

# West German Marriage and Family Law Reform

*Max Rheinstein*† and *Mary Ann Glendon*\*

On June 14, 1976, after eight years of deliberation, controversy and compromise, the "First Law concerning Marriage and Family Law Reform," was promulgated in West Germany.<sup>1</sup> The new legislation introduces<sup>2</sup> a comprehensive revision of the law governing divorce and establishes a new system for regulating its economic effects. The legislation also provides for certain changes that are intended to emphasize the personal and economic independence of persons married to each other.

German divorce law has, from the beginning, departed in practice from the fairly strict provisions of the Civil Code of 1900. If one party strongly desired a divorce, the cooperation of the other party was frequently obtained through financial concessions. Presented with an unopposed complaint based on a fabricated ground for divorce, the court rarely exercised its right or fulfilled its duty to undertake an independent investigation.<sup>3</sup>

In 1938 when the German Reich and the Republic of Austria were united to form the National-Socialist dominated Greater German Reich (*Grossdeutsches Reich*), certain aspects of the law of the two countries were also unified. The Austrian and German Civil Code provisions governing marriage formation and divorce were repealed and replaced by a single statute, the Marriage Law of Greater Germany of July 6, 1938.<sup>4</sup> The statute made important innovations in the law governing divorce, an institution previously available in Austria for Protestants and Jews, but not for the Catholic majority. The rules dealing with the effects of marriage (the personal and property relationships of the spouses) were not unified

---

© 1978 by Max Rheinstein and Mary Ann Glendon.

† Max Pam Professor of Comparative Law, The University of Chicago (1937-1977).

\* Professor of Law, Boston College.

<sup>1</sup> Erstes Gesetz zur Reform des Ehe- und Familienrechts of June 14, 1976 [1. EheRG], [1976] Bundesgesetzblatt [BGBl] I 1421 (W. Ger.).

<sup>2</sup> As the title indicates, the law is expected to be followed eventually by related legislation, covering such matters as the formation of marriage.

<sup>3</sup> Prior to any change in the law, the number of divorces rose from 7,022 in 1900 to 42,485 in 1933. Divorces per 100,000 inhabitants rose from 14.0 in 1900 to 65.1 in 1933. E. WOLF, G. LÜKE & H. HAX, SCHEIDUNG UND SCHEIDUNGSRECHT: GRUNDFRAGEN DER EHESCHIEDUNG IN DEUTSCHLAND 390-91, 465 (1959).

<sup>4</sup> Grossdeutsches Ehegesetz of July 6, 1938, [1938] Reichsgesetzblatt I 807. Section 84 of this statute repealed §§ 1564-1587 of the German Civil Code.

at that time, however, and remained unchanged in the respective civil codes.

After the collapse of the Greater German Reich, the law of marriage was purged of its National Socialist components—in Austria by the new Austrian government and in the Allied occupational zones of Germany by the Allied Control Council Law No. 16, of February 20, 1946.<sup>5</sup> Apart from these modifications and a slight amendment made in 1961,<sup>6</sup> the 1938 Marriage Law remained in force as a separate statute supplementing the Civil Code in what was constituted in 1949 as the Federal Republic of Germany. The project of re-examining the law on the incidents of marriage was begun in West Germany in the Basic Law of 1949 which proclaimed that “[m]en and women have equal rights.”<sup>7</sup> This proclamation was implemented in 1957 by the Equal Rights Law which equalized in most respects the mutual rights and duties of husbands and wives and established a new legal regime of marital property, the “community of increase” (*Zugewinnngemeinschaft*), a modified system of community property.<sup>8</sup>

During the 1960s continuing changes in the social structure, especially in marriage behavior, intensified the demands for further legal reform. In 1968, shortly after the long predominance of the conservative Christian Union Parties (Christian Democratic Union and Christian Social Union) had given way to a coalition of the Social Democratic Party and the Free Democratic Party, Gerhard Jahn, then the Minister of Justice, appointed a commission of experts to do preparatory work on family law reform. The reports of the Commission and the government bill based on these reports provoked lively, and at times acrimonious, public discussion. In the *Bundestag* (Federal House of Representatives) the progressive elements represented in the government coalition and the more conservative groups represented in the Christian Union parties worked out a compromise after prolonged debates. But a few points remained controversial, and the settlement reached in the *Bundestag* was challenged by the *Bundesrat* (House of States), where the Union-dominated state governments had a narrow majority. In the

---

<sup>5</sup> Ehegesetz of Feb. 20, 1946 [EheG], [Gesetz Nr. 16 des Kontrollrats], Amtsblatt des Kontrollrats in Deutschland 77, 294.

