sup>20</sup> Letter by the State Secretary of Justice on 05.03.2002; *Kamerstukken Tweede Kamer*, 2001-2002, 28 000 IV no. 57.

expressed opinion<sup>21</sup> by stating that in her view the possibility of transforming a marriage into a registered partnership does not encourage divorce.<sup>22</sup> Besides, it was stated that in the agreement on the dissolution of a registered partnership arrangements should be made as to the effects of the dissolution, such as arrangements concerning maintenance, division of common property etc. In this respect, the State Secretary noticed that the arrangements to be made are mostly the same as those which are to be provided in the divorce agreement. She also affirmed that at present the Central Bureau of Statistics is considering whether it is possible to keep up to date the number of transformations of marriages into registered partnerships followed by the dissolution of the registered partnership by the common consent of the parties throughout the country.

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

The district court (*arrondissementsrechtbank*) is competent in the case of separation claims (Article 42 Judiciary Organisation Act). The district court where the home of the claimant or of one of the parties concerned (generally the other spouse) is located has territorial jurisdiction (Article 262, sub. a Dutch Civil Procedural Code). Either party can appeal against a district court order providing for separation (Article 358 in conjunction with Article 820 Dutch Civil Procedural Code). The appeal lies before the court of appeal (Article 60 Judiciary Organisation Act). Against the appeal judgment an appeal in cassation is possible before the Supreme Court (Article 426-429; Article 78 Judiciary Organisation Act).

Informally, the judge(s) hearing separation cases, is (are) referred to as the 'family chamber'. At first instance (the district court) the family chamber consists of only one judge, on appeal of three and on appeal in cassation of five judges

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<sup>21</sup> *Kamerstukken, Tweede Kamer, 2000-2001 no. 1700.*

<sup>22</sup> Keeping in mind the statistics in section 1.2 of this report it can be argued that this statement is far from convincing.

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?)*

A claim initiates the divorce procedure. This claim must be signed and delivered by a procurator litis (Article 278, § 3 Dutch Civil Procedural Code) to the court registry of the competent district court. If the procurator has not signed and delivered the claim, the court provides the opportunity to rectify the claim within a certain time on penalty of inadmissibility (Article 281 Dutch Civil Procedural Code). In the case of a sole application for divorce, the claim should also be delivered by a bailiff upon the other spouse (Article 816, § 1 Dutch Civil Procedural Code). The parties can personally attend the hearing, although most parties are usually accompanied by their lawyers, who act as spokespersons.

Legal aid, financed by the State, is a constitutional right, guaranteed in Article 18 § 2 of the Dutch Constitution. This regulation has been elaborated in the Legal Aid Act. Five 'Councils for Legal Aid' have been created to co-ordinate the granting of legal aid (Article 7 Legal Aid Act). Linked to each council for legal aid is an 'Office for the Provision of Legal Aid'. This office examines, for instance, the applications for legal aid and assigns lawyers (Article 10 Legal Aid Act). An important criterion in examining the applications is the applicants' ability to pay. Applications will only be considered from those whose monthly income is below €1344 for a single household or €1920 for a joint household.

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

The marriage is dissolved when the court order determining the dissolution of the marriage is registered in the register of births, deaths and marriages (Article 1:163, § 1, respectively Article 1:183 Dutch Civil Code). Registration can take place once the court order becomes final, i.e. is not subject to any appeal. If the court order is not registered, upon request of one of the spouses, within six months after becoming final, it will lose its force (Article 1:163, § 3 Dutch Civil Code).

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

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

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

Irretrievable breakdown of the marriage means a situation when cohabitation has become unbearable and no prospects exist for re-establishing a proper marital relationship.<sup>23</sup> Evidence should be adduced that any continuation of marital cohabitation has become unbearable and that no prospects exist for re-establishing an appropriate marital relationship to any extent.<sup>24</sup> Thus, two conditions must be met: cohabitation must have become unbearable, and the breakdown has to be irretrievable with no prospects of re-establishing a proper marital relationship. Irretrievable breakdown is of an objective nature. What is relevant is the breakdown itself and not its underlying cause.<sup>25</sup> The way in which the irretrievable breakdown is established depends on (a) whether both spouses apply for divorce on the ground of irretrievable breakdown (Article 1:154 Dutch Civil Code) or (b) whether there is a sole application by one of the spouses (Article 1:151 Dutch Civil Code).

(a) An application for divorce is submitted by both spouses

If both spouses submit an application for divorce expressing their common consent that the marriage has irretrievably broken down (Article 1:154), the judge will not enquire as to whether an irretrievable breakdown of the marriage has indeed taken place. The law departs from the general assumption that if two adults declare that their marriage has irretrievably broken down, this will be accepted as true.<sup>26</sup>

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<sup>23</sup> S.F.M. Wortmann, *Personen- en familierecht* – Suppl. 143 (October 1999), Boek 1, titel 9, afd. 2, Article 151 no.2.

<sup>24</sup> Supreme Court, 01.02.1980, *NJ*1980, 318.

<sup>25</sup> Asser-De Boer, Mr. C. Asser's *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Personen- en Familie Recht*, 1998, no. 603.

<sup>26</sup> Gr. Van der Burght and M. Rood-de Boer, *Personen en familierecht*, 1998, p. 444.

(b) An application for divorce is submitted by one of the spouses

If the application for divorce is submitted by only one of the spouses (Article 1:151 Dutch Civil Code), there are several possibilities for the defendant to react.

1) In the first place, it is possible that the defendant will acknowledge the irretrievable breakdown of the marriage. In this case the irretrievable breakdown is obvious. The judge can *ex officio* examine whether the situation admitted by the parties has indeed existed and the request for a divorce should then be granted.

2) Another possibility is that the defendant will defer to the judgment of the court. In this case the application should also be granted. The deferment in this case can be considered as an admittance of the irretrievable breakdown alleged by the applicant.

3) If during a certain period (of at least six weeks)<sup>27</sup> no defence has been lodged because the defendant does not appear before the court, the application for divorce will be granted.

In all the three previous cases it is possible that the court will not consider the merits of the case.

4) The final possibility is that the defendant will deny that an irretrievable breakdown has taken place. In this case the applicant must be given the opportunity to submit his or her evidence. As evidence the applicant should prove certain facts and circumstances, which have taken place during the marriage and, in his or her opinion, have resulted in the irretrievable breakdown. In this connection adultery and conduct which under the old law could be advanced as a ground for judicial separation (intemperate behaviour, mistreatment, serious insult) can be considered. However, even if one of the grounds provided by the old law is available and the facts are not disputed by the defendant or are obvious, it is not necessarily of decisive importance for the judge to declare that an irretrievable breakdown

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<sup>27</sup> Article 816, § 2 Dutch Civil Procedural Code.

has taken place. On the one hand, while considering the law of divorce in Parliament it was observed by the Minister that in the case of adultery by the defendant, if it is established, the claim for divorce should be granted. On the other hand, as a ground for the irretrievable breakdown the judge can consider other facts such as homosexual conduct or insemination by donor without the consent of the husband or wife, but this is not mandatory.<sup>28</sup> An application for divorce can be granted without the conduct mentioned under the old law. In this respect one can speak of several presumptions of irretrievable breakdown:

a) The very fact that one of the spouses advances facts for the existence of the irretrievable breakdown itself constitutes 'a very serious indication that an irretrievable breakdown does exist'.<sup>29</sup> Even if the submitted facts have not been proved, this will not necessarily entail that an irretrievable breakdown does not exist.<sup>30</sup> While considering the law of divorce in Parliament it became clear that in establishing the existence of the irretrievable breakdown primary attention should be given to the opinion of the applicant. During the debate with the Permanent Commission of Justice in the Lower Chamber it was observed that 'if the applicant, while adducing the grounds for divorce, claims and continues to claim that he or she cannot live with the defendant in any case, this must be considered by the judge as being a very serious indication that an irretrievable breakdown does exist'.<sup>31</sup>

b) When the spouses have not cohabited for a considerable period of time, this must be regarded as a serious indication that an irretrievable breakdown has taken place.<sup>32</sup> The relevant

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<sup>28</sup> S.F.M. Wortmann, *Personen- en familierecht – Suppl. 143* (October 1999), Boek 1, titel 9, afd. 2, Article 151 no.2.

<sup>29</sup> Supreme Court, 06.12.1996, *NJ*1997, 189.

<sup>30</sup> Supreme Court, 22.03.1974, *NJ*1974, 354 (WLH)

<sup>31</sup> S.F.M. Wortmann, *Personen- en familierecht – Suppl. 143* (10.1999), Boek 1, titel 9, afd. 2, Article 151.

<sup>32</sup> Minkenhof, p. 32



case law also supports this conclusion.<sup>33</sup> As the Dutch Supreme Court observed: 'The marriage between the parties has irretrievably broken down; the fact that at the time of pronouncing the judgment the parties had been living apart for about two and a half years means that the husband is not inclined to continue the cohabitation'.<sup>34</sup> Generally speaking the irretrievable breakdown can be based on two grounds: (1) living apart for more than two years and (2) one of the spouse refuses to re-establish the cohabitation.<sup>35</sup>

c) One of the presumptions of an irretrievable breakdown is mental illness on the part of one of the spouses. It follows from the explanatory memorandum that the judge, in establishing whether there is an irretrievable breakdown, should take medical aspects into consideration. It is necessary that the judge acquires all the relevant information from medical specialists concerning the seriousness of the mental illness and the possibilities of recovery. It has also been observed in the memorandum that the medical aspect is not the only aspect which should be taken into account while establishing the existence of an irretrievable breakdown: the judge can also conclude that as a consequence of long-lasting mental illness the gulf between the spouses has become so large and permanent that even a future recovery – possibly only partial – could no longer unite the spouses.<sup>36</sup>

d) In 1975 one of the Dutch district courts was confronted with the question whether differences in religious belief between the spouses can lead to an irretrievable breakdown. The court took the view that the freedom to manifest one's religion which is guaranteed under the Dutch Constitution does not mean that differences of opinion on religious grounds cannot lead to such an estrangement between the parties so that -

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<sup>33</sup> District Court of Amsterdam, 15.05.1972, *NJ* 1972, 399; Court of Appeal of s Hertogenbosch, 09.10.1973, *NJ* 1974, 39

<sup>34</sup> Supreme Court, 01.02.1980, *NJ* 1980, 318

<sup>35</sup> Supreme Court, 12.07.2002, Jurisprudentie Online: <http://www.rechtspraak.nl>

<sup>36</sup> *Personen- en Familierecht, Tekst en Commentaar*, 2002, p. 198.

taking account of other circumstances of the case - one can speak of an irretrievable breakdown.<sup>37</sup>

In spite of all these different circumstances which to date the courts have taken into account when the irretrievable breakdown of a marriage is considered, in the majority of cases the mere and only fact that a divorce is requested and both spouses have not cohabited for a considerable period of time, is to be regarded as the most serious indication for the judge that an irretrievable breakdown of the marriage does exist.

