THE GERMAN MARITAL PROPERTY SYSTEM: CONFLICT OF LAWS IN A DUAL-NATIONALITY MARRIAGE

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Changes in the German constitutional system after the Second World War necessitated extensive revision of the then-existing marital property law. In adapting the law to the post-war era, Germany was able to carefully analyze and evaluate experiences under its own diverse domestic systems as well as under foreign marital property regimes. Germany synthesized this information into a new marital property regulation which has been characterized by some commentators as the marital property system of the future.[1] The resulting property regime, consisting of a statutory 'community of gains'[2] (*Zugewinngemeinschaft*) and elective contractual options, including 'total community of property' and 'total separation of property,' reflects the experience collected under a variety of systems.

This Article presents an overview of Germany's new property system in the light of certain conflict of laws problems that arise in a dual-nationality marriage. It deals specifically with a marriage between a German national and an American national who are domiciled in either Germany or a community property state of the United States.

I. HISTORICAL DEVELOPMENT OF THE PRESENT MARITAL PROPERTY SYSTEM

The significance of the new developments in marital property

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1. Glendon, *Matrimonial Property: A Comparative Study of Law and Social Change*, 49 TULANE L. R. 21, 41, n.63 (1974) and authorities cited therein. The German drafters borrowed heavily from Scandinavian marital property systems in their revision of the marital property law of the BGB; *see*, M. GLENDON, STATE, LAW AND FAMILY 158-61 (1977) [hereinafter cited GLENDON — FAMILY].

2. The appellation 'community of gains' (*Zugewinngemeinschaft*) is actually a misnomer, because the gains of the partners to the marriage never become joint or community property, but rather remain at all times the separate property of the individual spouses.

law under Germany's modern system is best seen in the context of its historical development.

A. Prior to 1900

Prior to the codification of German civil law in the Civil Code in 1896 (*Bürgerliches Gesetzbuch* — BGB), each separate region of the German Reich had its own marital property law. The result was a total of over 100 different property systems.[3] Despite the wide variations between the regions, certain major forms of marital property regulation were distinguishable.

The most common early marital property system was the 'administrative community of property' (*Verwaltungsgemeinschaft*). Under its provisions the property of the husband (H) and the wife (W) remained separate, but H possessed the rights of administration and usufrucht as to W's property. For example, H had the right to take possession of W's property, to administer it and to collect the income.[4] This was the system contained in the well-known medieval compilations of Germanic legal custom; the Mirror of Saxony (*Sachsenspiegel*, 1215-1235), the Mirror of Germans (*Deutschenspiegel*, 1265), and the Mirror of Swabia (*Schwabenspiegel*, 1275).[5] About half of the German population at that time (about 21 million people) lived under the 'administrative community of property'.[6]

The 'universal community of property' (*Gütergemeinschaft*) was also common. Under this system all property held and acquired by the spouses before and after marriage was merged into community property and administered by H.[7]

Under the 'community of earnings' or 'community of acquests' (*Errungenschaftsgemeinschaft*), property acquired after marriage

3. 4 STAUDINGER-FELGENTRAEGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, Pt. 2: Familienrecht, preceding § 1363 No. 7 (10/11th ed. 1970) [hereinafter cited as STAUDINGER-FELGENTRAEGER].

4. Massfeller, *Matrimonial Property Law in Germany*, MATRIMONIAL PROPERTY LAW 369, 369 (W. Friedman ed. 1955); PALANDT-DIEDERICHSEN, BÜRGERLICHES GESETZBUCH [BGB] preceding § 1363 No. 1 (37th ed. 1978) [hereinafter cited as PALANDT-DIEDERICHSEN]; Graue, *The Rights of Surviving Spouses under Private International Law*, 15 AM. J. COMP. L. 164, 168 (1967) [hereinafter cited Graue — Spouses].

5. Massfeller, *supra* note 4, at 369-70; Glendon, *supra* note 1, at 39; Graue, *German Law*, COMPARATIVE LAW OF MATRIMONIAL PROPERTY 114, 115 (A. Kiralfy ed. 1972) [hereinafter cited Graue — German Law] doubts that the *Sachsenspiegel* clearly supports this conclusion as to separation of property, but agrees as to administration.

6. Massfeller, *supra* note 4, at 369-70; 4 STAUDINGER-FELGENTRAEGER, *supra* note 3, preceding § 1363 No 6.

7. Graue — Spouses, *supra* note 4, at 170.

became community property under H's management. This was the prevailing Frankish system in the Middle Ages, and the statutory regime in numerous states prior to the entry into force of the BGB in 1900.[8]

Less common was the 'community of chattels and goods' or 'community of movables' (*Fahrnisgemeinschaft*). Under this regulation, not only the gains made during the marriage but also the pre-marriage separate movable property of both spouses became community property.[9] This system later became the statutory property regime of the French Civil Code.

The least common of the existing major systems was the Dotal system (*Dotalsystem*) which was inherited from the Roman law. The Dotal regime resembled a separate property system, but one in which the separate property of W would be transferred to H as a dowry, to be refunded upon dissolution of the marriage.[10]

B. 1900-1953

In 1900, the German BGB entered into force and codified the civil law including the marital property law for the entire German Reich. The sheer variety of matrimonial property systems had caused the drafters of the BGB to rule out a possible total unification of the marital property law. Instead, they reduced the number of available regimes to a limited number of prototypes, the features of which were regulated in detail in the BGB. The parties could choose any one of five alternate marital property systems ('administrative community of property', 'universal community of property', 'community of acquests', 'community of movables', and 'separate property') by simple reference to the relevant code provisions in a notarial settlement. A complex marital settlement was no longer necessary as had been the case under the prior laws. Where the spouses had not made any particular election, the BGB specified one "preferred" system to apply by force of statute.[11]

As the ordinary statutory regime the drafters of the BGB chose the most common pre-Code system, the administrative community of property, now named the regime of 'administration and

8. CREIFELDS RECHTSWÖRTERBUCH, *Errungenschaftsgemeinschaft*, 372 (5th ed. 1978) [hereinafter cited as CREIFELDS].

9. *Id. Fahrnisgemeinschaft*, 390-91: Massfeller, *supra* note 4, at 370.

10. STAUDINGER-FELGENTRAEGER, *supra* note 3, preceding § 1363 No. 6; *see*, Graue — Spouses, *supra* note 4, at 167-68.

11. I.E. COHN, MANUAL OF GERMAN LAW 165 (1st ed. 1950); Glendon, *supra* note 1, at 39.

usufrucht' (*Güterstand der Verwaltung und Nutzniessung*).[12] In the absence of an election by the spouses of another property regime, this statutory system applied and thus controlled the large majority of German marriages. It continued the pre-1900 principle of separation of property, with H possessing, administering and enjoying the benefits of W's property. But, several significant structural changes were introduced into the system. A certain class of W's property was created known as 'reserved property' (*Vorbehaltsgut*), in which W had not only title but also the exclusive right of administration, enjoyment and disposal. This reserved property included objects intended exclusively for W's personal use, such as: profits and earnings acquired through the exercise of a separate profession; assets acquired by W through gift or succession under the stipulation that they be W's separate property; any property deemed by the marriage agreement to be W's separate property and anything acquired in substitution for any of the reserved property.[13] All other property of W became subject to H's administration although W retained title to it.

The BGB also provided for a subsidiary statutory regime, separate property, which was applicable when the parties had so contracted or in certain cases, such as when H had abused his administrative powers.[14] Finally, there were also three options which could be elected by marital contract but whose practical significance was minimal: the community of earnings, the universal community of property, and the community of chattels or movables.[15]

C. 1953-1958

The above marital property system prevailed in Germany from the entry into force of the BGB in 1900 through the periods of the Weimar Republic, the Third Reich and World War II. It terminated abruptly in 1953, however, because of certain provisions of the functional post-war Constitution of the new Federal Republic: the Basic Law (*Grundgesetz*). The Basic Law entered into force on May 23, 1949, and provided that men and women were equal

12. I. COHN, *supra* note 11, at 165-66; G. BEITZKE, FAMILIENRECHT 77-78 (21st ed. 1980).

13. BÜRGERLICHES GESETZBUCH [hereinafter cited as BGB] §§ 1363 & 1367-1370 (W. Ger. 1960); Glendon — Family, *supra* note 1, at 159.

14. I. COHN, *supra* note 11, at 166.

15. *Id.* at 166; PALANDT-DIEDERICHSEN, *supra* note 4, preceding § 1363 No. 1.

before the law.[16] This constitutional principle of equality (*Gleichheitsgrundsatz*) conflicted directly with the majority of the marital property provisions of the BGB. A transitional Article of the Basic Law[17] was intended to prevent immediate legal chaos and provided a constitutional grace period. Existing laws in conflict with the equality mandate of Article 3 would remain in force until they were brought into conformity with the constitutional requirement, but not later than March 31, 1953. The West German Parliament failed to meet this deadline for bringing marital property law into line with constitutional equality requirements and the Federal Republic was temporarily left without any statutory regulation of marital property.

The task of establishing some sort of interim regime between the invalidity of the old law and the enactment of a new marital property system fell to the courts. The highest federal courts decided that it was beyond their powers to establish any system more complicated than those currently existing. Therefore, they adopted 'separate property' (*Gütertrennung*) as the only alternative that appeared consistent with the equality provision of the Basic Law.[18] Germany then continued to be a separate property jurisdiction until the present regulation entered into force on June 30, 1958, as part of the Law on the Equality of Men and Women.[19]

II. THE NEW MARITAL PROPERTY SYSTEM

The marital property law (*Eheliches Güterrecht*) in effect since 1958 is contained in the BGB, sections 1363-1563.[20] Additionally, certain sections of the BGB dealing with bankruptcy, obligations and divorce law also affect the new marital property regime.

The new marital property provisions retain the basic principle of contractual freedom for the spouses, but three formal marital property regimes are provided for: a regular statutory regime, a subsidiary statutory regime, and an elective contractual regime. By statute, the marital property regime of the spouses will be the so-called 'community of gains', unless the couple has chosen another option by marital settlement. This statutory priority means that the

16. Basic Law art. 3(2).

17. Basic Law, art. 117(1).

18. Judgment of July 14, 1953, Bundesgerichtshof, W. Ger., Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 11, 73.

19. Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiete des bürgerlichen Rechts, June 18, 1957, Bundesgesetzblatt (BGBl.) I, 609.

20. Eheliches Güterrecht BGB Book 4, Title 6.

large majority of current German marriages function under the community of gains. The subsidiary statutory regime — separate property — automatically applies in doubtful cases, such as where the spouses have contracted to exclude one regime or another without having made a positive stipulation of a chosen property system.

Alternatively, the spouses may contract for the universal community of property provided for in the BGB. They may incorporate the statutory regulation of this regime simply by reference in a marital contract, or they may change any of its features by stipulation. By marital contract the spouses may also elect the separate property system, alter the statutory provisions of the community of gains, or construct almost any other marital regime they choose.

A. The Community of Gains

The drafters of the new German marital property law were faced with two essential requirements for the new regulation. First, the statute had to conform to the requirements of the constitutional equality mandate.[21] Equality in a technical sense had been achieved by the judicial resort to separate property in 1953, but this regulation failed to meet the second requirement for the new statute: to give the married woman more of a share of the family property than she received under the separate property system or under the old Code system.[22] The latter requirement was particularly important because the housewife marriage was the recognized predominant form of marriage at that time.[23]

The community of acquests, which most closely resembles the community property systems of the American states, was carefully considered by the drafters as a possible statutory model, but it was rejected on three grounds: complications upon liquidation, the problems of administration of the common property, and the problem of liability for debts.[24] Thus, the drafters finally decided on the community of gains as the best method for giving a married woman a position equal to that of her husband. This system allowed W to participate in the income and profits acquired during the marriage in a way which avoided the problems of liability and administra-

21. Massfeller, *supra* note 4, at 377.

22. GLENDON — FAMILY, *supra* note 1, at 159. Bärmann, *Das neue Ehegüterrecht*, 157 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS (AcP) 145, 150 (1958-1959).

23. Massfeller, *supra* note 4, at 377. Bärmann, *supra* note 22, at 147.

24. Dölle, *Errungenschaftsgemeinschaft-gesetzlicher Güterstand*, 1953 JURISTENZEITUNG (JZ) 617, 617; G. BEITZKE, *supra* note 12, at 86.

tion.[25] Arguably, it recognizes the greatest legal and economic autonomy of the spouses over their own property, while simultaneously protecting the stay-at-home housewife.[26]

1. *The Community During Marriage*. The BGB provides that the spouses shall live under the matrimonial property regime of community of gains unless they have agreed differently by marital settlement.[27] The nature of the community of gains system is defined as follows:

> The husband's and the wife's property shall not become joint property of the spouses: this shall also apply to property acquired by either spouse after marriage. However, the gains obtained by the spouses during their married life shall be compensated upon termination of the community of gains.[28]

This definition indicates that the name community of gains is actually a misnomer, because no genuine community is created. Rather, the new regime is one of separate property during marriage, with compensation or balancing of the individually-won gains upon termination of the marriage.[29] Each spouse retains title to and administers his or her own property as if unmarried. Therefore, subject to certain limitations on the disposition of the property,[30] no community assets arise through the marriage or at its dissolution.[31] While the law does affect the rights of the spouses in some significant aspects during marriage, it is only upon dissolution of the marriage or at the death of a spouse that the gains of the spouses are balanced.