<sup>6</sup> Familienrechtsänderungsgesetz (Amendment of Family Law) of Aug. 11, 1961, [1961] BGBI I 1221 (W. Ger.). See note 31 *infra*.

<sup>7</sup> GRUNDGESETZ art. 3 (W. Ger.).

<sup>8</sup> Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiete des bürgerlichen Rechts (Law Concerning the Legal Equality of Men and Women in the Area of Civil Law) of June 18, 1957 [Gleichberechtigungsgesetz—GleichberG] (Equality Law), [1957] BGBI I 609, BGBI III 4 Nr. 400-3.

compromise that finally emerged, the basic ideas of the government bill were left intact, but some important modifications were made in the divorce provisions.

The Christian Union Parties successfully insisted on inserting a provision that stands as the first section of the reform law, and that now, as section 1353, paragraph 1, opens the Civil Code Title on Effects of Marriage in General (*Wirkungen der Ehe im Allgemeinen*—Book IV. Family Law—Part I, Civil Marriage). It proclaims that: "Marriage is concluded for a lifetime." The sentence is meant to be an affirmation of the continued vitality of the ethical-religious principle that marriage is to last "until death do us part," but, standing where it does, as a preface to the apparently liberal provisions on divorce that follow, it seems more the expression of a wish, a hope, or an aspiration in the face of an uncertain future. One might be inclined to regard it as an ironic epigraph to the whole reform.

This article will present a translation and preliminary critique of the central provisions of the reform act of 1976. Examination of the changes made by the act in the legal effects of marriage will be followed by a treatment of the new statutory grounds for divorce and the economic effects of divorce. The paper will conclude with a brief discussion of court organization and procedures under the new act.

## I. CHANGES IN THE LEGAL EFFECTS OF MARRIAGE

While most of the Marriage and Family Law Reform is concerned with marriage dissolution, certain important changes are also made in the legal effects of marriage.<sup>9</sup> The significance of these changes perhaps lies more in their reflection of changes in marriage behavior and ideals in West Germany than in their specific practical consequences. The new provisions on the marriage name and on the mutual rights and duties of the spouses, both personal and economic, alter the marriage model previously embodied in the Civil Code.

### A. The Marriage Name

One of the most controversial changes made by the Reform Law is the revision of the law of married persons' names. In the end, the 1976 reform fell short of fully implementing sex equality in this area.

---

<sup>9</sup> Unlike the new provisions on divorce which were effective from July 1, 1977 onward, the revisions in the law of married persons' names went into effect on July 1, 1976. See text and notes at notes 10-16 *infra*. Effective dates and transitional provisions are contained in 1. EHERG, *supra* note 1, art. 12.

The Civil Code of 1896 incorporated into law the traditional custom by which a woman assumed her husband's surname upon marriage and his surname became that of the children. Prior to the 1976 Reform Law, Section 1355 of the Civil Code had read:

The marriage and family name is the name of the husband. The wife is authorized to add her maiden name to the name of the husband by declaration before the Registrar (*Standesbeamte*); the declaration must be publicly authenticated (*beglaubigt*).<sup>10</sup>

This provision had long been considered to be of doubtful constitutionality, but achieving a legislative consensus to remedy the defect turned out to be difficult. The provisions of the government draft bill on name law were a major source of contention between the *Bundestag* and the *Bundesrat*. By the version finally adopted, the law governing marriage formation was amended to require the Registrar to ask the spouses before the marriage is celebrated whether they wish to make a declaration concerning the marriage name they will bear.<sup>11</sup> Their choice is limited to the name of the wife or the name of the husband. The one whose name is not chosen has the option of adding his or her name to the marriage name. Section 1355 now reads:

§ 1355. (1) The spouses bear a common family name (the marriage name).