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

The application for divorce can no longer be rejected on the ground that the irretrievable breakdown is, to a considerable extent, the fault of the applicant which was the case under Article 1:152 of the old Civil Code. This so-called fault-based defence was abolished in 1993. The notion of fault is to a certain extent only relevant with respect to maintenance claims and – indirectly – alimony payments because while assessing the amount of maintenance non-financial factors such as misconduct must also be taken into consideration. See also question 21.

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

No.

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

No.

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<sup>37</sup> District Court of Zwolle, 19.02.1975, NJ 1976, 266.

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

No.

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

(a) Which circumstances suspend the term of separation?

No.

(b) Does the separation need to be intentional?

No.

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

No.

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

No.

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

No.

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

After the Law on Separation Proceedings came into force on 1 January 1993, the parties no longer have to submit to the judge an agreement as to arrangements between them concerning their children and matters relating to property rights. If the parties have reached such an agreement, the judge can, at the request of the parties, include it in whole or in part in the judgment (Article 819 Dutch Civil Procedural Code). The executory copy of the court order acts as a writ of

execution (Article 430 Dutch Civil Procedural Code). In principle, there are no requirements as to the form of the divorce agreement.<sup>38</sup>

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

Within the Dutch legal system arrangements relating to the custody of children after the divorce are not exclusively and solely left to the parties: the authorities should ensure that the necessary arrangements have been made and that they are in the interest of the child.<sup>39</sup> However, the judge will certainly adhere to the parties' agreement as far as possible.<sup>40</sup> In 1998 joint custody after divorce was transformed from a mere option into the main rule:<sup>41</sup> since then it has become automatic, 'unless the parents or one of the parents have requested the District Court to determine that, in the best interest of the child, custody should be awarded to only one of them' (Article 1:251 § 2 of the Dutch Civil Code).

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

Under Article 1:153 (1), if, as a consequence of the requested divorce, the existing prospects of payment to the other spouse after the unexpected death of the spouse who made the divorce application would be lost or considerably diminished, and due to this the other spouse objects to this application, the divorce cannot be granted until the necessary arrangements are made which, in the circumstances of the case, are regarded as reasonable with respect to both spouses. The judge can set a period to this end. Article 1:153 (2) further specifies that the first paragraph is not applicable: (a) if it can reasonably be expected that the other spouse can make the necessary arrangements in such a case him or herself; (b) if the irretrievable breakdown of the

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<sup>38</sup> Supreme Court, 26.01.1979, *NJ* 1980, 19.

<sup>39</sup> Gr. Van der Burght, M. Rood-de Boer, *Personen en familierecht*, 1998, p. 446.

<sup>40</sup> Gr. Van der Burght, M. Rood-de Boer, *Personen en familierecht*, 1998, p. 446.

<sup>41</sup> Act of 30.10.1997, *Staatsblad* 1997, no. 506; the Act entered into force on 01.01.1998.

marriage has mainly been caused by the other spouse. Thus, the meaning of this article is that the divorce can be postponed if, as a result of it, the prospects of pensions and the like would be lost or seriously impaired. The divorce can nonetheless be granted if the necessary arrangements are made. In this way it can be prevented that particularly the wife will be badly cared for in the case of the unexpected death of her husband.<sup>42</sup> As far as we know as yet, there has been no case law on this article.

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

#### **I. General**

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

Special rules for maintenance after divorce are contained in the Dutch Civil Code (Articles 1:157-160) and have been elaborated upon by the courts. In addition, the rules on maintenance as laid down in Articles 1:400 (1) and 1:401-403 are also applicable.

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

The old Article 280 of the Dutch Civil Code of 1838 contained the following main elements of the ground for the maintenance obligation: (a) the right of the wife to maintenance during and on the basis of the marriage in relation to her husband; (b) the presumption that the marriage was supposed to last for a lifetime; (c) compensation in the form of maintenance; (d) the fault basis of the loss of the right to maintenance (i.e. the loss of the right to maintenance must be caused by the fault of the spouse; (e) responsibility of the spouse on the ground of fault.<sup>43</sup>

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<sup>42</sup> Explanatory Memorandum, *Kamerstukken Tweede Kamer*, 10 213, no. 3, p. 18.

<sup>43</sup> D.M. Campagne, *Alimentatie, onderhoudsplicht tussen voormalige echtgenoten, betalingen ter zake van echtscheiding...een evolutie*, 1978, pp. 58-59.

The so-called 'big lie-judgment' of 22 June 1883 authorized divorce by mutual consent.<sup>44</sup> As a result of this, according to D.M. Campagne, several of the above-mentioned elements of the basis for the maintenance obligation *de facto* diminished.<sup>45</sup> The growing gap between the divorce and the maintenance obligation as to the applicable criteria had to lead to the birth of the new legal source for the maintenance obligation. In its judgment of 21 November 1913,<sup>46</sup> the Supreme Court decided that the judge is entirely free in his decision concerning factors which he or she considers relevant for the determination of the maintenance obligation after the divorce: it is he or she who decides whether to grant maintenance or not. The more the practice of the 'big lie' openly pushed aside the strict statutory principle of fault, the more pressing the question of the reasons for the post-marital maintenance obligation became. In 1919 the Supreme Court<sup>47</sup> declared that the maintenance obligation 'rests on life's relationship as it is created by the marriage and this effect of it...remains in force even though the marital bonds are totally or partially broken'. However, it is still true that, as Minkenhof concluded, 'before the new Divorce Act of 1971, in order to be granted maintenance after divorce it was necessary that the one who received this payment was an applicant in the procedure, but if this requirement was satisfied, for the rest the judge was free as to whether to grant maintenance taking all the circumstances into account, including those which were non-financial'.<sup>48</sup> The major change brought about by the new Divorce Act of 6 May 1971<sup>49</sup> was that it explicitly eliminated the distinction between the guilty and the innocent party, and thus the procedural position of the spouse is, in principle, no longer relevant for the question of maintenance.<sup>50</sup>

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<sup>44</sup> D.M. Campagne, *Alimentatie, onderhoudsplicht tussen voormalige echtgenoten, betalingen ter zake van echtscheiding...een evolutie*, 1978, p. 59.

<sup>45</sup> D.M. Campagne, *Alimentatie, onderhoudsplicht tussen voormalige echtgenoten, betalingen ter zake van echtscheiding...een evolutie*, 1978, p. 59.

<sup>46</sup> NJ 1913, 1320.

<sup>47</sup> Supreme Court, 11.04.1919, NJ 1919, 574.

<sup>48</sup> A.A.L. Minkenhof, H. Nuytinck and M. van Look, *Preadvieszen over het onderhoud na echtscheiding en scheiding van tafel en bed in Nederland en België*, 1976, p. 9.

<sup>49</sup> See Question 2.

<sup>50</sup> At present, the question of fault is only relevant within the scope of financial arrangements under Article 1:153 of the Dutch Civil Code. See Question 21 (Boek I, ABC).

The 1971 Act did not bring any changes to the main rule contained in Article 1:157 of the Dutch Civil Code, according to which the judge *may* grant maintenance although he is not required to do so. The new act also did not introduce anything new concerning the established rule that when considering whether the maintenance can be granted or whether there is a ground for the modification of the previous decision on this point, the judge can take into account all the circumstances of the case, including the behaviour of the wife and that of the husband during the marriage and after the divorce.<sup>51</sup>

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

No.

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

According to Article 1:157 (1) Dutch Civil Code, in the decision granting a divorce or in a subsequent decision the judge may award maintenance to the former spouse, at his or her request, if he or she does not have sufficient income to maintain himself or herself and cannot reasonably be expected to be able to gain such income. It should be pointed out that under this provision the judge '*may*' grant maintenance. He is authorized, but is not obliged to do so and, as a consequence, has wide discretion in this respect<sup>52</sup>, which is furthermore extended by the separation of the maintenance question and the question of fault. 'The judge, to a large extent, can thus be guided by fairness, but, nevertheless, he is not absolutely free in reaching his decision. For awarding maintenance two principles are of great importance, namely: the principle of the lack of means, on the one hand, and, on the other, the ability to pay principle.<sup>53</sup>

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<sup>51</sup> This issue is considered in more detail in Question 65 (Boek I, ABC).

<sup>52</sup> This discretion goes hand in hand with a strict duty to justify the decision. See, e.g., Supreme Court, 06.2001, *RvdW*2001, 122. In addition, the judge must remain within the limits of the legal dispute; Supreme Court, 30.10.1998, *NJ*1999, 102.

<sup>53</sup> P. Vlaardingerbroek, K. Blankman, A. P. van der Linden, E.C.C. Punselie and G.G.M. van Wamelen, *Het hedendaagse personen- en familierecht*, 2002, p. 129.