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25. *See* discussion of liability and administration problems of various marital property system proposals in: Massfeller, *supra* note 4, at 380 et seq.

26. STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1364 No. 2; *see* discussion in Judgment of April 22, 1966, Bundesgerichtshof, BGHZ 46, 343 at 349-50. The housewife without property, for whose benefit the compensation at dissolution of the marriage was intended, is, however, precisely the party who cannot benefit from these autonomy provisions, since she has no separate property to manage in the first place. When W *does* have separate property of her own, the parties will frequently contract for the separation of property regime, or contract to exclude the compensation of gains at the dissolution of the marriage.

27. BGB § 1363(1).

28. BGB § 1363(2).

29. v. Hippel, *Ausgleich des Zugewinns in Fällen mit Auslandsberührung*, 32 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (RabelsZ) 348, 348 (1968) [hereinafter cited as v. Hippel]. Graue — Spouses, *supra* note 4, at 186; Bärmann, *supra* note 22, at 151.

30. Property rights may be affected, however, by other provisions outside of the marital property law, such as the law of obligations which may apply to marital debts, and the law of divorce, which regulates claims for maintenance and support.

31. STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1364 No. 4; PALANDT-DIEDERICHSEN, *supra* note 4, § 1363 No. 3; Bärmann, *supra* note 22, at 152.

The BGB provides that each spouse shall independently administer his or her own property.[32] But, the following provisions contain two limitations on the independent administration of the spouses' property. First, a spouse is forbidden to dispose of his or her own property in its entirety (*Vermögen im ganzen*), without the consent of the other spouse.[33] The purpose of this regulation is to protect the economic basis of the family within the bounds of independence established by the separate property concept. Additionally, it protects the spouse with a lesser gain in his or her expectancy of a compensatory claim in the event of dissolution of the community.[34] Second, neither spouse can dispose of household goods belonging to himself or herself without the consent of the other spouse.[35] Household goods in this sense include almost any property except land or buildings, including items being purchased on installment plans.[36] This provision also serves to guarantee the existence of a basis for the family community. Thus it prevents either spouse from singlehandedly disposing of important household property.[37]

Attempts to undertake such dispositions are ineffective in both situations, and the other spouse can assert such ineffectiveness against third parties.[38] A "disposition" in the sense of German property law would include a sale or gift of the property, assignment of property rights and modification of the contents of property rights, as well as mortgages or similar encumbrances on the property.[39]

Similar limitations relating to disposition of property apply when an article is purchased with commingled funds of both spouses, who then become proportional joint owners. However, the management of such jointly-owned household property and other co-owned property is not regulated by the marital property law, but rather by the law of partnership or community.[40]

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32. BGB § 1354.

33. BGB §§ 1365 & 1366.

34. G. BEITZKE, *supra* note 12, at 89; STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1365 No. 2.

35. BGB § 1369.

36. Judgment of December 14, 1977, Oberlandesgericht Stuttgart, W. Ger., Entscheidungen der Oberlandesgerichten in Zivilsachen (OLGZ) 1977, 4; Graue — German Law, *supra* note 5, at 124; G. BEITZKE, *supra* note 12, at 91-92.

37. STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1369 No. 1; PALANDT-DIEDERICHSEN, *supra* note 4, § 1369 No. 1.

38. BGB §§ 1367 & 1368.

39. Graue — German Law, *supra* note 5, at 123.

40. STAUDINGER-FELGENTRAGER, *supra* note 3, § 1363 No. 5.

These limitations on the management of a spouse's separate property are the only ones which arise directly out of the marital property law provisions of the BGB. But, relationships of the community of gains may also be affected by provisions elsewhere in the German family law which relate to the general effects of marriage, and which apply regardless of which marital property regime has been selected. One such provision[41] deals with what was formerly called the 'power of the keys' (*Schlüsselgewalt*), or the power of the housewife to bind her husband for transactions made by her within her domestic sphere. That section was amended in the course of the divorce law reform in 1977. It now provides in sex-neutral terminology that each spouse is empowered to undertake transactions binding on the other spouse to acquire the necessities of life for the family. "Necessities" in this sense includes food, clothing, household equipment and furniture, and the necessities for raising children.[42] Both spouses will be bound by such transactions unless the circumstances dictate a different result.

Under the BGB[43] both spouses are obligated to maintain and support the family with their earnings and property, a provision which also limits the ability of the spouses to freely dispose of their own property. However, if one spouse pays more than his or her share of this support, in a doubtful case, it will be assumed that the providing spouse did not intend to exact reimbursement.[44] An express reservation or record of such intent to demand reimbursement is not necessary. The intent at the time of the transaction is controlling, and such intent may be proved by the circumstances of the case, for example, when the payment is made out of the principal of a spouse's estate.[45]

2. *Termination of the Community by Dissolution*. The BGB provides that 'compensation of gains' between the spouses (*Zugewinnausgleich*) shall occur whenever the statutory marital property regime is terminated by circumstances other than death.[46] This property settlement takes the following basic form: the gain of each spouse is calculated by subtracting the value of his or her net assets at the beginning of the marriage ('initial property' —

41. BGB § 1357.
42. CREIFELDS, *supra* note 8, *Schlüsselgewalt*, 988.
43. BGB § 1360.
44. BGB § 1360(b).
45. PALANDT-DIEDERICHSEN, *supra* note 4, § 1360b No. 2.
46. BGB § 1372.

Anfangsvermögen) from his or her net assets at the termination of the marriage ('final property' — *Endvermögen*).[47] The individual gains of the two spouses are then compared. If the gains of one spouse exceed the gains of the other (and where there are any gains at all, they usually will be unequal), then one-half of the excess shall be awarded to the other spouse as a compensatory claim.[48]

a. Determination of Initial and Final Property. Initial property is the property owned by a spouse at the beginning of the matrimonial regime, after deduction of any liabilities. Liabilities, however, are only deductible to the extent of the existing property.[49] Property acquired by a spouse after the beginning of the community through bequest, inheritance, in anticipation of a bequest, or through gift or dowry, is also considered initial property, so long as the circumstances do not categorize such property as income[50] even as to gifts between the spouses.[51] The initial property will be valued as of the date of the beginning of the marriage, or if the property is acquired during marriage, it will be valued as of the date of acquisition.[52]

Final property is the property belonging to a spouse after deduction of liabilities or debts at the termination of the marriage. Debts may be deducted in this calculation even though they exceed the amount of the final property, if third parties may be held liable[53] for their payment under the provisions dealing with payments made by one spouse to a third party with the intention of disadvantaging the other spouse.[54]

The final property and the liabilities will be valued at the time of the termination of the marital property regime.[55] Any genuine increase in the value of the property which occurred during the period of the marriage, as may often be the case with stocks or real estate, will be included in the valuation of the final property.[56] Pa-

47. BGB § 1373.

48. BGB § 1378.

49. BGB § 1374(1).

50. BGB § 1372(2).

51. Judgment of February 25, 1964, Oberlandesgericht Hamburg, 1964 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1076.

52. BGB § 1376(1).

53. BGB § 1390.

54. BGB § 1375.

55. BGB § 1376(2).

56. Judgment of November 14, 1973, Bundesgerichtshof, BGHZ 61, 385, at 388; Bärmann, *supra* note 22, at 177; PALANDT-DIEDERICHSEN, *supra* note 4, § 1376 No. 14.

per gains, on the other hand, such as those due solely to inflation and diminished purchasing power of the currency, are not considered to be 'gains' in this sense,[57] and adjustments may be made based on cost-of-living indexes to reflect a more constant and accurate value of the final property.[58]

In calculating individual gains, if the spouse has squandered his or her assets, has made excessive gifts to third parties or has undertaken other transactions to harm the other spouse, the amounts so spent or squandered will be included in the value of that spouse's final property.[59]

The problem of determining, upon dissolution of the marriage, what property was initial property and what was not is solved through an inventory requirement. In calculating the gains of each spouse during the divorce proceedings, all property owned by each spouse is presumed to be gains (final property) unless the spouses have made an inventory of their initial property.[60] Such an inventory by the spouses, listing their initial property and the later-acquired property classified as initial property,[61] will be presumed correct as between the spouses in the calculation of the '*Zugewinn*' of each spouse. One spouse may even compel the other to cooperate in the taking of such an inventory.[62] In the absence of an inventory, a rebuttable presumption arises that no initial property existed, and that all of the final property of the spouse represents gains.[63] The spouse then has the burden of proving both the existence and the amount of any actual initial property in order to rebut the presumption.[64]

Since German spouses are no more inclined to file inventories than their American counterparts, this presumption significantly increases the amount of gains that will be available for distribution. Such an increase normally inures to the benefit of the wife, who as

57. BGB § 1373.

58. Judgment of November 14, 1973, Bundesgerichtshof, BGHZ 61, 385 at 388 et seq.; STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1373 No. 11 et seq.; PALANDT-DIEDERICHSEN, *supra* note 4, § 1376 No. 3; *see*, G. BEITZKE, *supra* note 12, at 100-101; *but see*, Bärmann, *supra* note 22, at 157, 177 (false gains are to be compensated under § 1381, *not* by the use of index adjustments).

59. BGB § 1375(2).

60. BGB § 1377(3).

61. BGB § 1374(3).

62. BGB § 1377(1)(2).

63. Bärmann, *supra* note 22, at 167; G. BEITZKE, *supra* note 12, at 99; PALANDT-DIEDERICHSEN, *supra* note 4, § 1377 No. 4.

64. STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1377 No. 24.

a rule will have had the smaller gain during the course of the marriage.[65]

b. Compensatory Claim. The compensatory claim of the spouse with the smaller gain cannot exceed the actual value of the property existing at the time of termination of the regime.[66] Losses will not be compensated in the final calculation, that is, the gain of a spouse will be reduced to zero to reflect losses suffered, but not to below zero. To do otherwise would be unfair to the spouse with an actual gain and would reward the bad management of the losing spouse.[67]

The compensatory claim which accrues to the spouse with the smaller gain (*Ausgleichsforderung*) is in the nature of a statutory debt; the recipient spouse will be a statutory creditor. The earlier German divorce law had normally required culpability or fault on the part of one spouse as a prerequisite to dissolution of the marriage. The right to such a compensatory claim, however, was independent of the fault requirement, being based instead on the economics of the marriage and the individual property gains of the spouses. Thus, the conversion of the divorce law to a no-fault system in 1977 did not affect the nature of the compensatory claim. Nor is the claim for compensation affected by claims of a spouse for alimony; claims for maintenance or child support are decided in a separate maintenance hearing.[68]

The one defense available to the payor spouse, to the economic calculations of the compensatory claim, is gross inequity.[69] It applies where the claiming spouse has culpably failed to perform his or her economic duties arising out of the marriage relationship, such as failing to contribute to the maintenance of the family for an extended period of time. It would apply in those cases where H had willfully failed to find work, forcing W to work outside the home, or where W had not adequately performed her duties as a housewife. When this malfeasance on the part of one spouse would make any or all further economic demands on the payor spouse patently unjust, the court can adjust the calculation of the compen-

65. Graue — German Law, *supra* note 5, at 127-28; Glendon, *supra* note 1 at 74-75.

66. BGB § 1378(2).

67. G. BEITZKE, *supra* note 12, at 102; PALANDT-DIEDERICHSEN, *supra* note 4, § 1373(1)(a).

68. Judgment of April 22, 1966, Bundesgerichtshof, BGHZ 46, 343 at 347-51.

69. BGB § 1381.

sation.[70] It is in essence a defense of economic inquity, and is not dependent on the fault of the claiming spouse in the divorce under the former divorce law or under the new no-fault system.[71]

To a limited extent the debtor spouse may be able to set off benefits received during marriage by the creditor spouse against the amount of the compensatory claim. The statute provides for such set-off only where the benefit was rendered under the assumption that the amount would be set off at some time in the future. Such an intention of a set-off may be presumed where the amount of the benefit conferred exceeds the normal limits of (otherwise permissible and uncomplicated) gifts between the spouses.[72] Such intention could be presumed, for example, where one spouse purchased a life insurance policy for the other, or paid for expensive training or education out of his or her private capital.[73]

c. Pension Compensation. Before the 1977 changes in the divorce law, the problems of rights in old-age insurance or pension plans were not regulated in the German marital property law. Such regulation which did exist was merely incidental to the social insurance or divorce law, and dissolution of the community of gains did not, by itself, affect either spouse's pension rights.[74] Such rights were at all times separate property and were not included in the final property gain calculations. Any rights of one spouse to pension rights or old-age or disability insurance acquired during marriage by the other spouse, were dependent upon the claimant spouse's possession of a separate statutory claim for spousal support. The existence of such a support claim under the old divorce law was in turn dependent on the "fault" of a spouse in the divorce proceedings.[75] It also depended on the sex of the claimant spouse. Reflecting the old stereotypes, men were usually required to pay at least some level of maintenance if they were at fault in the divorce, while women who were at fault were only required to pay maintenance to the extent that the man could not support himself.[76]

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70. Thiele, *Die grobe Unbilligkeit des Zugewinnausgleichs*, 1960 JZ 394, 395; PALANDT-DIERDERICHSEN, *supra* note 4, § 1381 No. 2a; G. BEITZKE, *supra* note 12, at 101.

71. Judgment of April 22, 1966, Bundesgerichtshof, BGHZ 46, 343, at 345; Thiele, *supra* note 70, at 397; Graue — German Law, *supra* note 5, at 129; Glendon, *supra* note 1, at 74.

72. BGB § 1380.

73. STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1380 No. 5 et seq.; PALANDT-DIEDERICHSEN, *supra* note 4, § 1380 No. 2.

74. Massfeller, *supra* note 4, at 407-08.

75. *Id.* at 408.

76. *Ehegesetz a.F.* — Marriage Law, old version § 58.

The new divorce law created the institution of the *Versorgungsausgleich* (this term translates roughly as 'maintenance compensation', but it only applies in reference to old-age maintenance. Therefore, it will be referred to here as 'pension compensation'). This institution extended the concept of the marital compensation of gains to the area of pension, old age and disability insurance benefits. The purpose of pension compensation was to aid the spouse at divorce who had either not been employed or only minimally employed during the marriage, and who as a result had established only minimal rights or no rights to old-age pensions.[77]

The law relies on the principle of the compensation of gains between the spouses to allow the disadvantaged spouse to participate in the expectancy of such old-age security benefits acquired by the other spouse through his or her employment or work. The expectancy of such benefits formally belongs to the working spouse alone, but is considered to have been actually earned by the work of both spouses, with the benefits intended to later support both parties.[78]

Pension compensation is difficult in both concept and application, in part because of the variety of pension and old-age benefit plans existing in Germany and the differing standards which must apply to them. In simplified terms, at the time of divorce the value of the expectancies of each spouse in such pension, old-age insurance and disability insurance plans is calculated and expressed in the terms of a monthly pension. The values of the two expectancies are then compared and the spouse with the smaller pension value will be entitled to one-half of the excess of the other spouse's expectancies.

How this excess value is to be compensated depends on the nature of the pension or insurance plans involved. Germany distinguishes carefully between public statutory plans such as employee pension insurance and civil servant pension insurance, and the other private insurance and pension plans. Different rules on the transfer or equalization of benefits apply to each. Usually the payor spouse must either establish a pension or insurance plan for the recipient spouse in the amount of the compensatory claim, or transfer the one-half excess of his interest to an existing plan of the

77. BGB § 1587.

78. Belchaus, *Einführung in den Versorgungsausgleich*, 30 MONATSCHRIFT FÜR DEUTSCHES RECHT 793 (1976).

recipient spouse.[79]

This pension compensation is only required in the case of pension and insurance expectancies established or maintained through the work of the spouses or the use of their property.[80] It does not extend to awards for compensation of injuries, such as disability payments,[81] or to gifts from others (e.g., an old-age trust fund established by one's parents).[82] However, expectancies may arise during periods where the spouse was not actually "working" in the narrow sense of the term. The concept of "work" has been interpreted in a social sense to include time spent sick, unemployed or in training.[83]

Pension compensation considers all provisions, both public and private, that the spouses have made for their old age. Unless excluded by marital settlement, this compensation for earned pension rights is not limited to only those spouses living under the community of gains, but applies to all marriages, regardless of marital property regime.[84] Thus, although such old-age pension benefit claims would technically qualify as one of the assets of the marriage, such claims would be compensated under the pension compensation statute and not under the general marital property law.[85] However, by marital contract, the spouses can exclude the pension compensation just as they can exclude the compensation of gains.[86]

d. Lifespan of the Community. The Code provisions for determining the lifespan of the community were altered in the 1977 divorce law reform. Under the new provisions, when the spouses have been living separately and apart for three years, either spouse may petition for termination of the community and calculation of gains even if they are not yet divorced. After termination of the community, the spouses live under a separate property marital property regime until the formal dissolution of the marriage.[87] A petition for calculation of gains may be filed before the three-year mark under certain other circumstances, such as when one spouse

79. *Id.* at 793-94; Wolff, *Der Versorgungsausgleich im deutschen internationalen Privatrecht*, 43 RabelsZ 720, 722 (1979).
80. BGB § 1587(1)(2).
81. BGB § 1587a(1)(2), 4th sentence.
82. Belchaus, *supra* note 78, at 794.
83. *Id.*
84. *Wolff*, *supra* note 79, at 722.
85. BGB § 1587(3).
86. BGB § 1408(2).
87. BGB §§ 1385 & 1388.

wrongfully fails to meet the economic obligations of the marriage, or when his or her actions endanger the future viability of a compensatory claim.[88] When the community of gains is terminated before the actual divorce, the calculation of the gains dates to the filing of the petition for compensation.[89] Where the community of gains is terminated concurrently with the divorce, the compensation of gains will date to the filing of the divorce petition.[90]

In the final analysis, the community of gains (which is really not a community at all), arguably demonstrates its community aspects in this regulation of the spouses' interests at the termination of the marriage.[91] The sharing of property at divorce, however, is not accomplished by splitting the property owned by the spouses together, but by splitting the excess gains of one spouse as compared to the gains of the other. This more closely resembles the equitable sharing/division of property which takes place under certain of the separate property systems (those that strictly adhere to a 50-50 division of property at divorce), than the splitting in a true community. This is particularly evident in the cases where W has worked only in the home and has not been able to increase her separate property.

3. *Termination of the Community by Death*. When the community of gains is terminated by the death of one spouse, the gains of the marriage are not compensated by the compensatory claim used in divorce cases. Rather, the compensation of gains is determined under a combination of marital property law and the law of succession. While the legal classification of such a claim is generally not too important in the normal domestic case, it becomes very significant in the cases of international conflict of laws considered here.

The drafters of the new marital property system in the early 1950's had been reluctant to extend the compensatory claim method of compensation of gains to death cases. Among other reasons, they found that the presumption that in the absence of an inventory all property would be considered gains, would affect the other heirs too harshly because it increased the share of the surviv-

88. BGB § 1386.

89. BGB § 1387.

90. BGB § 1384.

91. Graue — German Law, *supra* note 5, at 125-126; Glendon, *supra* note 1, at 73; STAUDINGER-FELGENTRAGER, *supra* note 3, § 1363 No. 15.

ing spouse.[92] The drafters therefore, relied primarily on altering the share guaranteed to the surviving spouse under the statutory succession provisions for cases of intestate succession. In other cases, where testamentary succession resulted in the surviving spouse neither becoming an heir nor receiving a legacy, the marital property scheme was retained subject to certain modifications. Finally, where the surviving spouse was the recipient of only a limited legacy or share, the spouse was permitted an election between remedies under the marital property law and under the law of succession.

a. Intestate Succession. The German statutory regulation of intestate succession is a complex one, involving several competing orders of heirs and lines of inheritance. Under its provisions, the surviving spouse of an intestate is generally granted a statutory share of:

— ¼ of the total estate if the spouse inherits together with the children of the deceased.

— ½ of the total estate if the spouse inherits together with any of the other statutory heirs, such as parents, brothers, sisters, the latter's progeny or grandparents.[93]

When a couple has lived under the community of gains as their marital property regime, and a spouse dies intestate, the marital property law attempts an abstract compensation of gains by increasing the statutory share of the surviving spouse by ¼ of the estate.[94]

Section 1371(1) of the BGB provides:

> If the matrimonial regime is terminated by the death of one of the spouses, compensation of gains shall be achieved through an increase in the statutory share accruing to the surviving spouse under the law of succession by one-quarter of the estate. In this connection, it shall be irrelevant whether or not the spouses have obtained any gains in the individual case.

Thus, regardless of whether the community has actually achieved any gains or not, the surviving spouse receives an automatic increase in his or her share of the estate instead of any compensation of gains between the spouses. Under these circumstances the sur-

92. Glendon, *supra* note 1, at 75; Graue — German Law, *supra* note 5, at 133-34; STAUDINGER-FELGENTRAEGER, *supra* note 3, preceding § 1371 No. 9, 10.

93. BGB § 1931.

94. This ¼ increase will be referred to here as the 'gain share' of the surviving spouse, in order to distinguish it from the normal 'statutory share' granted upon intestate succession and the 'obligatory share' to be discussed *infra* text accompanying notes 110-15.

viving spouse would receive one-half of the estate if he or she inherits with the children (¼ statutory share plus ¼ gain share) or three-quarters of the estate if there are no children and the inheritance is with other heirs, such as parents (½ statutory share plus ¼ gain share).

This system of abstract compensation is admittedly easy to administer and provides adequate financial security for the surviving spouse. It appears to codify the effect the drafters wished to avoid in the first place, however, i.e., it disadvantages the other heirs by increasing the share of the surviving spouse. Some authorities also find an apparent contradiction in the fact that the survivor is granted an increased share of the estate as an abstract compensation of gains whether there have been any actual gains or not.[95]

Other authorities argue that despite the literal wording of the statute, the 'gain share' was not intended to be a substitute for the compensation of gains, but rather serves the purpose underlying the compensatory claim, i.e., the sharing of the assets acquired during the marriage.[96] Such an award to the surviving spouse, particularly where there have been no gains, may also be unfair to the spouse's other descendants, particularly the deceased spouse's children by a previous marriage.[97]

Probably the most biting criticism of this regulation is that the additional share is awarded to the surviving spouse regardless of whether that spouse would have been entitled to compensation of gains upon divorce. If the surviving spouse is the spouse with the larger gain (usually H if housewife W has died), H not only gets to keep his own gain, which he would have had to pay over to W had the marriage ended by divorce instead, but he also gets an extra ¼ of her estate as a gain share, amounting in effect to double compensation.[98]

The share of the estate that the surviving spouse receives is also increased as a practical matter through a special statutory legacy to the survivor consisting of the household goods and wedding presents.[99] If the spouse inherits together with the children, he or

95. Ulmer, *Die Stellung des erstverster benden Ehegatten bei der Zugewinngemeinschaft*, 1958 NJW 170, 171; Bärmann, *supra* note 22, at 158; G. BEITZKE, *supra* note 12, at 104-05.

96. STAUDINGER-FELGENTRAEGER, *supra* note 3, preceding § 1371 No. 13.

97. Bärmann, *supra* note 22, at 184, 195 et seq.; G. BEITZKE, *supra* note 12, at 106; PALANDT-DIEDERICHSEN, *supra* note 4, preceding § 1363 No. 3, § 1379 No. 1.

98. v. Hippel, *supra* note 29, at 348; Bärmann, *supra* note 22, at 182-183.

99. The *Vorraus* that the surviving spouse receives under § 1932 has been defined as being in the nature of a legacy created by statute, rather than as an elective right or share of

she obtains those items necessary to run an adequate household. If the spouse inherits with the other statutory heirs instead of the children, he or she is granted all of these items by statute.[100] In the large number of cases where the estate consists of little more than such household chattels, this provision has great practical significance. Under its terms the surviving spouse may in effect inherit the entire estate.[101]

b. Variations on Testamentary Succession. Under the German law of succession, no estate is created at a person's death. Rather, his or her property vests directly in the heirs at death, by force of statute in the case of intestacy or by force of testament.[102] A testator is free under German law to dispose of his or her property in any way he or she chooses (*Testierfreiheit*). However, certain relatives (spouse, children, and in the absence of children, the testator's parents) are granted a right to a certain non-barrable minimum share of the estate (*Pflichtteil*), which may be claimed from the legatees (not the estate) if these relatives are not provided for.[103] Where a testator has left the listed relatives less than this minimum share of the estate, the decedent's property vests directly in the testamentary heirs, and the statutory heirs have a cause of action against them.

This obligatory minimum share, similar in concept to the American forced share, is one-half of what that person's share would have been under the statutory provisions for intestate succession. Thus, without regard to any possible increase for a potential gain share, the surviving spouse would be guaranteed in all cases ⅛ of the estate as an obligatory share of the estate if he or she inherited with the children of the deceased spouse (½ of the ¼ statutory share), and ¼ of the estate in other cases (½ of the ½ statutory share).

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the spouse under the law of succession. *See*, 5 STAUDINGER-LEHMAN, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, Pt. 1: Erbrecht, § 1932 No. 8 (11th ed. 1954); PALANDT-KEIDEL, *supra* note 4, § 1932 No. 4; Graue — German Law, *supra* note 5, at 134.

100. BGB § 1932.

101. Graue — German Law, *supra* note 5, at 135; PALANDT-KEIDEL, *supra* note 4, § 1932 No. 4.

102. BGB § 1922.

103. The German law distinguishes this claim as being one against the legatees, rather than one against the estate; thus, it arguably does not place a limitation on the testamentary freedom of the decedent. Glendon, *supra* note 1, at 77. It is, however, clearly an indirect limitation on the power of the testator to achieve the desired result, no matter how it is classified. STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1371 No. 49.

There has been a significant dispute as to whether this obligatory share should be calculated from the increased intestate share of the surviving spouse who has been granted a gain share, or whether it should be calculated from the normal, unincreased intestate share.[104] The compromise resolution of this dispute results in different treatment of the spouse depending on how he or she is provided for in the will.