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?*

Rules relating to maintenance upon divorce are not connected with the rules relating to matrimonial property law. However, the judge can take the latter into account when awarding maintenance.

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

Pension rights relate to the matrimonial property relationship of the spouses which is a division of the expectations relating to the past, whereas maintenance is a future obligation. The judge can take pension rights into account when determining the maintenance limitation period.

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

No.

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.*

As there is only one ground for divorce under Dutch law, namely the irretrievable breakdown of the marriage, there is only one type of maintenance claim after divorce.<sup>54</sup>

63. *Are the divorced spouses obliged to provide information to each other spouse and/or to the competent authority on their income and assets? Is*

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<sup>54</sup> See Articles 1:157-160; 1:400 (1) and 1:401-403 of the Dutch Civil Code.



*this right to information enforceable? What are the consequences of a spouse's refusal to provide such information?*

Law does not regulate this obligation. However, according to a recent decision of the Supreme Court, the divorced spouses are obliged to provide information concerning their income and assets to the competent authority.<sup>55</sup>

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

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

According to Article 1:397 (1) of the Dutch Civil Code, when establishing the amount of maintenance due on the part of blood relatives and relatives in law, the lack of means of a person who is entitled to maintenance, on the one hand, and the ability to pay on the part of a person who is obliged to pay maintenance, on the other, will be taken into account. Although only blood relatives and relatives in law are mentioned in this article, the financial conditions provided by it are also of importance for maintenance after divorce.<sup>56</sup> The purpose of the limitation expressed in the text of this article is to provide for the possibility of taking other conditions into account when awarding maintenance.<sup>57</sup>

Under Article 1:157 (1) of the Dutch Civil Code the judge enjoys wide discretion as regards questions relating to the granting of maintenance. This freedom manifests itself, in particular, in the fact that the judge, when awarding (or modifying) maintenance after divorce, has the freedom to take all the circumstances of the case into account.<sup>58</sup> This

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<sup>55</sup> See e.g. Supreme Court, 12.04.2002, <http://www.rechtspraak.nl>

<sup>56</sup> Supreme Court, 10.05.1974, *NJ* 1975, 183 (EAAL); S. F. M. Wortmann and J. van Duijvendijk-Brand, *Compendium van het Personen- en Familierecht*, 2002, p. 136.

<sup>57</sup> S. F. M. Wortmann and J. van Duijvendijk-Brand, *Compendium van het Personen- en Familierecht*, 2002, p. 136.

<sup>58</sup> Supreme Court, 20.12.1991, *NJ* 1992, 180. See also Supreme Court, 12.12.1975, *NJ* 1976, 573 (EAAL).

means that, apart from financial circumstances, other factors can also be taken into consideration.

Among these pertinent factors of a non-financial nature, the duration of the marriage and the behaviour of the person who is entitled to maintenance<sup>59</sup> may be taken into account. Depending on the duration of the marriage, its consequences for the earning capacity of the wife can be more drastic. The duration as well as the amount of maintenance are influenced by this factor.<sup>60</sup>

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

On 1 July 1992 Article 1:167 of the Dutch Civil Code dealing with divorce proceedings was amended.<sup>61</sup> The main difference with the law before 1992 is that the judge can also award maintenance at the expense of the spouse upon whose request the divorce is granted. Consequently, maintenance is in principle separated from the question of fault. However, prior to this change in spousal maintenance law, in its decision of 4 June 1965<sup>62</sup> the Dutch Supreme Court admitted the possibility that the spouse upon whose request the marriage had been dissolved had a moral duty to contribute to the maintenance of 'the guilty party' after divorce; this duty can be so pressing that it can be considered to be a natural obligation. In connection with this change, during the discussions in Parliament the question was asked how it can be consistent with case law, also under the new divorce law of 1992, that, when determining maintenance, the behaviour of the spouse can be taken into account. The Minister's answer was that the only aspect which has been changed under the new law is the procedural position of the spouse. The procedural position of the spouse, i.e. whether he or she is a claimant or a respondent, is no longer relevant to the question of maintenance; under the new law the respondent can also request maintenance. However, when considering a request for maintenance, the judge has discretion whether to take

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<sup>59</sup> See the answer to Question 65.

<sup>60</sup> Supreme Court, 19.04.1996, *NJ* 1997, 57.

<sup>61</sup> The Law of 01.07.1992, *Staatsblad* 1992, nr. 373 which entered into force 01.01.1993.

<sup>62</sup> Supreme Court, 04.06.1965, *NJ* 1965, 277.

into account the same conditions, which played a role in maintenance proceedings under the former law. Reproachable behaviour on the part of the spouses also belongs to these conditions.<sup>63</sup>

When awarding maintenance the judge may take into account any possible misconduct on the part of the parties before as well as after the divorce. What matters here are the specific circumstances, which differ to a great extent in each case, but which are so grievous that it cannot (can no longer) be expected that the person who is obliged to pay maintenance has to continue to support the person in question.<sup>64</sup> For example, a wife who has attempted to murder her husband cannot claim maintenance after her divorce and release from prison.<sup>65</sup> In certain cases the existence of a wife's lesbian relationship can be grievous as far as the husband is concerned.<sup>66</sup> The decision of the District Court of Groningen of 10 March 1970 also represents an example of the case when the wife's misconduct, namely blemishing the honour and good name of the husband before third persons, resulted in the maintenance being reduced to zero.<sup>67</sup>

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

No, only the debtor's factual situation after the dissolution of the marriage is decisive. The way in which the spouses had organized their marriage life is of no relevance with regard to the question whether one of the spouses may claim maintenance.<sup>68</sup> However, the judge will certainly take these circumstances into account when determining the amount and the limitation period of the maintenance.

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<sup>63</sup> S.F.M. Wortmann, *Personen- en familierecht – Suppl.* 143 (October 1999) Boek 1, titel 9, afd. 2, Article 151 no.1.

<sup>64</sup> Supreme Court, 09.10.1964, *NJ* 1966, 84, Supreme Court, 02.04.1965, *NJ* 1966, 85, Supreme Court, 10.05.1974, *NJ* 1975, 183, Supreme Court, 03.01.1975, *NJ* 1976, 330, Supreme Court, 17.03.1978, *NJ* 1978, 489.

<sup>65</sup> Supreme Court, 21.02.1986, *NJ* 1986, 382.

<sup>66</sup> Supreme Court, 19.12.1980, *NJ* 1982, 65.

<sup>67</sup> District Court of Groningen, 10.03.1970, *NJ* 1970, 234.

<sup>68</sup> Supreme Court, 09.02.2001, *NJ* 2001, 216, Supreme Court 01.02.2002, *RvdW*2002, 27 (the maintenance obligation does exist even if the parties concluded a sham marriage)

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

The claimant's lack of means must exist within the maximum limitation period of 12 years (Article 1:157 § 4 of the Dutch Civil Code). This period is strict. If one of the spouses files a maintenance request more than 12 years after the dissolution of the marriage no maintenance will be granted even if the claimant had fully met his or her living costs after the divorce, independent of the other spouse.<sup>69</sup>

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

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

Until 1994 the Dutch Civil Code contained no time-limits for the duration of the maintenance. The judge could grant maintenance for a certain specific period of time.<sup>70</sup> The Law of 28 April 1994<sup>71</sup> and the Law of 7 July 1994<sup>72</sup> provided a statutory basis for the limitation of the duration of maintenance and signalled the end of 'a life long' duty to provide maintenance. The legal grounds for limiting maintenance in time are found in the governmental report entitled 'Limitations on the Duration of Maintenance'.<sup>73</sup>

'The responsibility taken by entering into a marriage does imply a duty to contribute to the maintenance of the other party, but it does not justify that this duty continues to exist without limits after the end of the marital bonds. When answering the question how far this duty of maintenance should extend, the duration of the existence of the lack of means determined by the marriage is also important. As a consequence of the division of duties in the marriage

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<sup>69</sup> Supreme Court, 08.05.1998, *RvdW*1998, 101 C.

<sup>70</sup> Supreme Court, 11.06.1982, *NJ* 1983, 595 and 596; Supreme Court, 22.01.1993, *NJ* 1993, 233.

<sup>71</sup> *Staatsblad* 1994, nrs. 324 and 325.

<sup>72</sup> *Staatsblad* 1994, nr. 570.

<sup>73</sup> Explanatory Memorandum, *Kamerstukken Tweede Kamer*, 1985-1986, 19 295, no. 3.

differences in social opportunities can arise. So, the role of a wife in the marriage and the responsibility for taking care of the children that she takes on herself result during and after the end of the marriage in her being given a contribution from the husband. Often the lack of means related to the marriage can cease to exist after a certain time. The situation that a person who is entitled to maintenance still cannot provide for his or her maintenance on one's own, can no longer be attributed to the marriage, but can result from other social circumstances, for example, a specific situation on the labour market. Another ground for the limitation is that nowadays it is generally considered to be unfair that former spouses are tied by the duty of maintenance to each other on a life long basis. This unfairness is considered to be all the more so because the question of fault is no longer relevant for the dissolution of the marriage and maintenance should no longer be regarded as compensation for the former wrong, and the irretrievable breakdown of the marriage as such is a ground for divorce.<sup>74</sup>

The new provisions are to be found in Article 1:157 (3-6) and Article 1:158 (second sentence) of the Dutch Civil Code. The starting point is that the duration of the maintenance established by the judge at the request of one of the spouses ends no later than 12 years after the date of divorce (Article 1:157 (3) of the Dutch Civil Code). The duty of maintenance is thus limited, in principle, to 12 years. If no period has been established by the judge,<sup>75</sup> the maintenance duty ends after the expiry of the period of 12 years, which starts to run from the date of the registration of the court decision in the civil status register (Article 1:157 (4) of the Dutch Civil Code). This also means that the first request for maintenance should be submitted within 12 years after the registration. After the lapsing of this period such a request will no

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<sup>74</sup> Explanatory Memorandum, *Kamerstukken Tweede Kamer*, 1985-1986, 19 295, no. 3, p. 6.