If the spouse is completely disinherited, the marital property law controls the surviving spouse's recovery. The surviving spouse may claim a share of the gains of the marriage through the compensation of gains with a compensatory claim, just as if the marriage had ended by divorce rather than death. The disinherited spouse is additionally granted the minimum obligatory share, calculated in this situation from the *unincreased* statutory intestate share. The spouse thus takes ⅛ of the estate with children and ¼ of the estate with the other statutory heirs,[105] plus the compensation of gains. No increase in the statutory share is necessary to compensate the surviving spouse for the marital gains because this has already been accomplished in the normal calculation of the *Zugewinnausgleich*.[106]

When the spouse is not totally disinherited, but receives only a legacy or a share of the decedent's estate smaller than the obligatory share, or a share subject to strings or conditions, the surviving spouse may choose to take *either* under the law of succession or under the marital property law provisions.[107] Under the law of succession, when the share of the estate received by the spouse under the will is less than the obligatory share guaranteed under the BGB,[108] the spouse is granted a claim against the other heirs for the balance up to the full value of the obligatory share.[109] Instituting suit against the other heirs for the balance of the obligatory share is not an election by the survivor between taking under the will and taking under the statute. It is rather a combination of testamentary and statutory rights; the heir takes under the will, and then sues for the balance guaranteed by statute.

104. *See* discussion in 4 STAUDINGER-FELGENTRAEGER, *supra* note 3, preceding § 1371 No. 17-36; PALANDT-DIEDERICHSEN, *supra* note 4, § 1371 No. 4.

105. Lange, *Der BGB und die erb- und güterrechtliche Lösung des § 1371 BGB*, 1965 NJW 369, 369; Graue — German Law, *supra* note 5, at 138-39.

106. Judgment of March 21, 1962, Bundesgerichtshof, BGHZ 37, 58, at 66 (dicta); Judgment of June 25, 1964, Bundesgerichtshof, BGHZ 42, 182, at 192.

107. BGB § 1371(3).

108. BGB § 2303.

109. BGB § 2305.

If there are restrictions or conditions imposed on an inheritance, and the amount received is less than the obligatory share to which the spouse is entitled, the spouse may simply ignore such restrictions. If such a restricted inheritance is greater than the statutory minimum, the heir must then choose between taking an unrestricted obligatory share under the statute, or, the larger encumbered inheritance under the will.[110] In the case of a legacy, the legatee may reject the legacy and take the obligatory share directly (for example, where the legacy was subject to conditions), or he may accept the legacy and sue for any outstanding balance up to the value of the obligatory share.[111]

In all situations where the partially-disinherited surviving spouse takes under the law of succession, the minimum obligatory share guaranteed to the surviving spouse is what is known as an increased obligatory share.[112] The statutory obligatory share is increased to include the ¼-of-the-estate gain share as a compensation for the gains of the marriage. No other calculation or compensation of the marital gains takes place.[113]

Alternatively, the partially-disinherited spouse may disclaim the legacy or inheritance received under the will, and reject the increased obligatory share guaranteed under the law of succession. He or she may elect instead to take under the marital property law — the compensation of gains plus an unincreased obligatory share of the estate, just as is given to the disinherited spouse.[114]

Only in the case of a partial disinheritance may a surviving spouse elect between remedies under the law of succession and remedies under the marital property provisions. The totally-disinherited spouse is restricted to his or her remedies under the marital property law because differing social policies are involved. The total disinheritance of a spouse is seen as an indication of the desire of the decedent to exclude the survivor from any participation in the estate beyond the statutorily-required compensation of gains and obligatory share. The surviving spouse is not allowed to circumvent this intent by taking under the law of succession with its increased obligatory share, because to do so would give the survi-

110. BGB § 2306.

111. BGB § 2307.

112. BGB § 2303.

113. Graue — German Law, *supra* note 5, at 140; STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1371 No. 49, § 2303 note 42b.

114. STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1371 No. 46.

vor a larger share in the estate than the decedent had wished.[115] When some provision for the surviving spouse has been made in the will, however, such a clear intent of the decedent to limit the survivor's share is not evident, and the surviving spouse is allowed to choose between the law of succession and marital property rights.

Comparative calculations of the relative portions of the estate granted the surviving spouse under these complicated provisions of the law of succession show the following distribution (assuming in all cases that the spouse takes with children):

1) Intestate succession: ½ of the estate
   ¼ of the estate statutory share, plus ¼ of the estate gain share = ½ of the estate
2) Disinherited spouse: ⅛ of the estate plus ½ of the marital property gains
   ½ of ¼ statutory share = ⅛ of estate as unincreased obligatory share, plus ½ of gains in compensation of marital property gains like the usual *Zugewinnausgleich*
3) Partially-disinherited spouse:
   a) Law of succession: ¼ of the estate
      Increased obligatory share = ½ of increased statutory share = ½(¼ statutory share + ¼ gain share) = ¼ of estate. Any legacy the spouse may have received is counted towards the ¼ of the estate receivable under the law of succession.
   b) Marital property law: ⅛ of the estate plus ½ of gains
      After rejection of the legacy, the partially-disinherited spouse can opt for remedies available to the disinherited spouse, i.e., ⅛ of the estate plus ½ of the marital property gains.

B. Contractual Marital Property Regimes

The new marital property law of 1958 retained the basic freedom of the spouses to choose any marital property arrangements they wish, or to change marital property systems even during the marriage by way of a simple marital contract.[116] Such a marital settlement must be witnessed by a notary (an institution with extensive functions in Germany, more like a Louisiana notary than the usual American notary public), and if it is to be binding on third parties, the contract must be registered at the local court in the mar-

115. *See* note 106 and decisions cited there; Lange, *supra* note 105, at 369-70.
116. BGB § 1408.

ital settlements register.[117] Subject to these requirements, couples can elect or construct any marital property regime they choose, even one conflicting with the equality requirements of the Basic Law.[118]

Certain restrictions do exist on the spouses' election of foreign marital property regimes. The BGB stipulates that the spouses cannot choose a marital property regime by reference to a law which is no longer valid or by reference to a foreign law.[119] This does not mean that the spouses cannot elect such a property system. Rather, the choice cannot be accomplished by mere contractual reference to the foreign or superseded statutory provisions, as is possible when German spouses elect the universal community of property by mere reference to the statutory regulation in the BGB. Instead, the spouses' marital contract must include the actual text of all relevant provisions in order for such an arrangement to be recognized. But, if either of the spouses has their domicile in a foreign country at the time of the marriage or at the time of the contract, then mere reference to a foreign law would be sufficient.[120]

1. *Separate Property*. The separate property regime is a subsidiary statutory regime as well as one of the contractual options of the spouses. A single statutory provision in the new marital property laws regulates this option; it provides that separate property will be assumed to exist as the subsidiary statutory regime if the spouses have contracted to exclude or suspend the compensation of gains, and have not provided for a different property regime.[121] By law, separate property will also be the regime of the spouses when the community of gains is terminated before the end of the marriage[122] or in certain other cases relating to property agreements entered into before the new law went into effect in 1958.[123]

Like any other contractual marital property regime, separate property may also be elected by the spouses by marital contract

117. BGB § 1412.

118. PALANDT-DIEDERICHSEN, *supra* note 4, § 1401 No. 1. While spouses theoretically can invent any marital property system they wish, the practical realities of other limitations on administration, limitations of other family law and marriage law provisions, and restrictions under the law of obligations limit the spouses essentially to variations on the usual marital property regimes. G. BEITZKE, *supra* note 12, at 82.

119. BGB § 1409(1).

120. BGB § 1409(2).

121. BGB § 1414.

122. BGB § 1388.

123. PALANDT-DIEDERICHSEN, *supra* note 4, § 1414; G. BEITZKE, *supra* note 12, at 111.

under the preceding requirements. A significant number of couples do elect separate property as their marital property regime, particularly two-career professional families, families with university backgrounds and/or families at higher income levels.[124]

Under the separate property system, the spouses manage, possess and use their property as if they were unmarried. They are not liable for each other's debts, and no community property comes into existence between them. The spouses can become joint owners of property through joint acquisition, but this joint ownership status arises out of the general property law and is not the result of the marital property provisions.[125] The general provisions of the marriage law dealing with the effects of marriage apply to all marital property regimes,[126] however, so that spouses electing separate property are still bound by the provisions regulating operation and support of a household and the sections dealing with marital community and marital separation.

The termination of the separate property regime is not regulated by the marital property law. In the case of termination through death of a spouse, the normal law of succession would apply, that is, upon intestate succession the surviving spouse would receive the statutory share of the decedent's estate (¼ with children, ½ with other heirs), and in other cases would be entitled to at least the unincreased obligatory share. Termination by divorce leaves the spouses with only maintenance claims against each other under divorce law, and possibly with claims out of a contractual arrangement, but no claims arise under marital property law.[127] The only exception is the possible existence of a claim to pension compensation for any expectancies in pension or disability insurance rights the spouses may have acquired during marriage.

2. *Universal Community of Property*. The universal community of property is solely a contractual property regime. It is extensively regulated in the BGB, because numerous statutory changes were necessary to adapt its old form to the equality principle of the Basic Law. Despite the detail of its regulation, it is a relatively unimportant marital property option elected by very few couples.[128] Where the parties stipulate by marital contract merely that their

124. Graue — German Law, *supra* note 5, at 146.

125. STAUDINGER-FELGENTRAEGER, *supra* note 3, preceding § 1414 No. 10.

126. *See* text *supra* accompanying notes 34-41.

127. CREIFELDS, *supra* note 8, *Gütertrennung*, 534; BEITZKE, *supra* note 12, at 112.

128. While the statutory marital property system of the *Zugewinngemeinschaft* requires

marital property will be held under the universal community of property, absent any further specifics, the statutory provisions are automatically incorporated by reference.[129] The parties are free to change any of the law's stipulations by specific provision in the marital contract.

The universal community of property exists in two versions: sole administration by one spouse, or joint administration by both spouses. Should the spouses not specify what form of administration is to prevail in their community, joint administration will be presumed.[130] Under either version, the separate property of H and W is merged into joint property (*Gesamtgut*);[131] the merger extends to the property acquired post-nuptially by either spouse.

The spouses retain sole possession and control over two types of their separate property. First, special property (*Sondergut*) is property which cannot be transferred by legal action, such as alimony claims, copyrights, and tort claims based on pain and suffering.[132] Second, reserved property (*Vorbehaltsgut*) is property left at a spouse's disposal by agreement, including all property acquired by gift or succession, provided that the testator has stated that it is to be reserved property. Property acquired in replacement of reserved property, whether as the result of involuntary conversion, destruction or voluntary sale or exchange transactions is also reserved property, as is property arising from rights owned as reserved property, for example, assigned claims and rights to receive rents and dividends.[133]

Under the sole administration form of the universal community, the administering spouse takes possession of the joint property, administers it as he sees fit, and acts as the sole party to any legal actions involving it, all without imposition of personal liability on the other spouse.[134] The other spouse's consent is necessary for the disposal of the joint property in its entirety,[135] for the dispo-

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only 27 sections for its regulation, the elective universal community of property requires 103 sections.

129. BGB § 1415.

130. BGB § 1421.

131. BGB § 1416(1).

132. BGB § 1417. BEITZKE, *supra* note 12, at 116; PALANDT-DIEDERICHSEN, *supra* note 4, § 1417 No. 2.

133. Graue — German Law, *supra* note 5, at 148; STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1418 No. 45 et seq.; for the reservation to be effective against creditors of the community, it must be registered in the marital settlements register, BGB §§ 1418(4) & 1412.

134. BGB § 1422.

135. BGB § 1423.

sal of land belonging to the joint property[136] and for gifts out of the joint property, except minor gifts necessary by social custom.[137] Creditors of either spouse can move against the joint property for satisfaction of debts, although with certain exceptions, liability of the joint property will usually depend on the administering spouse having undertaken the transaction himself or approving the transaction involved. The administering spouse is also personally liable with his reserved and special property, for debts payable out of joint property incurred by the other spouse.[138]

Under the joint administration variation of the universal community of property, the spouses jointly possess and administer the joint property, and jointly prosecute any legal actions relating to it.[139] Consent of both parties is required for legal transactions or suits necessary for the orderly administration of the joint property, but a guardianship court may substitute judicial consent if one spouse unreasonably withholds his or her consent.[140] Without such personal or judicial consent, transactions by one spouse are not valid until ratified by the other spouse.[141] As under separate administration, creditors of either spouse may exact payment out of joint property for debts owed, and both spouses are personally liable even as to their special and reserved property for community debts.[142]

Upon termination of the community, the joint property is divided up; the debts of the community are first paid and the remaining property is divided equally between the spouses.[143] Where an equal division upon liquidation of the community would be unfair, the division of property may be based instead on "enrichment" principles. Under these principles each spouse would receive back the value of the property he or she brought into the marriage, as well as most property acquired during the marriage by inheritance, gift or dowry. Any inadequacy of the community funds for this purpose would be borne by each spouse in relation to the value of the property each brought into the community.[144]

The spouses may, finally, provide by marital contract for a

136. BGB § 1424.
137. BGB § 1425.
138. BGB §§ 1437 & 1438.
139. BGB § 1450.
140. BGB § 1452.
141. BGB §§ 1366 & 1453.
142. BGB § 1459; PALANDT-DIEDERICHSEN, *supra* note 4, § 1459 No. 2.
143. BGB §§ 1475-1477.
144. BGB § 1478.

continued community in case of death of a spouse. Such community would be continued by the surviving spouse and the descendants of the marriage.[145]

III. THE GERMAN CONFLICT OF LAWS NORMS

The German and the American conflict of laws norms that apply to a marital property dispute in a German-American marriage differ quite radically. Thus, complex international conflicts questions arise in such a situation, particularly in cases relating to the disposition of marital property at death.