<sup>75</sup> According to Asser-De Boer, *Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Personen- en Familie Recht*, 1998, no. 449 it fits within the statutory system that the judge establishes the period of maintenance in all cases.

longer be admissible.<sup>76</sup> The period of 12 years is accordingly an expiry date, which may not be set aside. If the judge, pursuant to Article 1:157 (3) of the Dutch Civil Code, has determined a specific period, he is not allowed to state that this period is not subject to prolongation.<sup>77</sup> At the same time the judge is authorized to reduce maintenance during the period when it continues to be due.

For those who have divorced after 1 July 1994<sup>78</sup> and are obliged to pay maintenance, this duty ends, in principle, after the period of 12 years. It does not matter whether the parties have themselves agreed on maintenance or that the maintenance has been judicially determined. However, the 12-year period is not an absolute maximum. The parties are free to agree to a longer period in their agreement. If they have not included such a period in the agreement, the period of 12 years automatically applies.

In addition, Article 1:157 of the Dutch Civil Code concerning the termination of maintenance contains a hardship clause. According to this provision, if the end of maintenance as a result of the expiry of the period established under Article 1:157 (4) of the Dutch Civil Code, is of such a drastic nature that a non-modified adherence to this period cannot be reconciled with the requirements of fairness and reasonableness concerning a person who is entitled to maintenance, upon the request of the latter the judge may establish an additional period of maintenance. Thus, a person who is entitled to maintenance can request the judge to prolong the period of maintenance if its termination is in conflict with the principle of fairness and reasonableness. Such a request should be submitted within three months after the end of the period of maintenance. The judge will consider whether prolonging the period is possible (Article 1:157 (5) of the Dutch Civil Code).

The 12-year period has been chosen taking into account the most undesirable situation when the youngest child of that marriage has been born after the divorce of its parents. The 12-year period provides

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<sup>76</sup> Supreme Court, 08.05.1998, *NJ* 1998, 889.

<sup>77</sup> Supreme Court, 30.01.1998, *RvdW* 1998, 31.

<sup>78</sup> The Act of 28.04.1994 entered into force on this date.

an opportunity to a person who is entitled to maintenance to care for the child and, after the children have become independent, to take the necessary steps to maintain oneself.<sup>79</sup>

Finally, Article 1:157 (6) contains a rule that does away with the life long enjoyment of maintenance after a marriage of a short duration without any children. If the duration of the marriage has not exceeded 5 years and no children have been born out of it, the duty to maintain ends after the expiry of the period which is equivalent to the period of the marriage and starts to run from the date when the court decision is registered in the civil status register. The maintenance period set by the judge in such cases cannot, however, be longer than 5 years. At the same time, its prolongation by setting an additional period according to Article 1:157 (5) of the Dutch Civil Code is possible.

Since 1 July 1994 it should be distinguished whether maintenance has been established or agreed upon before 1 July 1994 (the so-called old cases) or on 1 July 1994 or later. If the duty to maintain dates from 1 July 1994, then the transitional provisions under Article II (2-4) of the Law on the Limitation of Maintenance will apply (and thus not the provisions of Article 1:157 (4-6) of the Dutch Civil Code). This implies, in principle, the obligation to pay for a maximum of 15 years. A person under an obligation to maintain his or her former spouse, who has paid for 15 years or longer, can request the judge to terminate the maintenance duty. The judge will grant such a request unless the termination is particularly unfair to the person who is entitled to maintenance. In such a case the judge, upon the request of a person who is entitled to maintenance, may establish an additional period.

A person under a duty to maintain, who on 1 July 1994 or thereafter had already been paying for 15 years or longer, could not request the judge to terminate the maintenance obligation. The Limitation of Maintenance Act contains a transitional period of 3 years. Only on the 1 July 1997 could the duty to maintain for a minimum of 15 years be terminated. The purpose of this rule was to prevent a person who was entitled to maintenance from ending up in difficulties as a result of a

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<sup>79</sup> S.F.M. Wortmann and J. van Duijvendijk-Brand, *Compendium van het Personen- en Familierecht*, 2002, p. 138.

very sudden termination. This period gave such a person the necessary time in order to prepare him/herself for the new situation. During this period a request to prolong the maintenance obligation can also be made. Thus, the present Dutch law envisages 3 limitation periods:

- 12 years for divorces granted after 1 July 1994;
- 15 years for divorces in 'old cases';
- 5 years for divorces after brief marriages without children.

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

The standard of living during the marriage is one of the determining factors for establishing the amount of maintenance to be paid<sup>80</sup>. However, its importance can diminish with the lapse of time. It is thus not always fair to claim that the same standard of living as during the marriage must be sustained over the years.<sup>81</sup> According to the Court of Appeal of Amsterdam, the possibility of taking into consideration the well-being of the former spouses during the marriage, does not, pursuant to current social beliefs, mean that a man is under a continuing obligation to enable his former wife to continue to maintain a lifestyle to which she had become acquainted during the marriage, even if he is financially able to provide for such a lifestyle. In this respect, the Court took into consideration the fact that a woman in the case in question found herself in a similar situation as the one she would have found herself in had she not married.<sup>82</sup>

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<sup>80</sup> Supreme Court, 25.06.1965, *NJ* 1965, 385; Supreme Court, 30.06.1967, *NJ* 1967, 341; Supreme Court, 12.02.1988, *NJ* 1988, 945. For the details as to the calculation of maintenance in this case see Question 70.

<sup>81</sup> Report by the Dutch Association for the Administration of Justice's 'Maintenance Standards' Working Party, published in *Trema*, 2001 no. 1, in: *Personen- en Familierecht, Tekst en Commentaar*, 2002, p. 672.

<sup>82</sup> Court of Appeal of Amsterdam, 05.12.1972, *NJ* 1973, 471.



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?

When considering the amount of maintenance to be granted, the judge must determine the debtor's ability to pay, on the one hand, and the claimant's lack of his or her own means, on the other (Article 1:397 (1) of the Dutch Civil Code).<sup>83</sup> Each year the 'Maintenance Standards' Working Party of the Dutch Association for the Administration of Justice publishes a report with recommendations for the calculation of maintenance.<sup>84</sup> These so-called 'Trema standards'<sup>85</sup> are very important and are widely used in practice, although they are not binding on the judge, as they are not 'law' as such in the sense of Article 99 of the Judiciary Organization Act.<sup>86</sup>

According to the 'Trema standards', minimum own means pertaining to a person who is entitled to maintenance can be calculated on the basis of the model for the calculation of the so-called *draagkrachtloos* income, i.e. those expenses necessary for subsistence-level maintenance and other relevant expenses. The minimum means include only those necessary expenses which are essential such as subsistence-level maintenance, reasonable living costs, the costs of health insurance and other necessary expenses. Luxurious expenses to which the parties had become acquainted during the marriage – to the extent that they are reasonable in a given situation and constitute a part of a general lack of means – such as, for example, a car, are as such not considered to fall within the minimum means. These expenses should be combated on account of the so-called 'free' space which is left after the deduction of the *draagkrachtloos* income. It means that the 'free' space should be sufficient in order to provide for the possibility of paying extra expenses, i.e. a part of the lack of means,

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<sup>83</sup> See Supreme Court, 03.11.1995, *NJ* 1996, 350.

<sup>84</sup> Supreme Court, 03.11.1995, *NJ* 1996, 350.

<sup>85</sup> Published in *Trema (Tijdschrift voor de rechterlijke macht*, i.e. Journal for the Judiciary).

<sup>86</sup> Supreme Court, 01.11.1991, *NJ* 1992, 30; Supreme Court, 01.12.1995, *NJ* 1996, 272 and Supreme Court, 22.03.1996, *NJ* 1996, 640.

which surpasses the minimum lack of means.<sup>87</sup> As to the ability to pay, the 'Trema standards' also offer a basic scheme for calculating this ability.<sup>88</sup>

The amount of maintenance is based on the calculated ability to pay and the lack of one's own means. The lowest of the two determines the upper limit of the amount of the maintenance. However, the statutory requirement to take into account the debtor's ability to pay and the claimant's lack of his or her own means provides the possibility to settle for an amount which is a lower amount than the maximum on the ground of mutual relations.<sup>89</sup>

In addition, a special computer program has been created for different target groups, by means of which the maintenance can be calculated on the basis of several variants.<sup>90</sup>

It should be noted that according to the Dutch Supreme Court, it is not necessary to include the maintenance calculation in the decision; only the circumstances on which the calculation is based should be mentioned and justified.<sup>91</sup>

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?)*

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<sup>87</sup> Report by the Dutch Association for the Administration of Justice's 'Maintenance Standards' Working Party, published in *Trema*, 2001 nr. 1, in: *Personen- en Familierecht, Tekst en Commentaar*, 2002, p. 672.

<sup>88</sup> Report by the Dutch Association for the Administration of Justice's 'Maintenance Standards' Working Party, published in *Trema*, 2001 nr. 1, in: *Personen- en Familierecht, Tekst en Commentaar*, 2002, p. 676.

<sup>89</sup> Report by the Dutch Association for the Administration of Justice's 'Maintenance Standards' Working Party, published in *Trema*, 2001 nr. 1, in: *Personen- en Familierecht, Tekst en Commentaar*, 2002, p. 679.

<sup>90</sup> 'Aliment', maintenance calculation program elaborated by Fernhout and Wagemans, Kluwer Datalex and Hansco.

<sup>91</sup> Supreme Court, 17.03.2000, *NJ* 2000, 313.

According to the 'Trema standards', the costs of health insurance are included in the minimum means,<sup>92</sup> and can thus be demanded by the claimant as normal living costs.

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

According to the 'Trema standards', the amount of maintenance cannot be higher either than the claimant's lack of own means or than the debtor's ability to pay. The lowest of the two thus constitutes the maximum.<sup>93</sup>

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

There is no automatic reduction in the level of maintenance after a certain time. The level of maintenance can only be reduced upon a request based on a change of circumstances. See Question 77.

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

The maintenance obligation is mostly fulfilled in the way of periodical payments. The judge decides from which date a person who is obliged to pay maintenance must make the necessary payments and whether they must be made once a week, once a month or once every three months (Article 1:402 (2) of the Dutch Civil Code).

*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 ?*

At present Dutch law does not provide the possibility for the judge to impose a lump sum payment. The Commission on Maintenance Standards has advanced the view that such a possibility should be

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<sup>92</sup> Report by the Dutch Association for the Administration of Justice's 'Maintenance Standards' Working Party, published in *Trema*, 2001 no. 1, in: *Personen- en Familierecht, Tekst en Commentaar*, 2002, p. 672.

<sup>93</sup> Report by the Dutch Association for the Administration of Justice's 'Maintenance Standards' Working Party, published in *Trema*, 2001 nr. 1, in: *Personen- en Familierecht, Tekst en Commentaar*, 2002, p. 671.

included within the law<sup>94</sup> due to, among other grounds, the frequent use of lump sum maintenance agreements which generally leads to tax advantages. These lump sum payments are often combined with a clause stating that the contract may not be amended by a court decision due to a change of circumstances. The law requires that such an agreement is in written form (Article 1:159 § 1 of the Dutch Civil Code). Only if a major change of circumstances is at stake the judge can change such an agreement if, for the claimant, it would be contrary to good faith to uphold the agreement (Article 1:159 § 3 of the Dutch Civil Code). At the same time, in general, Dutch legal literature admits the possibility for spouses to put an end to their financial obligations by means of a lump sum payment on the ground of the freedom of contract provided by Article 1:158 of the Dutch Civil Code.<sup>95</sup> On the basis of this freedom the parties can thus exclude the application of the respective statutory provisions. However, under Article 1:401 of the Dutch Civil Code there is the possibility of a very limited modification of such an agreement.<sup>96</sup>

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

From 1 January 1973 there has existed in the Netherlands an explicit indexation regulation laid down in Article 1:402a of the Dutch Civil Code.<sup>97</sup> According to this provision, the amounts of maintenance, once established, remain consistent with the statutory requirement of the ability to pay despite changes in salaries.<sup>98</sup> In addition, it is not necessary for the claimant to ask for the adjustment of the amount of maintenance each year due to inflation.<sup>99</sup> Each year the amounts of maintenance established by the judge as well as the amounts agreed upon between the parties are modified on the basis of a specific

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<sup>94</sup> Report by the Dutch Association for the Administration of Justice's 'Maintenance Standards' Working Party, published in *Trema*, 2001 nr. 1, in: *Personen- en Familierecht, Tekst en Commentaar*, 2002, p. 37.

<sup>95</sup> A. Kappelhof, *Alimentatie en de som ineens*, 1983.

<sup>96</sup> Supreme Court, 23.10.1987, *NJ* 1988, 438.

<sup>97</sup> The Act of 06.07.1972, *Staatsblad* 1972, nr. 390 amended by the Act of 01.06.1982, *Staatsblad* 1982, nr. 366, the Act of 09.09.1992, *Staatsblad* 1992, nr. 484 and the Act of 30.09.1993, *Staatsblad* 1993, 593 (which entered into force on 01.03.1994).

<sup>98</sup> *Personen- en Familierecht, Tekst en Commentaar*, 2002, p. 471.

<sup>99</sup> *Personen- en Familierecht, Tekst en Commentaar*, 2002, p. 471.

percentage to be determined by the Minister of Justice. This percentage is calculated on the basis of the difference between wage index figurers on 30 September of the current year and the same date of the preceding year. By the index figure pertaining to wages the legislature means the index figure for collective wages per month including special payments to adult employees, as calculated by the Central Bureau of Statistics for each calendar month and, for the first time, though not provisionally, published by the Central Bureau of Statistics.<sup>100</sup> Subsequently, the modification takes effect on 1 January of the following year and is published in the Netherlands Government Gazette (*Staatscourant*).

The fact that the index figure relating to wages is chosen supports the view that chiefly the debtor's ability to pay is decisive for the automatic rise in the amounts of maintenance. As a result, the claimant profits from – as a rule – the extended means of the debtor. Inflation and wage increases constitute an important reason for the annual indexation of maintenance.

The indexation leaves intact the right of the claimant under Article 1:401 of the Dutch Civil Code to request an increase in the amount of maintenance on the ground of an increase in the debtor's income. Such an increase in the debtor's income can be the result of a better paid job. In his or her turn the debtor under the same Article can request the judge to reduce the indexation of maintenance because no improvement has occurred in the ability to pay due to the wage increase. As a result, a disproportion between the ability to pay and the lack of means might arise, and in such a case the judge can make the necessary corrections. When such a disproportion has already been envisaged and provided for when the maintenance was determined, the judge has a possibility to exclude automatic indexation. Instead he can include in his decision a modification clause tailored to a greater extent to the individual case (Article 1:402a (5) of the Dutch Civil Code). The judge can thus exclude the indexation of maintenance for a

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<sup>100</sup> Decision of the Minister of Justice of 28.09.1992 with the definition of concepts relating to the index figure for wages, *Staatsblad 1992*, nr. 507, as amended by the Decision of the Minister of Justice of 28.05.1994, *Staatsblad 1994*, nr. 373 and by the Decision of the Minister of Justice of 18.04.1997, *Staatsblad 1997*, nr. 169.

certain period of time. He may resort to such a possibility, for example, if the amount of maintenance is determined at the end of the year. As in such a case the wage increase in the relevant year has already been taken into account, the judge can exclude the indexation in that year. In the last few years the following indexation percentages have been established:

|     |                               |
|-----|-------------------------------|
| 3.3 | 1 January 1999 <sup>101</sup> |
| 2.5 | 1 January 2000 <sup>102</sup> |
| 3.3 | 1 January 2001 <sup>103</sup> |
| 4.6 | 1 January 2002 <sup>104</sup> |

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

According to Article 1:401 (1) of the Dutch Civil Code, a court decision or agreement concerning maintenance may be modified or set aside by a later court decision when it, as a result of the subsequent change of circumstances, no longer satisfies the statutory requirements. There is a change of circumstances in the sense of this article when at the time of the judgment sought to be modified there was still a circumstance relating to the future which had not been taken into account in that judgment. There must be a relevant change of circumstances, which took place later, i.e. after the judgment sought to be modified was rendered. When after the conclusion of the agreement on maintenance a party discovers that the factual circumstances at the time of concluding the agreement had been different from what he or she assumed, the obtaining of this knowledge is not considered as a change of circumstances in the sense of Article 1:401.<sup>105</sup> Not every change of circumstances is sufficient for the amount of maintenance to be modified. Only the changes due to which the amount initially established or agreed upon no longer satisfies the statutory requirements are relevant in this respect. If a higher amount is

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<sup>101</sup> Netherlands Government Gazette, (Staatscourant) 1998, 212.

<sup>102</sup> Netherlands Government Gazette, (Staatscourant) 1999, 216.

<sup>103</sup> Netherlands Government Gazette, (Staatscourant) 2000, 218.

<sup>104</sup> Netherlands Government Gazette, (Staatscourant) 2001, 212.

<sup>105</sup> Supreme Court, 09.06.2000, JOL 2000, 325.

deliberately determined for the child maintenance than is actually necessary for that child because the component for the maintenance of the wife is included within it, the request to modify this amount cannot be based on the proposition that the child maintenance has not satisfied the statutory requirements from the very beginning.<sup>106</sup> The fact that a certain change of circumstances is foreseeable, such as, for example, attaining retirement, does not in itself mean that it was taken into account at the time of the initial court decision or the agreement between the parties.<sup>107</sup> The fact that the debtor's new spouse no longer had an income and that his living costs had increased is not considered to be a change of circumstances.<sup>108</sup> The judge is not obliged *ex officio* to examine whether there is a relevant change of circumstances if the interested party does not advance this.<sup>109</sup> Article 1:401 (1) provides that a court decision or agreement between the parties concerning maintenance 'may' be modified or annulled in the case of changed circumstances. This provision gives the judge the freedom to determine which circumstances he will attach importance to in his decision and what importance he will attach thereto.<sup>110</sup> If the maintenance contribution fixed by the judge or agreed upon by the parties is susceptible to modification, the new payment should be established on the basis of all the circumstances existing at that moment.<sup>111</sup>

#### **IV. Details of calculating maintenance: Financial capacity of the debtor**

78. *Do special rules exist according to which the debtor may always retain a certain amount even if this means that he or she will not fully fulfil his maintenance obligations?*

No.

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<sup>106</sup> Supreme Court, 26.03.1999, *NJ* 1999, 430.

<sup>107</sup> Supreme Court, 17.03.1989, *NJ* 1989, 855 and Supreme Court, 15.11.1996, *RvdW* 1996, 222.

<sup>108</sup> Supreme Court, 12.07.2002, Jurisprudentie Online: <http://www.rechtspraak.nl>

<sup>109</sup> Supreme Court, 28.02.1997, *NJ* 1997, 329.

<sup>110</sup> Supreme Court, 27.03.1998, *NJ* 1998, 551.

<sup>111</sup> Supreme Court, 07.12.1990, *NJ* 1991, 201 and Supreme Court, 04.02.2000, *RvdW* 2000, 40C.

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?*

In its decision of 24 June 1966,<sup>112</sup> the Dutch Supreme Court ruled that when establishing the maintenance contribution, the judge is given the discretion to decide whether the amount will be increased if and when there has been a wage increase. If the payment thus fixed in view of all the circumstances present at the time of a wage increase does not satisfy the requirements of the law, the interested party can request the modification of the payment.