When the BGB was being drafted, Germany became one of the states to choose a codified set of international conflicts rules over continued reliance on decisional law, reflecting the still-prevalent German concern for certainty of the law.[146] The resulting codification was an incomplete one because the proposed final chapter of the BGB, which would have contained a detailed regulation of international conflict of laws questions, was never adopted.[147] The German conflicts norms are thus codified only in the Introductory Law to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*-EGBGB),[148] which despite gaps in coverage, is usually an adequate regulation for the majority of family and succession law cases.

A. Marital Property Law

Article 15 of the EGBGB contains the conflict of laws rule applicable to marital property questions. It provides simply that the marital property regime of spouses is governed by German law if the husband was a German citizen at the time of marriage. Although the provision literally deals only with German husbands, it has been expanded in application from a one-sided to a universal

145. BGB §§ 1483-1518.

146. Neuhaus, *Legal Certainty v. Equity in the Conflict of Laws*, 28 L. & CONTEMP. PROB. 795, 798-800 (1963); *See*, Judgment of March 17, 1959, Oberlandesgericht Bayern, W. Ger., reprinted in: Max-Planck-Institut für Ausländisches und Internationales Privatrecht, DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS 1958-1959, No. 120, 416, 419-20 [hereinafter cited IPR-Rspr.].

147. Graue — Spouses, *supra* note 4, at 173-74; PALANDT-HELDRICH, *supra* note 4, preceding EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH [hereinafter cited as EGBGB] art. 7, No. 4 (W. Ger. 1977). The reasons were essentially political ones: a key German official wanted to retain the flexibility and the ability to take retaliatory action against other legal systems by use of conflicts norms, an option which complete statutory regulation of conflict of laws norms would have prevented.

148. EGBGB arts. 7-31.

conflicts norm, making marital property law in general dependent on the nationality of the husband.

This Article of the EGBGB goes on to provide that if H acquires German nationality after the marriage, or if foreign spouses have their domicile in Germany, the laws of the country of which H was a citizen at the time of marriage will govern the marital property regime.[149] Foreign spouses domiciled in Germany may enter into marriage contracts under German law, however even though this would not be permitted under the laws of their country of citizenship.[150]

Article 15 differs from the usual American conflicts rules in two important respects. First, a German court will look to nationality, and not to domicile or the interests involved in determining the law applicable to a marital property dispute. This nationality basis for conflicts regulation in personal, family and succession law (marital property falling within family law) is the more common regulation in the continental European systems, in contrast to the domicile principle that was traditionally favored in Anglo-American circles.[151] Those countries that suffered a substantial population emigration to other lands in the last century and a half sought to retain some control over their emigrating nationals by the use of nationality-based conflicts rules. The traditional immigrant lands such as the United States, on the other hand, sought to assimilate their new and diverse populations as quickly as possible, and relied on domicile as the basis of conflicts norms as a means for doing so.[152] In Europe, the increasing resort to 'habitual residence' (*residence habituelle*) as the basis for jurisdiction is diminishing the importance of domicile/nationality distinctions in the area of divorce, personal, and family law, but the dichotomy is still alive in marital property law.[153]

149. EGBGB art. 15, para. 2.

150. *Id.*

151. G. KEGEL, INTERNATIONALES PRIVATRECHT 151-52 (1961); PALANDT-HELDRICH, *supra* note 4, preceding art. 7 EGBGB No. 7a; K. FIRSCHING, EINFÜHRUNG IN DAS INTERNATIONALE PRIVATRECHT 161-62 (1974).

152. Graue, *Domicile, Nationality and the Proper Law of the Person*, 19 GERMAN Y.B. INT'L L. 254, 256 (1976) [hereinafter cited Graue-Domicile]. Neuhaus, *supra* note 146, at 799.

153. Graue — Domicile, *supra* note 152, *passim*; Pålsson, *Marriage and Divorce*, in: 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PRIVATE INTERNATIONAL LAW, Chapter 16, No. 16-18 at 111-12 (1978). The Hague Conference on Private International Law relies on a concept of domicile almost indistinguishable from habitual residence, and Germany and Austria both rely on habitual residence as the basis for divorce jurisdiction: Zivilprozessordnung § 606(b)(1), Zivilprozessgesetz § 76(3), respectively.

Second, Germany proceeds from the immutability of the law governing marital property. The law controlling a marital property regime under Article 15 of the EGBGB depends on H's citizenship *at the time of marriage*, regardless of any subsequent changes in H's domicile or citizenship.[154] This is in German law the principle of *Unwandelbarkeit des Güterstandes*: once a marital property regime has commenced under a certain national law, the law of that country will always govern the property relations of the spouses.[155] Aspects of the property regime itself may change, if the spouses draw up a marital contract or if the substantive marital property law of that nation is amended, but the national jurisdiction controlling such marital property law will remain the same as on the date of the marriage.[156]

This reliance in German law on the *husband*'s nationality as the basis for determining the controlling law of a marital property regime has not yet run afoul of Germany's constitutional equality mandate of the Basic Law.[157] To date, the marital property provision has been upheld by the courts,[158] despite fairly uniform scholarly opinion that the equality requirements and this norm *are* irreconcilable.[159] It is doubtful, however, that the provision would withstand constitutional review by the German Federal Constitu-

154. Judgment of October 18, 1968, Bundesgerichtshof, 1969 NJW 369; G. KEGEL, DAS INTERNATIONALE PRIVATRECHT IM EINFÜHRUNGSGESETZ ZUM BGB, art. 15 No. 4 (1961) [hereinafter cited KEGEL — EGBGB] (emphasis added).

155. K. FIRSCHING, *supra* note 151, at 162-63; STAUDINGER-FELGENTRAEGER, *supra* note 3, preceding § 1363 No. 194-96.

156. K. FIRSCHING, *supra* note 151, at 164; Judgment of March 17, 1959, Oberlandesgericht Bayern, IPR-Rspr. 1958-1959, No. 120, 416, *passim*. In the case of refugees, exiles and similarly situated persons who have emigrated to another country and acquired that country's citizenship, any changes in the original nation's marital property law subsequent to the change of citizenship will not be considered: *Id.* at 417; Judgment of June 6, 1963, Oberlandesgericht Bamberg, IPR-Rspr. 1962-1963, No. 90, 273, at 274-275; Gesetz über den ehelichen Güterstand von Vertriebenen und Flüchtlingen, BGBl. I, 1067 (1967), providing that such persons now fall under W. German marital property law.

157. Basic Law art. 3(2).

158. Among others: Judgment of January 18, 1954, Bundesgerichtshof, IPR-Rspr. 1954-1955, No. 90, 272; Judgment of March 17, 1959, Oberlandesgericht Bayern, IPR-Rspr. 1958-1959, No. 120, 416, at 419-20; Judgment of March 28, 1961, Oberlandesgericht Bayern, IPR-Rspr. 1962-1963, No. 101, 342, at 343; Judgment of May 22, 1978, Oberlandesgericht Stuttgart, IPR-Rspr. 1978, No. 54, 117, at 118 (holding that mere preference of H's national law, absent violation of personal constitutional rights in its application, is not unconstitutional). Most recently, Judgment of July 9, 1980, Bundesgerichtshof, 1980 NJW 2643, 2644-2645, (holding that protection of established legal expectations takes precedence over the constitutional mandate of sexual equality in German conflicts of law).

159. Graue — German Law, *supra* note 5, at 132; PALANDT-HELDRICH, *supra* note 4, art. 7 EGBGB, No. 17; Pålsson, *supra* note 153, at 131-32. *See* discussion in STAUDINGER-GAMILLSCHEG, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH — EGBGB, Pt. 3, art. 15

tional Court.[160]

B. Law of Succession

The law of inheritance under German conflict of laws norms also depends generally on the nationality of the deceased at the time of death. Article 24(1) of the EGBGB provides that succession to the estate of a German will be governed by German law, even if he has his domicile abroad. Article 25(1) of the EGBGB provides that a foreigner who had his domicile in Germany at the time of death will be succeeded under the laws of the country of which he was a citizen at the time of death. Out of these two provisions has developed the general principle that succession will be determined by the laws of the decedent's country of nationality at the time of death.[161]

Like the marital property law provisions of Article 15 of the EGBGB, the conflicts of law norms for succession look to nationality in determining the applicable law in a conflicts case. But, the succession law norms looks to nationality at the time of *death*, whereas Article 15 looks to nationality at the time of *marriage*. This difference in the time of attachment of the laws may lead to divergent if not conflicting results at the time of death, depending on the location the property involved. For example, if a United States citizen marries in the United States and moves to Germany for many years, acquiring German citizenship, but returns to spend his final years in California, upon his death, a German court would find his marital property to be governed by American law, while his estate would fall under German law. This potential overlap of the two legal systems increases the importance of classification questions, as are involved for example, with the problem of classification of the additional one-quarter gain share as an abstract

EGBGB No. 44-56 (1973), discussing forsaking the immutability principle as incompatible with the equality principle of Basic Law art. 3(2).

160. Pålsson, *supra* note 153, at 132. The German conflicts norms of the EGBGB were originally considered to generally be mere "Ordnungsvorschriften", or value-neutral regulatory provisions only. Current constitutional law, however, demands that the norms and their application of foreign law must measure up to the constitutional standard of the German list of personal constitutional basic rights. *See* Judgment of May 4, 1971, Bundesverfassungsgericht, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 31, 58, holding that application of a Spanish law rule prohibiting marriage between a Spaniard and a German divorcee would violate the freedom to marry protected in regard to both citizens and aliens by international law, German constitutional law, and *ordre public*.

161. Judgment of May 2, 1966, Bundesgerichtshof, BGHZ 45, 351; KEGEL-EGBGB, *supra* note 154, preceding art. 24 No. 3-7.

compensation of gains for the surviving spouse under the law of succession or the marital property law.

One narrow exception to the rule of nationality as the determinant of the controlling law in international marital property and succession cases is the property law rule that rights in real property may in certain cases be determined by the law of the place where the property is located (*lex rei sitae*).

Since the 18th century Germany has rejected any differentiation in its domestic law between the law applicable to movables and immovables; both are controlled by the personal law of the individual involved, normally nationality. This is known in succession law as the principle of 'unity of the estate' (*Nachlasseinheit*) under which the entire estate is controlled by the law applicable to succession. This is distinguished from the principle of division of the estate, (*Nachlassspaltung*), found in countries where personal and real property may be governed by differing laws, i.e., *lex domicilii* vs. *lex rei sitae*.[162]

Article 28 of the EGBGB provides that the provisions of Article 15, Article 24(1) and Article 25(1) (among others) do not apply to objects that are not within the territory of the country whose laws are applicable, when such objects are subject to special regulations under the law of the country in whose territory they are located. This regulation creates a preference for the law of the situs for certain types of property. It prevents German courts from handing down decisions based on nationality which would ultimately be unenforceable in a state where the property is located due to special situs regulation of the property within its borders.[163] For example, when a German citizen dies in Germany, succession to his entire property, of whatever type and wherever located, is controlled by German law and the principle of unity of the estate under Article 24. If, however, he leaves real property in Austria, Austrian law provides specially that succession to immovables is to be determined or regulated by the *lex rei sitae*. Thus, as to that piece of realty, German law would yield to the Austrian law.[164] This exception in Article 28 recognizes the practical reality that a German decision, as to the property under Article 24 alone, would be unen-

162. KEGEL-EGBGB, *supra* note 154, preceding art. 24 No. 1-2, art. 28 No. 1-3; FIRSCHING, *supra* note 151, at 123.

163. IV SOERGEL-BAUER, BÜRGERLICHES GESETZBUCH 272-73 (1955).

164. *See* Judgment of November 28, 1972, Landesgericht Hamburg, IPR-Rspr. 1972, 345 at 347 et seq.

forceable in a state with a special regulation governing the property within its borders.

What exactly constitutes such 'special regulation' in the sense of Article 28 is not altogether clear. Generally, special substantive law or conflict of laws rules for property that connect specifically to the fact of location, rather than to ownership, residence, domicile or nationality, have been recognized as being such special regulation.[165] As a practical matter, the property involved in such regulation will almost always be realty, although similar rules may apply to certain trust property or to other narrow succession situations.[166]

The special treatment of real property in American conflict laws could potentially lead to the application of differing substantive law to personal and real property in marital property and/or succession cases. For example, if an American citizen with personal and real property in the United States and land in Germany dies in a state relying on *lex rei sitae* for real property in its conflicts law, it would result in American law applying to the realty in the United States while German law would control the real property in Germany.[167] A German court would look to the American decedent's nationality, and then apply the conflicts law of his American state of domicile to the property within Germany. That would result in the application of German law to the German land.