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

In its judgment of 26 October 1979<sup>113</sup> the Dutch Supreme Court decided that in principle all financially burdensome circumstances influence the debtor's ability to pay. Thus, basically, all debts should be taken into consideration, including all financial obligations entered into in relation to the former family as well as those financial obligations which arose after the divorce. However, this does not exclude the possibility that there 'can be a reason to attach no or less importance to certain debts for the ability to pay'.<sup>114</sup> In this case 'the judge should provide sufficient insight into the line of reasoning which leads him to such a decision'.<sup>115</sup> The judge is free to take into account any possible debts when calculating the ability to pay.<sup>116</sup> A statutory maintenance obligation relating to third persons (new marriage partner,<sup>117</sup> registered partner, stepchildren) in general diminishes the debtor's ability to pay. The same is true for a concurrence of maintenance obligations in relation to additional ex-spouses and/or children from different relationships.<sup>118</sup> The judge can also take into account the fact that a

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<sup>112</sup> Supreme Court, 24.06.1966, *NJ* 1966, 462.

<sup>113</sup> Supreme Court, 26.10.1979, *NJ* 1980, 270 (EAAL).

<sup>114</sup> Supreme Court, 10.12.1999, *NJ* 2000, 4.

<sup>115</sup> Supreme Court, 10.12.1999, *NJ* 2000, 4.

<sup>116</sup> Supreme Court, 29.09.1978, *NJ* 1979, 143.

<sup>117</sup> Supreme Court, 10.12.1976, *NJ* 1977, 587; Supreme Court, 19.12.1997, *RvdW* 1998, 4 and Supreme Court 16.10.1998, *RvdW* 1998, 182.

<sup>118</sup> Supreme Court, 13.12.1991, *NJ* 1992, 178.



debtor lives in concubinage.<sup>119</sup> The ability to pay can also be influenced by the future financial obligations of the debtor if such obligations can be expected with a reasonable degree of certainty.

When entering into financial obligations the debtor should take into consideration any existing or expected maintenance obligations, and in this light it must be determined whether these obligations can be considered to be reasonable. If the debtor merely for his own housing requirements enters into a prohibitively high rental or mortgage agreement at the moment when he knows that a decision concerning the maintenance of his children is forthcoming, this burden does not have to be taken fully into account when establishing the amount of maintenance.<sup>120</sup> Nevertheless, the debtor's ability to pay is influenced by, say, a repayment obligation of 450 Dutch Guilders<sup>121</sup> per month secured on a loan, which has also been used to finance the redemption pension rights for a wife, in which the amount of 16,970 Dutch Guilders<sup>122</sup> was involved, which the husband could not pay from his own means.<sup>123</sup>

Debts arising from taking unjustified risks, for example a debtor who established a company in Poland with a Polish girlfriend, although he himself had no knowledge of the Polish language and whose girlfriend suddenly left him, do not influence the debtor's ability to pay.<sup>124</sup>

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

Alongside legal obligations, pressing moral obligations in respect of other persons can also be relied upon by the debtor. In the Supreme Court decision of 15 June 1985<sup>125</sup> a pressing moral obligation concerned an allowance which was paid to a mother who was resident abroad.

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<sup>119</sup> Supreme Court, 03.07.1995, *NJ* 1996, 86.

<sup>120</sup> Supreme Court, 02.05.1980, *NJ* 1980, 442.

<sup>121</sup> Around €220.

<sup>122</sup> Around €8,350.

<sup>123</sup> Supreme Court, 24.11.1989, *NJ* 1990, 162.

<sup>124</sup> Supreme Court, 29.06.2001, *NJ* 2001, 495.

<sup>125</sup> Supreme Court, 15.07.1985, *NJ* 1986, 566.

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

The debtor's ability to pay is not only determined on the basis of his or her income, but also on the basis of his or her property (capital).<sup>126</sup> In particular, an inheritance shared by the debtor can increase his ability to pay.<sup>127</sup>

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?*

For establishing the ability to pay, not only the income which the debtor has, but also the income which can be reasonably acquired, is taken into account: if the debtor, as a matter of fact, earns less than he is able to, then these lower earnings do not or do not fully have to be taken into account.<sup>128</sup> At the same time, when the fact that the debtor earns less (and this is a result of his own fault) is ignored, this cannot lead to the situation where the debtor can no longer provide for his or her own maintenance. His or her total income cannot in any event drop below the level of 90% of the applicable subsistence norm.<sup>129</sup>

If the source of the income has been deliberately given up, as a result of which the ability to pay has diminished, the judge can ignore this diminution when determining the ability to pay. According to the case law, giving up paid employment by a father unnecessarily and making himself dependent on the social security system does not constitute a ground for diminishing the existing contribution to the maintenance and upbringing of his children.<sup>130</sup> The fact that the debtor has voluntarily given up his or her 'better paid job' is not taken into account not only when it is obvious that he or she is still able to earn a higher income at his or her former job, but also when the

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<sup>126</sup> Supreme Court, 25.05.1962, *NJ* 1962, 266 and Supreme Court, 12.11.1993, *NJ* 1994, 141.

<sup>127</sup> Supreme Court, 25.04.1997, *FJR* 1997, p. 216.

<sup>128</sup> Supreme Court, 10.12.1982, *NJ* 1983, 255.

<sup>129</sup> Supreme Court, 23.01.1998, *NJ* 1998, 707.

<sup>130</sup> Supreme Court, 24.12.1976, *NJ* 1977, 385.

circumstances of the given case can justify that the decrease in income, which the debtor has him or herself needlessly caused, will not be taken into consideration or will not be fully considered when determining his or her ability to pay.<sup>131</sup> According to Dorn, who is a judge in the District Court of sHertogenbosch, the decision of the debtor to give up his or her source of income can nevertheless be justified by certain circumstances.<sup>132</sup>

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

When determining the financial ability of the debtor to pay maintenance, the judge can take into account what the debtor has at his or her disposal by virtue of the law and in reality and what he will gain in the near future. The fact that there is (almost) no source of income is not taken into consideration when determining the ability to pay, which can be seen from the following jurisprudence. An increase of 40% to a special pension on the ground of Article 11 of the 1940-1945 Special Pensions Act is not so much connected with the person who is entitled to the pension in order to be taken into account when determining the limits of a statutory maintenance obligation.<sup>133</sup> The *Wiedergutmachungs*-benefit, aimed at compensating the suffering experienced during the war years, also belongs to the circumstances which are of importance for determining the ability to pay.<sup>134</sup> No reason can be found to justify why the reimbursement of expenses received by the debtor cannot as such eventually lead to an increase in his ability to pay.<sup>135</sup> When establishing the debtor's ability to pay in the sense of Article 1:397 of the Dutch Civil Code the judge should in principle take into account all the income which, in reality, is at the debtor's disposal; *in casu* also the income derived from a pension, which the man has built up before the marriage and outside the

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<sup>131</sup> Supreme Court, 10.12.1982, *NJ* 1983, 255.

<sup>132</sup> Th.M. Dorn, *Alimentatieverplichtingen*, 2001, p. 43.

<sup>133</sup> Supreme Court, 27.06.1974, *NJ* 1975, 4.

<sup>134</sup> Supreme Court, 07.10.1994, *NJ* 1995, 59.

<sup>135</sup> Supreme Court, 28.05.1982, *NJ* 1982, 472.

Netherlands.<sup>136</sup> However, the single fact that a redundancy payment received by the husband from his former employer in connection with his dismissal implied a decline in future income as far as he was concerned, did not mean that it could be required that the husband had to use what he had received by virtue of this redundancy payment for the performance of his maintenance obligation.<sup>137</sup>

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

The financial position of the new partner of the debtor can decrease his ability to pay,<sup>138</sup> and can also increase it.<sup>139</sup> The income of the following spouse increases the ability to pay. In this respect the former spouse profits from the income of the following spouse. Moreover, an unjustified choice on the part of the debtor and his or her new partner to allow the latter to give up his or her job as a result of which the family income and, consequently, the debtor's ability to pay decrease, is also taken into consideration by the court. The Supreme Court, in its decision of 12 January 1996,<sup>140</sup> dealt with the situation where the debtor, being the mother of a child raised by the father, decided with her present husband that in connection with raising their child, the present husband would give up his job and she would continue to work herself. According to the mother, as she now had to earn the family income alone, she was no longer able to pay maintenance. This choice by the mother and her present husband was not considered by the Court to be reasonable. Similarly, in its decision of 12 July 2002,<sup>141</sup> the Supreme Court did not take into account the fact that the debtor's new spouse no longer had an income and that his living costs had increased.

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<sup>136</sup> Supreme Court, 15.07.1987, *NJ* 1988, 108.

<sup>137</sup> Supreme Court, 24.11.1995, *NJ* 1996, 261.

<sup>138</sup> Supreme Court, 30.11.1998, *NJ* 1999, 102.

<sup>139</sup> Supreme Court, 20.10.1995, *NJ* 1996, 91 and Supreme Court, 12.03.1999, *NJ* 1999, 47.

<sup>140</sup> Supreme Court, 12.01.1996, *NJ* 1996, 335.

<sup>141</sup> Supreme Court, 12.07.2002, Jurisprudentie Online: <http://www.recht.nl>

**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?*

According to Article 1:157(1) of the Dutch Civil Code the judge can grant maintenance to the former spouse who neither has sufficient income nor can be reasonably expected to gain such income. Thus, in order for a person to be entitled to maintenance, there should be a lack of own means. The income of the creditor and the income that he or she can reasonably be expected to gain are taken into account when determining the scope of the need in the contribution from the former spouse. Accordingly, no right to maintenance exists if the former spouse has sufficient income and it is not relevant whether the income is derived from employment that can be reasonably expected or from employment that goes beyond what is reasonably expected.

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

No right to maintenance exists if the former spouse can be reasonably expected to be able to gain the necessary income. There are many circumstances which can be of importance in answering the question whether a person who is entitled to maintenance can reasonably be expected to be able to gain sufficient income. Among them the following can be mentioned:

- the need to raise children;
- the age and the state of health of a person who is entitled to maintenance ;
- the situation on the labour market;
- the lack, on the part of a person entitled to maintenance, of academic qualifications or vocational (professional) training;
- the suitability of available job opportunities for a person who is entitled to maintenance.<sup>142</sup>

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<sup>142</sup> Th. M. Dorn, *Alimentatieverplichtingen*, 2001, p. 40.

If a person who is entitled to maintenance loses the source of income which led to the limitation of the need, in principle the need relating to the marriage revives, except when this person with a view to his or her interests had to refrain in his or her relation to the debtor from the conduct which had led to the decrease in incomes.<sup>143</sup>

Article 1:157 (1) of the Dutch Civil Code in principle gives the judge discretion to determine which circumstances he will attach importance to in his decision and, if so, what importance. However, if the judge does not take into account the debtor's worsening state of health as a circumstance due to which he or she is not sufficiently able to maintain him or herself, he should also specify the facts or circumstances which justify the conclusion that this factor should be borne by the claimant.<sup>144</sup>

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

Article 1:157 (1) of the Dutch Civil Code uses the term 'income' which should be taken into consideration when determining whether a claimant is entitled to maintenance. It might be concluded from this that the capital assets of the claimant are not relevant. However, due to the fact that the judge must consider all the circumstances of the case and should ask himself whether the claimant can reasonably be expected to earn an income, he is free to determine the amount of maintenance *inter alia* on the basis of the capital assets.<sup>145</sup> A reasonable interpretation of the text of the law also does not exclude the fact that under certain circumstances it might be expected that some capital assets can be used up.<sup>146</sup> At the same time, living on one's capital assets cannot be reasonably demanded in all cases.<sup>147</sup>

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<sup>143</sup> Supreme Court, 24.04.1998, *NJ* 1998, 889.

<sup>144</sup> Supreme Court, 19.06.1981, *NJ* 1981, 457.

<sup>145</sup> M.J.A. van Mourik and A.J.M. Nuytinck, *Personen- en familierecht, huwelijksvermogensrecht en erfrecht*, 2002, p. 132.

<sup>146</sup> Supreme Court, 26.11.1999, *NJ* 2000, 329.

<sup>147</sup> Supreme Court, 18.11.1938, *NJ* 1939, 332.

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?*

No information is available.

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

The fact that a claimant is entitled to be supported by the state under the Social Security Act or on the ground of a subsidy scheme is not relevant for establishing the amount to be paid by the debtor. The supplementary nature of a rent subsidy entails that the living expenses of the wife without that subsidy should be taken as a point of departure when determining her needs.<sup>148</sup>

## **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?*

Several rules concerning the relationship between different maintenance claims are laid down in the Dutch Civil Code. Article 1:392 (3) of the Dutch Civil Code establishes the priority of the ex-spouse's duty to maintain him or her in relation to the duty to maintain relatives and other relations. Article 1:400 (1) of the Dutch Civil Code provides that if a person is obliged to maintain two or more persons and his or her ability to pay is not sufficient to maintain all those in question, his or her spouse, his or her former spouse, his or her registered partner, his or her former registered partner, his or her parents, his or her children and stepchildren rank ahead of the claims of his or her children-in-law and his or her parents-in-law. Most rules concerning priority of claims have, however, been established by case law (see Questions 92-96).

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<sup>148</sup> Supreme Court, 27.01.1995, *NJ* 1995, 291.

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

If additional former spouses claim maintenance, in principle, obligations towards the first spouse are taken fully into account when determining the debtor's ability to pay. In this sense the maintenance claim of the first spouse prevails.<sup>149</sup>

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?*

If the debtor's ability to pay is insufficient to fully maintain the ex-spouse as well as the children, the Working Party on Maintenance Standards considers that from the available financial resources, first of all the costs of maintaining and raising the children should be covered as much as possible and any possible remainder should be earmarked for the maintenance of the ex-spouse.<sup>150</sup> In general, the courts also follow this guideline.<sup>151</sup> However, in 1992 the Dutch Supreme Court ruled that no legal rule exists which entails that in the case of a concurrence of maintenance obligations, priority is automatically given to the children even when the ex-spouses have agreed in their maintenance contract upon the condition that the amount of maintenance cannot be changed; all the claims must be taken into account.<sup>152</sup> Accordingly automatic priority to the claim of the child was refused.

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

Under Dutch law majority is reached at the age of eighteen. However, the reaching of majority does not influence the existence of the maintenance obligation. Article 1:395a (1) of the Dutch Civil Code provides that parents are obliged to provide for the costs of

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<sup>149</sup> Supreme Court, 11.09.1992, *NJ* 1992, 745.

<sup>150</sup> Th. M. Dorn, *Alimentatieverplichtingen* 2001, p. 97.

<sup>151</sup> Supreme Court, 25.11.1994, *NJ* 1995, 286; Supreme Court, 02.12.1994, *NJ* 1995, 287.

<sup>152</sup> Supreme Court, 06.03.1992, *NJ* 1992, 358.



maintenance and studies of their children who have not reached the age of twenty-one.

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

Yes.<sup>153</sup>

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?*

According to Article 1:392(1) of the Dutch Civil Code, the following persons are obliged to provide maintenance on the ground of a blood relationship or a relationship-in-law:

- parents;
- children;
- children-in-law, parents-in-law, step-parents.

However, Article 1:392 (3) provides that these persons are not obliged to pay maintenance insofar as this can be obtained from the spouse or former spouse as well as the registered partner or former registered partner. Thus, Article 1:392 (3) establishes a 'pecking order' for maintenance claims by specifying that blood relatives and relatives-in-law are under a duty to maintain insofar as maintenance 'cannot be obtained' from the (ex-)spouse.

In this context the following decision of the Dutch Supreme Court should be considered. On 16 April 1993<sup>154</sup> the Supreme Court decided a case relating to the order of ranking of the father's duty to maintain his married daughter who had not yet reached the age of 21, on the one hand, and the duty to maintain her 23 year old husband, on the other. The father had paid for his daughter's maintenance until she married. One year after the marriage the spouses decided – the husband already had a job – to follow a full-time daily study course. In the first

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<sup>153</sup> P. Vlaardingerbroek, K. Blankman, A. P. van der Linden, E. C. C. Punselie and G. G. M. van Wamelen, *Het hedendaagse personen- en familierecht*, 2002, p. 353.

<sup>154</sup> Supreme Court, 16.04.1993, *NJ* 1994, 328.

place, the Supreme Court decided that the answer to the question of what can be considered to be possible to obtain from the spouse is determined *inter alia* by what can be demanded from the spouse in the given circumstances according to public opinion. *In concreto*: whether it could be demanded from the husband of the daughter that he should give up the study, supposing that the daughter could freely choose to follow it in relation to her father. Regarding the reasonableness of the decision to opt for the course of study, the Supreme Court considered that the daughter and her husband found themselves in similar circumstances. Therefore, the father was ordered to pay.

## VII. Limitations and end of the maintenance obligation

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

According to Article 1:160 of the Dutch Civil Code as amended on 1 January 1998,<sup>155</sup> the obligation of the former spouse to maintain the other party after divorce is extinguished when the latter remarries, enters into a registered partnership or cohabits with another person as if they were married or had registered their partnership. Since 1 April 2001 Article 1:160 implies the termination of the maintenance duty if a person who is entitled to maintenance enters into a marriage or registered partnership, regardless of the gender of his or her spouse or partner.

The termination of the maintenance duty under Article 1:160 is final. Thus, the dissolution of the second marriage or the termination of cohabitation cannot lead to the revival of the duty to maintain and do not justify a reference to the changed circumstances.<sup>156</sup> However, in the case of cohabitation not in the sense of Article 1:160 (e.g. lodging or temporarily living together with a member of the family), then the claim of a person who is entitled to maintenance is not extinguished.

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<sup>155</sup> The amendment concerned the addition of passages concerning the registered partnership which was introduced on 01.01.1998.

<sup>156</sup> Supreme Court, 02.05.1986, *NJ* 1987, 377.

This person can subsequently attempt, on the ground of a change of circumstances, to have the maintenance obligation revived or to have it increased (Article 1:401 of the Dutch Civil Code).<sup>157</sup>

The automatic termination of the maintenance duty implies that the intervention of the judge is not necessary in order to extinguish this obligation. However, the judge can be asked to determine, in a declaratory judgment, that the maintenance duty has been extinguished, in the course of which a request can be made to determine the date from which the obligation no longer exists and to determine the amount that should be repaid.<sup>158</sup>

The parties can deviate from the rules of Article 1:160 in their agreement.<sup>159</sup> They can exclude the application of this article completely or for a certain period. They can also agree that in certain circumstances the maintenance duty may revive. It is not necessary to explicitly provide for such a deviation, but the question of how the agreement should be interpreted regarding this point must be answered in the light of the circumstances of the case, under which the fact that the provision of 'no amendment' has been agreed upon can play a role.<sup>160</sup>

*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?*

Article 1:160 of the Dutch Civil Code provides that the maintenance obligation of the former spouse in relation to the other party is also extinguished 'when the latter (...) enters into cohabitation with another person as if they were married or as if they had registered their partnership'. The cohabitation 'as if they were married' means cohabitation that, apart for the official entrance into and recognition, has the characteristics of a marital relationship.<sup>161</sup>

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<sup>157</sup> Supreme Court, 02.05.1986, *NJ* 1987, 377.

<sup>158</sup> Supreme Court, 11.01.1986, *NJ* 1987, 99.