This split in applicable norms can at times lead to unfair or undesired results. For example, the German requirement of an obligatory share of the estate for certain heirs at death would apply to any property governed by German law in a succession case, thus making it practically impossible for an American spouse with property in Germany to disinherit a spouse or child, or to allocate specific properties to specific children.

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165. Judgment of April 5, 1968, Bundesgerichtshof, BGHZ 50, 63, 68-70; IV SOERGEL-BAUER, BÜRGERLICHES GESETZBUCH 273-74 (1955). PALANDT-HELDRICH, *supra* note 4, art. 15 EGBGB No. 3, art. 28 EGBGB No. 3; *contra*, KEGEL-EGBGB, *supra* note 154, preceding art. 24 No. 80. Specifically to marital property law; "Unter solchen besonderen Vorschriften sind nur Normen zu verstehen, die zwingend die Anwendung des Rechts des Gebietsstaates fordern [citations]. Die allgemeinen Vorschriften des ehelichen Güterrechts rechnen zu ihnen nicht". Judgment of March 17, 1959, Oberlandesgericht Bayern, IPR-Rspr. 1958-59, No. 120, 416, at 420.

166. BRESLAUER, THE PRIVATE INTERNATIONAL LAW OF SUCCESSION 42 (1937).

167. U. DROBNIG, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW 96 (1972); Judgment of December 29, 1962, Oberlandesgericht Frankfurt, IPR-Rspr. 1962-63, No. 146, 425, at 430-31.

IV. GERMAN-AMERICAN CONFLICTS HYPOTHETICALS

This divergence between German and American conflicts law leads to interesting results in concrete cases. Some of the problems are discussed below through variations on a hypothetical German-American marriage. To explore the interaction of German marital property law and the American community property law, the American spouses in the following scenarios will all be Californians.

A. German Husband — American Wife Domiciled in the Federal Republic

Assume that American W from California marries German H and that they live in the Federal Republic under the statutory property regime of 'community of gains'. Several significant conflicts questions are raised by this situation, which in turn isolate several basic differences between the conflicts law of the two nations.

If W divorces H, or if W returns to California, both the German and the American conflicts norms would probably result in the application of German law to the marital property division. German law would proceed from the German nationality of H, and German law under Article 15 of the EGBGB would apply. A California court in such a marital property dispute would first look to the domicile of the parties. Marital property has traditionally been governed by the law of the couple's domicile at the time of the property's acquisition,[168] (subject to statutory changes such as those regulating quasi-community property). While California has adopted the 'interest analysis' method of conflict resolution, domicile remains the primary indicator of the interests involved in marital property questions.[169]

Where the parties have separate domiciles, a California court would analyze which state or country has the greater interest in the application of its law, and in the outcome of the case. This would take the form of a comparative impairment approach i.e., analysis of which state or country's interest would be more impaired if its policy were *not* followed.[170] Here not only H's nationality, but also

168. Rozan v. Rozan, 49 Cal. 2d 322, 317 P.2d 11 (1957).

169. Reich v. Purcell, 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P.2d 727 (1967); Offshore Rental Co., Inc. v. Continental Oil Co., 22 Cal. 3d 157, 148 Cal. Rptr. 867, 583 P.2d 721 (1978); *see*, W. REPPY & W. DE FUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 471-72 (1975); VERRALL, CALIFORNIA COMMUNITY PROPERTY 32 et seq. (1977).

170. Offshore Rental Co., Inc. v. Continental Oil Co., 22 Cal. 3d 157, 164-65, 583 P.2d 721 (1978), 148 Cal. Rptr. 867, 872.

the domicile of the marriage and the probable location of most of the marital property, points to the greater interest of Germany in the application of its law to the conflict.

If the spouses had acquired real property in the United States during their marriage, the results are less clear. Article 28 of the EGBGB could cause the German court to look for special California regulation of any California realty. Such regulation could be found in the California Civil Code, which provides that California law will apply to real property situated within its borders.[171] While this statutory preference for the law of the situs may have been overturned in California by the move of the California courts to interest analysis in conflicts cases,[172] lack of clear precedent in similar cases may cause the German court to rely on the *lex rei sitae* tradition and the California realty statute, thus making California law applicable.

On the other hand, it is possible that a California court would decide to apply German law to the California realty. California courts have on occasion applied California law to out-of-state realty in a marital property dispute,[173] and in the present hypothetical, California interest analysis could well point to the application of German law to the realty as well as to the personal property. While California has an interest in regulating property within its borders generally, Germany as the domicile of the parties would have a strong interest in an orderly and fair property settlement between them. Failure to subject the land to German law would make calculation of the 'compensation of gains' difficult, and could skew the results to the disadvantage of either party. Thus it is possible, at least until California interest analysis becomes more clear in real property cases, that a German court would apply California law to property in California, while a California court would probably apply German law.

If H dies, the German conflicts norms would require the application of German law to the marital property as well as to the succession to H's estate because of H's German nationality. If an American court had jurisdiction, American reliance on the domicile of the decedent in succession cases, which interest analysis would not affect here, would also require application of German law.

171. Cal. Civ. Code § 755 (West 1954).

172. *See* note 153 and authorities cited therein.

173. *See* Ford v. Ford, 276 Cal. App. 2d 9, 80 Cal. Rptr. 435, 437 (1969).

If W dies in Germany, other basic differences between German and American conflicts law come into focus. Under German law, proceedings in a succession case are determined by the law of the country whose substantive law controls the estate and its division. Thus, in general, a German court has jurisdiction to regulate the estate of a foreigner only if an international treaty so provides, or where German substantive law would be applicable, at least as to part of the property of the estate.[174]

Analysis therefore begins with the question of whether German substantive law applies under the German conflicts norm for the law of succession, Article 25 of the EGBGB, which refers to the law of the deceased foreigner's nationality. This reference to W's nationality, however, is a reference to the *whole* American law, including its conflicts of law provisions,[175] and not just to the substantive American law. Where W does not currently have a domicile in the United States the German courts would determine the applicable state law by reference to her last domicile in the United States.[176] That analysis would point here to California law. Since the California law would look to the domicile of the deceased,[177] a renvoi back to German substantive law takes place.

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174. Judgment of February 7, 1958, Oberlandesgericht Bayern, IPR-Rspr. 1958-1959, No. 143, 471, at 473 (discussing possible exceptions to the rule, at 475-476); Judgment of September 25, 1958, Oberlandesgericht Frankfurt, IPR-Rspr. 1958-1959, No. 145, 482, at 484; PALANDT-HELDRICH, *supra* note 4, EGBGB art. 25, No. 3; K. FIRSCHING, *supra* note 151 at 100. In the German law of civil procedure, it is irrelevant for the international competence of the courts whether internal or foreign law is to be applied. However, in parts of the law under the *freiwillige Gerichtsbarkeit*, (which includes estates, wardship and guardianship questions) the rule is as here, that internal jurisdiction is predicated upon application of internal law. See discussion and criticism of this rule in: A. HELDRICH, INTERNATIONALE ZUSTÄNDIGKEIT UND ANWENDBARES RECHT, 199 et seq., 211 et seq. (1969).

No treaty between Germany and the United States bears directly on this question. The Friendship, Commerce and Navigation Treaty of October 29, 1954 guarantees only national treatment in estates questions to American nationals in Germany. Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, (1956), 7 U.S.T. 1839, T.I.A.S. 3593, art. 9(3), pt. 2.

175. Judgment of November 21, 1958, Bundesgerichtshof, BGHZ 28, 376, 380; K. FIRSCHING, *supra* note 151, at 51; Judgment of February 21, 1975, Oberlandesgericht Bayern, IPR-Rspr. 1975, No. 115, 292, at 293.

176. Judgment of February 21, 1975, Oberlandesgericht Bayern, IPR-Rspr. 1975, No. 115, 292, at 293; Judgment of May 15, 1963, Oberlandesgericht Karlsruhe, IPR-Rspr. 1962-1963, No. 181, 591; Judgment of February 7, 1958, Oberlandesgericht Bayern, IPR-Rspr. 1958-1959, No. 143, 471, at 473; FIRSCHING, *supra* note 151, at 66. It is possible, but is not discussed in the decisions, that other factors besides last residence might be considered in reaching a decision as to domicile.

177. Cal. Civ. Code § 946 (West 1954). Interest analysis, if relied on instead of the old statute, would point in the same direction, California having little interest in regulating personal property of a non-domiciliary.

The question of renvoi as regulated in the EGBGB contrasts sharply with the American practice. Article 27 of the EGBGB states that when the law of a foreign state, whose laws have been declared controlling by Article 15(2), Article 25, or certain other listed Articles, provides for the application of the German laws, then the German law will be applied. The courts have extended the scope of this acceptance of renvoi under the specific listed articles to an acceptance of renvoi in *all* cases under German conflict norms.[178]

A German court confronted with application of foreign law under these German conflicts provisions will thus look to the *whole* law of the foreign nation whose law has been declared applicable, and not just to the internal, substantive law.[179] If the conflicts law of the foreign nation refers back to German law, the renvoi back to German law (*Rückverweisung*) will be accepted. However, the renvoi is stopped at that point, regardless whether the renvoi back to German law is to German *substantive* law or to the German *conflicts* provisions.[180] In the former case, German substantive law is applicable *because* of the renvoi to German substantive law. In the latter case, the continuing circle of renvoi from conflicts norm to conflicts norm is simply broken off as a matter of policy when the renvoi is back to German law.[181] This ends the potential "endless circle" of remission complained about by some American writers.[182] In this respect Germany's conflict of laws doctrine is in radical contrast to the majority opinion in American conflict of laws where renvoi is not accepted.[183] If W in this hypothetical had died in the United States while domiciled in Germany, an American court under its conflicts rules would have referred to the German *substantive* law of succession as the law of W's domicile (and the probable center of interest analysis), ignoring the German conflicts rule requiring that the law of W's country of citizenship be applied.

178. PALANDT-HELDRICH, *supra* note 4, EGBGB art. 27, No. 3 & art. 15, No. 2.

179. Judgment of November 21, 1958, Bundesgerichtshof, BGHZ 28, 376, 380; G. KEGEL, *supra* note 151, at 120; K. FIRSCHING, *supra* note 151, at 49-50; PALANDT-HELDRICH, *supra* note 4, EGBGB art. 27, No. 2.

180. Judgment of February 7, 1958, Oberlandesgericht Bayern, IPR-Rspr. 1958-1959, No. 143, 471, at 474; KEGEL-EGBGB, *supra* note 154, art. 24, No. 74; M. DOMKE, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW CASES 1945-55, 96 (1956).

181. K. FIRSCHING, *supra* note 151, at 49-51; KEGEL, *supra* note 151, at 124.

182. *See*, Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 SO. CAL. L.R. 221, 249-50 (1941).

183. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971); 16 AM. JUR. 2D *Conflict of Laws* § 4 (1979). Renvoi is also considered to be inconsistent with interest analysis, which California follows rather than the Restatement approach.

Despite systematic oddities, this is basically a fair result. If neither country accepted renvoi in this situation, each county would have applied the law of the other. A German court would have simply applied the internal American law as the law of W's nationality and the Californian court would have simply applied German law as the law of W's domicile and/or the law of the country having the greatest interest in the conflict. Where one jurisdiction recognizes renvoi and one does not, German law would apply, but if both countries recognized renvoi, each would have applied their own law.[184] Thus, the result in this situation is not an unreasonable one; the applicable law of succession does not change by the chance factor of where W dies or where both country's court would seek jurisdiction. No other approach seems to offer a better reconciliation of interests.

The choice of law for the division of the marital property upon W's death would follow the same analysis as the succession questions. The question of the classification of the additional one-quarter gain share as a marital property or as a succession law provision does not arise since both succession and marital property would be controlled by the same law.[185]

B. German Husband — American Wife Domiciled in the United States — California

Assume that after their marriage in Germany, H and W decide to migrate to California. If H decides after several years to divorce W and to return to Germany, the conflicts situation is more complex, and the ultimate result will depend on the forum.

Under both the old statutory provisions[186] and interest analysis, a California court would apply California law to the marital property division in this situation. Even out-of-state or foreign property will be considered in the property division.[187] H's arguments to the California court that the marital property is actually governed by German law solely because of his nationality, would probably be of insufficient weight to move the court from the security of its own law. The marriage ran almost its entire course in California, probably little if any marital property exists anywhere but in California, and the contacts of the marriage to Germany are

184. K. FIRSCHING, *supra* note 154, at 51.
185. v. Hippel, *supra* note 29, at 349.
186. Cal. Civ. Code §§ 755 & 946 (West 1954).
187. Ford v. Ford, 276 Cal. App. 2d 9, 80 Cal. Rptr. 435, 437 (1969).

minimal. Thus, the court could justifiably divide the property under California law, a result in line with the trend to focus on the habitual residence of the parties rather than rigidly on nationality or domicile as the basis for a choice of law decision. This would be so because the former basis may better reflect the real interests and autonomy of the parties.[188]

The result is different if H returns to Germany and sues for divorce in a German court. The German court under Article 15 of the EGBGB would look simply to H's nationality, and German marital property law would be applied to the personal property and any German real property. California law as the *lex situs* would, probably, at least at present, still be applied to any real property in California.[189] This result is statutorily mandated, regardless of how little contact H may have had with Germany during the marriage years, and without regard to the location of the personal property.

Such results have led, in German private international law circles, to suggestions for reform to allow the courts more flexibility in reflecting the actual interests involved in such cases.[190] The principle of immutability of marital property regime has been rejected by some authors as being inconsistent with the personal mobility in modern society. The need to adapt to changing social and legal circumstances outbalances the difficulties involved in changing marital property regimes during the marriage.[191] The possibility of forum shopping would not be greater under the latter regulation than under the existing system.[192]

Complex choice-of-law questions also arise in succession cases involving either spouse. California probate law proceeds in the main from domicile, regulating under California law the distribution of all personal property and all real property in the state of its domiciliaries.[193] Thus, a California court would find California

188. Graue — Domicile, *supra* note 152, at 256-57, 268; KEGEL-EGBGB, *supra* note 154, art. 15 No. 5.

189. *See* text accompanying notes 169-73 *supra*.

190. Beitzke, *Zur Reform des Ehegüterrechts im deutschen Internalprivatrecht*, in; VORSCHLÄGE UND GUTACHTEN ZUR REFORM DES DEUTSCHEN INTERNATIONALEN EHERECHTS (Recommendations of the Commission on Family Law of the German Council on Private International Law) 89, 90 (W. Lauterbach ed. 1962); KEGEL-EGBGB, *supra* note 154, art. 15, No. 5.

191. Neuhaus, *supra* note 146, at 795, 801. The experience of the American courts with changes of marital property regime resulting from spouses moving from community property to separate property states or vice versa shows such problems to be far from insurmountable.

192. *See* Ehrenzweig, *Die Anwendung der lex fori als Basisregel*, in: INTERNATIONALES PRIVATRECHT 324, 338 (1974); Graue — Domicile, *supra* note 152, at 273.

193. Cal. Prob. Code § 201 et seq. (West Supp. 1979).

law to apply to both the marital property and to H's succession, based on H's California domicile. A German court, on the other hand, would find German law applicable to both marital property and succession, since both are controlled by H's nationality (with the possible exception of California realty). Article 28 of the EGBGB, however, subordinates the German nationality rule to the law of the situs for real property in some cases, so that a potential conflict of courts may be unavoidable only as to the personal property involved.[194]

The potential unfairness of this situation requires analysis of how the surviving W fares under each nation's laws. Under German law,[195] a surviving spouse on testamentary succession gets a minimum of ⅛ of the estate plus ½ of the marital gains, if her husband has *not* made provision for her in his will. She gets ¼ of the estate and ½ the gains if no children are involved. If she receives only a legacy, she may elect to take as the disinherited spouse does, or to take a statutory minimum of ¼ of the estate, ⅜ if there are no children.

On intestate succession, W gets ½ of the estate if there are children, and ¾ of the estate if there are none. Under California law, at intestate succession the surviving spouse gets all of the community property, plus a share of H's separate property, ranging from ⅓ to all of it, depending on the existence of children and other relatives.[196] On testamentary succession, W retains her half of the community property as a minimum, and receives whatever else she is left under the will.[197]

A simple example illustrates the comparison of the two systems. Assume H and W both bring $500 of separate property into a marriage. Afterwards, each spouse works, H saving $1,000 and W saving $500, and all community expenses are covered by community earnings. They have two children when H dies. W gets the following amounts, expressed in terms of her total property after administration of the estate.

German law:

1) Intestate succession: *$1,750.00*
   W gets ½ of H's estate (includes ¼ gain share):
   $ 750.00
   She keeps her original separate property:

194. BRESLAUER, THE PRIVATE INTERNATIONAL LAW OF SUCCESSION 42 (1937).
195. *See* text accompanying notes 104-06 *supra*.
196. Cal. Prob. Code §§ 201.5 & 221 (West Supp. 1979).
197. *Id.*

$ 500.00

She keeps her savings during the marriage:

$ 500.00

TOTAL *$1750.00*

2) Disinherited spouse: *$1,437.50*

W gets ⅛ of estate:

$ 187.50

She gets also ½ of the excess marital gains:

$ 250.00

She keeps her original separate property:

$ 500.00

She keeps her savings during the marriage:

$ 500.00

TOTAL *$1437.50*

3) Partially-disinherited spouse: Either *$1437.50* (above) or *$1375.00*

W gets ¼ of the estate:

$ 375.00

She keeps her original separate property:

$ 500.00

She keeps her savings during the marriage:

$ 500.00

TOTAL *$1375.00*

Note that when there are large gains by the other spouse, the partially disinherited spouse is better off allowing actual calculation of the gains like the disinherited spouse must do, rather than relying on the abstract increase in the "obligatory" share to compensate her.

California law:

1) Intestate succession: *$2167.00*

W retains her ½ of the community property:

$ 750.00

She gets the other ½ of the community property:

$ 750.00

She gets ⅓ of H's separate property:

$ 167.00

She keeps her original separate property:

$ 500.00

TOTAL *$2167.00*

2) Disinherited spouse: *$1250.00*

W retains her ½ of the community property:

$ 750.00

She keeps her original separate property:

$ 500.00

TOTAL *$1250.00*

3) Partially-disinherited spouse: *$1250.00 + legacy*
W retains her ½ of the community property:
$ 750.00
She keeps her original separate property:
$ 500.00
She keeps whatever she received under the will:
$?
TOTAL *$1250.00 + legacy*

Thus, in some cases W will be better situated under California law, while in others she will receive more under German law. The larger the gains H has in his separate property during the marriage (that is, separate property in the California sense), the more likely it is that German law will benefit W more than California law. California community property laws give W no share in the increase of H's separate property as a rule (unless attributable to community labor), whereas German law will consider that increase in calculating H's gains, and one-half of the excess gains will go to a surviving W who receives actual compensation of gains. H's separate property gains will also be indirectly reflected in the value of his estate for any spouse who receives an abstract compensation of gains via the increase in the obligatory share.

If W dies instead of H, a California court would apply California succession law to the marital property. A German court, however, would find marital property to be governed by German law (H's nationality), but succession to be governed by American law (W's nationality and domicile at time of death). This difference in applicable norms raises a whole array of complex questions. The thorniest question in adjudicating the marital property division between the two spouses is how the extra ¼ gain share granted to the surviving spouse under the community of gains is to be classified.[198] Is it a marital property regulation seeking to reconcile interests of the spouses in the marital property at death? Or is it a succession regulation, seeking to adjust the marital property interests through the law of succession to which it is clearly connected? This latter position would be similar to the adjustments made in the common law marital property states in the United States.

After extended discussion, the majority of German commentators have concluded that the best result requires classification of the ¼ gain share as a marital property regulation.[199] While this provi-

198. *See* BGB § 1371(1).

199. Lange, *supra* note 105, at 369-370; PALANDT-HELDRICH, *supra* note 4, EGBGB art. 15, No. 4; STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1371 No. 40, No. 139; v. Hippel,

sion is closely tied to the law of succession, it is primarily intended to determine marital property rights which would have been reconciled by the compensation of gains had the marriage ended in divorce. The drafters could have chosen to retain the compensation of gains in case of termination of the community by death, but they feared problems of proof of the gains and potential disadvantage to the other heirs. They thus sought to realize the participation of the other spouse in the gains of marriage by another method.

The classification of this gain share alone does not completely resolve the conflict however. The German legislature assumed in its drafting of § 1371(1) that German succession law would apply in the case of termination of the community at death, and failed to consider that a foreign law could control succession instead. The extra ¼ gain share at death could be inappropriate, inapplicable or simply incapable of calculation.[200]

Difficulties arise, for example, when the foreign law in its succession regulation has already realized the underlying principle of participation in the gains of marriage through raised shares of the surviving spouse in the estate. An additional difficulty arises when the foreign law does not proceed from shares in the estate as such in the division of the property, but instead grants the survivor support claims, usages or absolute sums.[201] Some commentators therefore argue that when the marital property regulation falls under German law, but the regulation of succession under a foreign law, the court should treat the surviving spouse as disinherited under German law and calculate the gains of the marriage through the marital property law[202] i.e., through the compensation of gains plus the obligatory share of ⅛ of the estate.[203] That solution requires calculation of the ⅛ share, however, and involves the same problems inherent in the calculation of the ¼ of the estate for a gain share.

The additional ⅛ share of the estate also overlaps with the rights of the spouse under succession law. Particularly where the California community property and quasi-community property

supra note 29, at 350; *contra*, Bärmann, *supra* note 22, at 198; Graue — German Law, *supra* note 5, at 137 (the ¼ share, while a marital property regulation, can only be granted when succession is also governed by German law).

200. v. Hippel, *supa* note 29, at 350; Graue — German Law, *supra* note 5, at 137.

201. v. Hippel, *supra* note 29, at 350. *See* discussion in Graue — Spouses, *supra* note 4, at 189-90.

202. BGB § 1371(2).

203. Graue — German Law, *supra* note 5, at 144 (advocating looking at the survivor as 'disinherited' under German law and thus guaranteed a *Pflichtteil* under § 1371(2)); v. Hippel, *supra* note 29, at 351; STAUDINGER-GAMILLSCHEG, *supra* note 159.

regulations of the Probate Code guarantee the surviving spouse at least a ½ share of the community estate,[204] the additional ⅛ share seems to disadvantage the other heirs who would receive less. The option of awarding the ⅛ share could be retained however for those cases where the surviving spouse is *not* adequately protected under the foreign succession law.[205]

Thus, the best solution for a court confronted with this problem of German marital property law and California succession law would appear to be, as a rule, simple calculation and compensation of the gains. The German court could then proceed to divide and distribute the remainder of the estate under California succession law. This is similar to the division of an estate after the community property share has been retained by the surviving spouse.

C. American Husband — German Wife Domiciled in the Federal Republic

When the roles are reversed, with American H marrying a German W, the results in a private international law conflict are not the same as with an American W and German H. This is because the stipulation of Article 15 of the EGBGB is not sex-neutral: the marital property law of the spouses under German law depends only on the nationality of the husband. Since H's American nationality would point to a conflicts law which will, at least in succession and marital property law, generally follow the domicile, the incidence of court conflict in the majority of situations is minimized. In the case of W's death with a domicile in the United States, however, the court conflict and the marital property and succession law classification problems remain.

Assuming that German W and American H remain in Germany after their marriage, the overlap of American and German conflicts rules leads to identical results in both forums in regard to

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204. Cal. Prob. Code § 201.5

205. At least one German court has been confronted with a German marital property law/California succession law question. Oberlandesgericht Celle classified Cal. Prob. Code § 201.5, dealing with quasi-community property as a succession law regulation, rather than one of marital property law. It was thus applicable even when German marital property law applied. The resulting disadvantage to the other heirs resulting from the increased share of the estate granted to the survivor under § 201.5 was not of legal significance. Unfortunately, however, the court failed to discuss the interaction of the Cal. Prob. Code provisions and BGB § 1371. It is clear from the discussion, in any case, that the additional protection of the surviving spouse by the ⅛ share of the estate under § 1371(2) would be unnecessary and redundant. Judgment of September 10, 1959, Oberlandesgericht Celle, IPR-Rspr. 1958-1959, No. 148, 492 at 494 et seq.

marital property and succession questions. If the spouses divorce, an American court will look to the spouses' domicile as indicative of the interests involved, and apply German marital property law. A German court will apply Article 15 of the EGBGB and look to H's nationality — American/Californian. This leads to the Californian conflicts norms which will result in application of the law of the domicile, which leads, via renvoi, back to the German substantive marital property law.

If H dies, the same results occur. The American court will look to his domicile, and German law will be applied. The German court will look to American conflicts law, which will translate as domicile, and German law will apply. When W dies, both marital property and succession provisions are governed by German law. As noted previously,[206] the German court may find that Article 28 EGBGB requires it to apply California law to any California realty involved, even where California interest analysis would indicate application of German law. This will probably change, however, as interest analysis develops more clearly as a conflicts rule, particularly when a foreign court seeks to avoid difficult conflicts questions.

D. American Husband — German Wife Domiciled in the United States — California

If American H and German W move to California, the conflicts situation is for the most part uncomplicated. If the spouses divorce, both German and American courts reach the same result. A California court proceeds directly to the domicile of the couple and California marital property law is applied, even as to any real property in Germany.[207] If the spouses sue in a German court, the law of H's nationality leads to California law. When H dies, a California court would apply California law to all personal property wherever located and to all realty within the state.[208] Whether the California court would also apply California law to land outside of California at death (instead of at divorce) is unclear, although the legislation dealing with quasi-community property supports this inference.[209]

206. *See* text accompanying notes 103-05 *supra*.

207. Ford v. Ford, 276 Cal. App. 2d 9, 80 Cal. Rptr. 435, 437 (1967).

208. Cal. Prob. Code § 201 (West 1954).

209. Cal. Prob. Code § 201.5 (West Supp. 1980); G. VERRALL, CALIFORNIA COMMUNITY PROPERTY 427 (1977).

When German W dies domiciled in California, a court conflict and a basic classification problem again arise. An American court would probably resolve both the succession questions and the marital property questions by reference to W's American domicile, as indicative of the interests involved. A German court would be confronted with more complex problems in that situation. Under German private international law rules, the appropriate law of succession depends on W's nationality, in this case German law. The marital property, however, would probably be governed by California law, because of H's nationality. Thus, the questions discussed previously of German marital property law and American succession law arise here in reverse: when German law of succession and California marital property law apply, what happens to the additional ¼ gain share granted under section 1371(1) BGB?