<sup>159</sup> Supreme Court, 11.10.1975, *NJ* 1976, 497.

<sup>160</sup> Supreme Court, 22.07.1981, *NJ* 1982, 12.

<sup>161</sup> Th. M. Dorn, *Alimentatieverplichtingen*, 2001, p. 103.

The term 'as if they were married' has led to rich case law on the matter, mostly due to the difficulties of providing an exact definition. There are also difficulties in proving such a situation. The following characteristics are considered as criteria for the cohabitation 'as if they were married': the permanent nature of the cohabitation; the eventual family relationship; a sexual relationship; and the existence of economic unity.<sup>162</sup> In addition, the Dutch Supreme Court considers that it must be demonstrated that persons living together take care of each other.<sup>163</sup> Alongside this, it is required that they live together with each other and have a joint household.<sup>164</sup> One can also speak of cohabitation 'as if they were married' if this cohabitation occurs not with a view to making it permanent, but in order to enter into a marriage if the experiment brings positive results and to separate if this is not the case.<sup>165</sup> Apart from these situations, the case of ex-spouses continuing to reside together after divorce is not regarded as such a cohabitation.<sup>166</sup>

If the existence of the situation of cohabitation in the sense of Article 1:160 has been established, a resulting consequence is that the maintenance obligation on the part of the former spouse is automatically and finally extinguished. In such a case there are no exceptional circumstances which can lead to the non-applicability of this provision.<sup>167</sup> Due to the serious consequences for a person who is entitled to maintenance, high demands should be made as regards justifying the affirmative answer to the question whether there is a situation of cohabitation in the sense of Article 1:160.<sup>168</sup> In this respect the Supreme Court ruled in July 2001<sup>169</sup> that the temporary cohabitation of a divorced spouse with a married person does not fall under the scope of Article 1:160. The rationale of this provision

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<sup>162</sup> Report by the Dutch Association for the Administration of Justice's 'Maintenance Standards' Working Party, *Trema*, 1994, nr. 10.

<sup>163</sup> Supreme Court, 22.02.1985, *NJ* 1986, 82.

<sup>164</sup> Supreme Court, 25.11.1994, *NJ* 1995, 299.

<sup>165</sup> Supreme Court, 11.06.1976, *NJ* 1976, 512.

<sup>166</sup> Supreme Court, 27.03.1998, *NJ* 1998, 550.

<sup>167</sup> Supreme Court, 17.12.1999, *NJ* 2000, 122.

<sup>168</sup> Supreme Court, 17.12.1999, *NJ* 2000, 122.

<sup>169</sup> Supreme Court, 13.07.2001, *RvdW*2001, 131.

requires a restrictive interpretation: The cohabitation must be based on an affective relationship of a permanent nature, which includes that the cohabiters take care of each other, live together and have a joint household.

Since 1 April 2001 (opening of the marriage to same-sex partners) cohabitation 'as if they were married' or 'as if they had registered their partnership' extinguishes the maintenance obligation irrespective of the gender of the partner. However, for example, the District Court of Amsterdam already ruled in 1977 that it would be inappropriate to grant an allowance to a wife at the expense of a husband when the wife is cohabiting with a girlfriend with whom she has a love affair within the meaning that they have formed a community that also entails a sexual relationship.<sup>170</sup>

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

According to Article 1:157 of the Dutch Civil Code, the judge 'may' award maintenance to the former spouse. This implies that he or she is free to decide whether and, if so, under which circumstances maintenance will be granted. This is reflected in the case law relating to the influence of a marriage of short duration on the maintenance claim. For example, no maintenance was granted to the claimant in a case when the marriage lasted for less than three years and there had been factual cohabitation for less than one year.<sup>171</sup> Neither was it granted at the expense of a rich ex-husband after a marriage of three days' duration, although as a result the wife had lost her maintenance from the first marriage.<sup>172</sup> According to the District Court of Almelo, in the case in question the duration of the marriage concluded between the parties – 78 and 74 years old by that time – in 1997, each of whom received an old age pension, does not justify the maintenance claim on the ground of the extra earnings enjoyed by the ex-husband as a result of his career before his retirement.<sup>173</sup> However, in its decision of 14

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<sup>170</sup> District Court of Amsterdam, 28.10.1977, *NJ*1978, 58.

<sup>171</sup> District Court of The Hague, 09.01.1975, *NJ*1977, 550.

<sup>172</sup> Court of Appeal of The Hague, 12.11.1981, *NJ*1982, 495.

<sup>173</sup> District Court of Almelo, 06.11.1985, *NJ*1986, 189.

November 1997<sup>174</sup> the Dutch Supreme Court ruled that the determination of the claimant's needs might not be based on the circumstance that the marriage was of short duration (in this case, of less than three years). This circumstance, according to the Court, is only relevant to the question whether the maintenance should be limited in time.<sup>175</sup>

*100. Can the maintenance claim be denied or reduced for other reasons such as the claimant's conduct during the marriage or the facts in relation to the ground for divorce?*

See Question 65.

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

In principle, the maintenance claim ends with the death of the debtor. However, Article 1:157 (2) of the Dutch Civil Code empowers the judge, when establishing the amount of maintenance, to take into account the maintenance needs in the case of the death of the debtor. This means that when determining the amount of maintenance, the sum that the debtor or the creditor should spend on pension insurance for surviving dependants must be taken into account.

### **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?*

According to Article 1:158 of the Dutch Civil Code, the parties before as well as after the decision of the court may determine whether and, if so, to what extent one will provide for the maintenance of the other after divorce; if no period is included in the agreement, Article 1:157 (4-6) of the Dutch Civil Code will apply. Thus, the spouses are free to arrange the financial consequences of their divorce themselves and to this end to conclude an agreement. These agreements must be

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<sup>174</sup> Supreme Court, 14.11.1997, *NJ* 1998, 112.

<sup>175</sup> In this respect see Question 68.

concluded during (and therefore may not be concluded before) the marriage.<sup>176</sup> Accordingly, in their agreement the spouses can deviate from the statutory criteria for the granting of maintenance (the ability to pay and a lack of means) as well as from the duration of the maintenance established by law.

Provided that certain conditions are met, it can be envisaged in the agreement that the judge cannot change or modify the agreement by invoking a change of circumstances (Article 1:401 (1) of the Dutch Civil Code). Nevertheless, despite such a provision in the agreement, the latter can be modified by the judge at the request of one of the parties in a decision on divorce or in a later decision on the ground of such a radical change of circumstances that the applicant can no longer adhere to the agreement due to the considerations of fairness and reasonableness (Article 1:159 (3) of the Dutch Civil Code). Strict requirements are laid on the obligation to furnish evidence by the one who is seeking modification; the same is true for justifying the decision concerning modification.<sup>177</sup> In addition, a modification is also possible on the ground of Article 1:401 (5), according to which an agreement concerning maintenance can also be modified or set aside if it has been concluded with a serious underestimation of the statutory standards. Such a possibility, however, is rather limited.<sup>178</sup>

The period included in the agreement during which the maintenance obligation remains in force cannot be modified on the ground of a single change of circumstances unless this is explicitly agreed upon in writing (Article 1:401 (1) (3) of the Dutch Civil Code).

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

According to Article 1:158 of the Dutch Civil Code, the parties may determine before as well as after the court decision whether and if so

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<sup>176</sup> Supreme Court, 07.03.1980, *NJ* 1980, 363 and Supreme Court, 12.01.1996, *NJ* 1996, 352.

<sup>177</sup> Supreme Court, 15.06.1985, *NJ* 1986, 489; Supreme Court, 23.12.1988, *NJ* 1989, 263.

<sup>178</sup> S.F.M. Wortmann and J. van Duijvendijk-Brand, *Compendium van het Personen- en Familierecht*, 2002, p. 140.

what amount one will provide for the maintenance of the other after divorce. In the light of this provision and as an exception to the main rule under Article 1:400 (2)<sup>179</sup> the parties can agree that no maintenance will become due (the so-called zero provision). Such an agreement, however, can only be reached during the marriage with a view to an intended divorce.<sup>180</sup> Accordingly, the exception to the rule under Article 1:400 (2) does not cover a stipulation already agreed upon before the marriage according to which the right to maintenance in the case of divorce is renounced. Such a stipulation is not valid. The same applies to agreements in which the right to maintenance is renounced during the divorce proceedings.<sup>181</sup>

An agreement in which one spouse renounces his or her right to maintenance in relation to the other cannot be placed on the same footing as an agreement in which one spouse renounces his or her right to submit a claim for maintenance against the other in divorce proceedings.<sup>182</sup>

At the same time, it must be borne in mind that Article 1:159a of the Dutch Civil Code expressly lays down that an agreement relating to maintenance between (ex-) spouses does not stand in the way of maintenance on the ground of Article 93 of the General Social Security Act. The aim of this provision is to prevent those who, due to the level of their income, must be regarded as being able to provide a certain amount in the way of maintenance from simply avoiding this obligation at the expense of society. However, it was not the legislator's intention to make the zero provision impossible.<sup>183</sup>

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

No.

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<sup>179</sup> Article 1:400 (2): Agreements renouncing the maintenance due under the law are null and void.

<sup>180</sup> Supreme Court, 07.03.1980, *NJ* 1980, 363.

<sup>181</sup> Supreme Court, 19.04.1974, *NJ* 1975, 237.

<sup>182</sup> Supreme Court, 04.10.1974, *NJ* 1975, 425.

<sup>183</sup> P. Vlaardingerbroek, K. Blankman, A. P. van der Linden, E.C.C. Punselie and G.G.M. van Wamelen, *Het hedendaagse personen- en familierecht*, 2002, p. 136.



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

No. However, the judge is competent to wholly or partly include such an agreement in the decision (Article 819 of the Dutch Civil Procedural Code). In practice this occurs very frequently. See Question 7 (Boek I, ABC).