The California law on the ownership of marital property is clearly a marital property regulation and thus avoids collision with the German succession norms. The spouses' interests in the community property exist before the death of either spouse; they are present and existing rights during the marriage which are merely distributed on liquidation of the regime; they do not arise because of the termination of the community.[210] Thus, H will retain his one-half of the California community property as a function of the California marital property law. However, the disposition of W's half of the community property and her separate property will be subject to the German law of succession. There is also some German authority that the California quasi-community property regulation[211] is to be considered a succession law norm rather than a marital property regulation, so that potential quasi-community property would not be divided by the court under California marital property law, but instead under German succession norms.[212]

As discussed,[213] the extra ¼ gain share granted to the surviving spouse under § 1371(1) is considered a marital property regulation by the majority of German commentators. An additional reason supports that conclusion in this situation. Section 1371(1) BGB proceeds from the assumption that at the death of the first spouse,

210. Cal. Civ. Code § 5105 (West Supp. 1980); Graue — Spouses, *supra* note 4, at 191; Judgment of September 10, 1959, Oberlandesgericht Celle, IPR-Rspr. 1958-1959, No. 148, 492, at 495.

211. Cal. Prob. Code § 201.5 (West Supp. 1980).

212. Judgment of September 10, 1959, Oberlandesgericht Celle, IPR-Rspr. 1958-1959, No. 148, 492, at 495.

213. *See* text accompanying notes 198-202 *supra*.

the spouses have lived together under the community of gains. When that assumption does not apply, such as where a different contractual regime or a foreign regime applies, there is simply no basis for the calculation of the extra quarter.[214] Thus, when German law controls succession, and not the marital property, the extra ¼ gain share cannot be available to the surviving spouse.

H, under German succession law in this case, would be granted the statutory share on intestate succession of ¼ of W's estate (taking with children, otherwise ½), without any additional gain share.[215] If W has by testament disinherited H, he is entitled to ⅛ of the estate (¼ with other heirs), again calculated without the gain share, because H already has his share of the marital property.

Because of the different policies underlying the two nations' succession laws, if H is disinherited, he fares better under German succession law than he would under American law. California recognizes no interest of the surviving spouse in the decedent's estate beyond the survivor's share of the community property: if W seeks to intentionally disinherit H, denying him any interest beyond his share of the community property, H has no further legal remedy.[216] German law, however, seeks to protect certain classes of heirs from total exclusion of a testamentary expectation through the statutory obligatory share of the estate apart from any compensation of marital gains. Even where W attempts to disinherit H, German law grants H a claim against the other heirs or legatees for the amount of his guaranteed share.

A comparison of the results in the different courts, under the application of two sets of collision rules, shows the following: when W dies intestate, a California court would award H the entire community property plus a ⅓ or greater share of the separate property. A German court would let H retain his ½ of the community property and award him also ¼ of W's estate on succession (½ if there are no children). If W had died testate, H would have retained, in California, ½ of the community property plus whatever he received under the will. Before a German court, H would keep ½ of the community property and would receive at least the ⅛ 'obligatory share' calculated from the remaining estate. Thus, H gets less than

214. v. Hippel, *supra* note 29, at 349.

215. Judgment of March 28, 1961, Oberlandesgericht Bayern, IPR-Rspr. 1960-1961, No. 101, 342, at 348 (when German succession law but Czech marital property law applied to Sudenten Germans now domiciled in Germany and of German nationality, surviving W receives no additional gain share, and BGB § 1371 does not apply).

216. Cal. Prob. Code § 201.5 (W. Supp. 1980).

he would have under California law alone, had W died intestate, but more than he would have had she tried to disinherit him. While application of the German succession law might hinder W's attempts to disinherit H, constituting a limitation on her testamentary freedom, the German policies behind the obligatory share and its protection of certain heirs must also find expression.

V. OTHER PROBLEMS IN GERMAN-AMERICAN CONFLICTS LAW

The problems sketched above are the simplest versions of a number of complex questions that could arise in a dual-nationality situation. While the above discussion is only intended to isolate the most basic problems, there are any number of interesting situations which would merit examination but which will not be dealt with here. For example, either one or both of the spouses could change citizenship during the marriage, the spouses could change their domicile either in the middle of or late in the marriage, or the spouses may live apart from one another. These factors could strongly influence the interests and equities involved in a choice of law situation.

One new problem which has arisen with the 1977 divorce law reform and which will be particularly difficult to resolve is that involving the compensation of differences in expectancies in pension and old-age benefit plans under the institution of pension compensation.[217] The 1977 reforms in the German family law, which were enacted in part to conform to the equality principle under the Basic Law,[218] were not accompanied by concurrent reforms in the choice of law rules of the EGBGB. The latter rules are still framed in pre-equality language, relying primarily on H's citizenship, which makes their application to the question of 'pension compensation' even more difficult.

This problem has just begun to find discussion in the German literature. No firm conclusions have as yet been reached, but a short discussion of some of the problems and trends may provide some basis for prediction of the future handling of 'pension compensation' cases.

Three major problems arise in private international law from the existence of pension compensation: 1) how this institution is to be classified, 2) when German law is applicable, how foreign expectancies are to be treated, and 3) how the expectancies are to be

217. *See* discussion accompanying notes 73-76 *supra*.
218. Basic Law art. 3(2).

treated by foreign law when foreign law is applicable.[219] The latter two questions have scarcely been addressed to date, particularly since most German courts confronted with cases with such conflicts questions have managed to avoid undertaking the 'pension compensation' issue.[220] The classification question, however, which will determine the applicable choice of law norm, received a fair amount of attention in 1978 and 1979, although no definitive answers were reached.

Numerous theories have been put forth for the classification of 'pension compensation' in private international law. Some authority would generally classify the provision as part of the public social insurance law,[221] but greater authority at present leans towards viewing the institution as one of family law.[222] Within the various branches of family law — personal effects of marriage, divorce law, marital property law — probably the majority opinion currently considers 'pension compensation' to be a divorce law regulation which is to be adjudicated concurrently with the other effect-of-divorce questions such as maintenance and support.[223] In a private international law case, Article 17 EGBGB would be controlling, which refers the court to the law of the country of which the husband is a citizen at the time of the divorce. In the event that a German wife sues for divorce, however, Article 17 provides for application of German law regardless of H's citizenship.

Apart from the fact that Article 17 like Article 15, is probably

219. Jayme, *Versorgungsausgleich in Auslandsfällen*, 1978 NJW 2417 (1978).

220. Wolff, *supra* note 79, at 723, note 4. Judgment of December 14, 1977, Amtsgericht Emmerich, 1978 NJW 498; Judgment of December 14, 1977, Amtsgericht Düsseldorf, IPR-Rspr. 1977, No. 77, 221 at 222-23. Some courts have dealt with the question of classification, but have simply excluded application of the *Versorgungsausgleich* in cases where one spouse is a foreigner. One court, however, proceded from EGBGB Article 14 and personal effects of marriage statutes in a case involving a German W and American H, who had been domiciled part of the time in the United States and part of the time in Germany. The court divided the expectancies acquired by the spouses during their residence in Germany, which was the place of their 'effective citizenship' during that time. Judgment of June 27, 1978, Amtsgericht München, IPR-Rspr. 1978, No. 66, 144, at 148-49.

221. Judgment of August 17, 1978, Amtsgericht Hamburg, IPR-Rspr. 1978, No. 65, 141, at 142 et seq.

222. Jayme, *supra* note 219, at 2419; Bürgle, *Zum Versorgungsausgleich bei Scheidungen mit Auslandsberührung*, 25 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT 388, 389 (1978).

223. Wolff, *supra* note 79, at 729; Jayme, *supra* note 219, at 2417-18; PALANDT-HELDRICH, *supra* note 4, EGBGB art. 17, No. 5; Judgment of September 18, 1978, Amtsgericht Lüneburg, IPR-Rspr. 1978, No. 69, 159, at 161 et seq.; Judgment of December 19, 1978, Oberlandesgericht Saarbrücken, IPR-Rspr. 1978, No. 67, 171; Judgment of December 20, 1978, Oberlandesgericht Bamberg, 1979 NJW 497.

unconstitutional because it is not a sex-neutral regulation,[224] problems exist with this classification because it is also not *nationality*-neutral. A German W of a foreign husband could decide whether to sue for divorce under German or under foreign law, and by doing so, she could choose or bar the application of the German pension compensation. She could thus indirectly force or prevent splitting of pension rights under the German system, depending on whether it would be in her interests to do so.[225]

A strong minority opinion divides itself between two other classification possibilities. Several lower courts have come out in favor of a marital property classification.[226] Prior to the institution of pension compensation, at least certain types of claims and expectancies in private pensions would have been included in the compensation of gains.[227] That solution is nonetheless problematic because the BGB[228] expressly makes clear that the 'pension compensation' is independent of any specific marital property regime.[229]

Finally, pension compensation could be classified as part of the law of the person, in which case Article 14 of the EGBGB would regulate private international law questions.[230] That Article stipulates that the relations of the spouses are determined by their (joint) law of citizenship, but when the spouses have differing nationalities, viewpoints diverge on how the matter should be settled. The unfairness inherent in the application of this provision makes

224. Judgment of November 17, 1977, Amtsgericht Hamburg, IPR-Rspr. 1977, No. 73, 211, at 212 et seq. (EGBGB art. 17 conflicts with Basic Law art. 3(2), with discussion of alternate solutions); Judgment of April 16, 1975, Oberlandesgericht Düsseldorf, IPR-Rspr. 1975, No. 56, 126 at 126-27; *see*, Judgment of May 25, 1977, Landgericht Hamburg, IPR-Rspr. 1977, No. 68, 193, at 197-98 (failing to reach the question since all the results were the same); Judgment of October 26, 1977, Amtsgericht Düsseldorf, IPR-Rspr. 1977, No. 72, 207 at 209-10. STAUDINGER-GAMILLSCHEG, *supra* note 159, EGBGB art. 17, No. 25. *But see*, PALANDT-HELDRICH, *supra* note 4, art. 17, No. 2a.

225. Wolff, *supra* note 79, at 735; Judgment of June 27, 1978, Amtsgericht München, IPR-Rspr. 1978, No. 66, 144, at 145.

226. Judgment of January 19, 1978, Amtsgericht Berlin-Charlottenberg, 1978 NJW 1116; *see*, Jayme, *supra* note 219, notes 8 and 9 and cases cited therein; Judgment of April 3, 1978, Amtsgericht Wunsiedel, IPR-Rspr. 1978, No. 63, 135, at 137.

227. STAUDINGER-FELGENTRAEGER, *supra* note 3, § 1374 No. 2.

228. BGB § 1587(3).

229. Belchaus, *supra* note 78, at 793; G. BEITZKE, *supra* note 12, at 148; Wolff, *supra* note 79, at 733.

230. Bürgle, *Zum versorgungsausgleich bei Scheidungen mit Auslandsberührungsupra*, 25 ZEITSCHRIFT FÜR DAS GASAMTE FAMILIENRECHT 388, 391 (1978); Judgment of June 27, 1978, Amtsgericht München, IPR-Rspr. 1978, No. 66, 144, at 146 et seq.

its extension to pension compensation unlikely.[231]

The question remains unresolved at present, and will probably be first answered through statutory amendment of the German conflicts norms. There are already extensive on-going discussions underway in German legal circles of various proposals for encompassing amendment of the German law of conflicts.[232] There is, as noted above, a trend in German law to proceed from habitual residence of the spouses in some areas of family law, which may well be extended to the problem of pension compensation.[233]

VI. CONCLUSION

The German marital property system is classified as an "intermediate system," constructed to combine certain elements of both community property and separate property systems without adopting either in its entirety. Certain of its historical forms had more closely resembled the common law system,[234] but the general German marital property law in present form is more accurately characterized as establishing a "deferred community;"[235] the regime functions like a separate property system during the marriage and like a community property system upon its dissolution.

Despite developmental problems, the new German system has adapted traditional forms of marital property regulation to modern conceptions of sexual equality and sharing in marriage. It remains now for Germany to enact complementary, and hopefully equally successful, changes in its conflict of laws norms to reflect both the equality of the sexes and the increasing mobility of the modern population.

231. Jayme, *supra* note 197, at 2418; *cf.*, Bürgle, *Zum versorgungsausgleich bei Scheidungen mit Auslandsberührungsupra*, 25 ZEITSCHRIFT FÜR DAS GASAMTE FAMILIENRECHT 388, 391 (1978).

232. For a recent summary of the discussions and the various amendment proposals, *see*, Neuhaus and Kropholler, *Kürze oder-Kasuistik im Gesetz über internationales Privatrecht?*, 1981 JZ 58.

233. Graue — Domicile, *supra* note 152, *passim*; Wolff, *supra* note 79, at 741-42.

234. *See* Glendon, *supra* note 1, at 21, 31, 71.

235. Graue — Spouses, *supra* note 4, at 164, 168, notes 22, 23.