(2) The spouses can designate as the marriage name, by declaration to the Registrar at the time of the celebration of the marriage, the birth name of the husband or the birth name of the wife. If they make no designation, the marriage name is the birth name of the husband. The birth name is the name recorded on the birth certificates of the intended spouses at the time of the celebration of the marriage.

(3) A spouse, whose birth name is not the marriage name, can, by declaration to the Registrar, place his birth name or the name he bears at the time of the celebration of the marriage in front of the marriage name; the declaration must be publicly authenticated.

(4) A widowed or divorced spouse retains the marriage

---

<sup>10</sup> The requirement of authentication demands that the declaration be in writing and that the signature be attested to by a notary or, as here, by the Registrar. *Bürgerliches Gesetzbuch* (Civil Code) [BGB] § 129 (W. Ger.).

<sup>11</sup> EHEG, *supra* note 4, § 13a inserted by 1. EheRG, *supra* note 1, art. 3(4). Marriage formation remains governed by the provisions of the 1938/1946 marriage legislation, but is eventually expected to be the subject of further reform legislation.

name. He can, by declaration to the Registrar, take back his birth name or the name borne at the time of the celebration of the marriage; the declaration must be publicly authenticated.

Thus, if the couple does *not* make a declaration concerning their marriage name, the husband's birth name becomes the marriage name by operation of law. This final version of section 1355 compromised two basic features of the government's 1973 draft bill. Under the draft bill, in addition to the option of choosing the husband's or wife's name, the spouses had a third choice: a double marriage name composed of the names of both, but which could contain no more than two names.<sup>12</sup> The draft bill also provided that where the spouses did not make a joint declaration concerning their marriage name, the name would be a double name composed of the names of both spouses, with the husband's name standing first.<sup>13</sup> The draft bill would thus have eliminated the channelling effect created by limiting the choice to the husband's or the wife's name when tradition has so long fostered the wife's taking the husband's name. It also would have more nearly approached the ideal of sex equality with its provision that, in the absence of choice, a double name (albeit with the husband's name first), rather than the husband's name, would apply.

West German treatment of the marital name was complicated by the fact that, unlike England, France, and the American states (with the exception of Hawaii), Germany, in its Civil Code had given the social custom concerning married women's names the force of law. In contrast, the English common law rule, received in the United States, has been that any person may use any surname he or she desires so long as the use is nonfraudulent.<sup>14</sup> In France, in further contrast, a woman's legal name does not change upon marriage though she has a limited right to use her husband's surname during the marriage if she wishes.<sup>15</sup> Indeed it was a controversial feature of the 1976 French Divorce Reform law that under special circumstances, a divorced wife may continue to use her former husband's name with judicial permission.<sup>16</sup>

In West Germany, however, the mandate of a common name

---

<sup>12</sup> See Böhmer, *Die Neuregelung des Eheschliessungsrechts*, 28 DAS STANDESAMT 5, 9 (1975).

<sup>13</sup> *Id.*

<sup>14</sup> The cases are collected in Daum, *The Right of Married Women to Assert Their Own Surnames*, 8 J. LAW REFORM 63, 66-67 (1974).

<sup>15</sup> See Glendon, *The French Divorce Reform Law of 1976*, 24 AM. J. COMP. L. 199, 220-21 (1976).

<sup>16</sup> *Id.*

in former section 1355 of the Code of 1896 came to be valued as an expression of the unity of the spouses and the family. In trying to implement sex equality, reformers were reluctant to give up the ideal of the common name or to affect the smooth functioning of the comprehensive national registration and identification system. The price paid for administrative convenience and the symbolism of community, however, was the retention, in subsection (2), of the symbolism of the subordination of the wife to the husband, thus laying the constitutionality of new section 1355 open to question. Furthermore, though subsection (1) still transmits the principle that the spouses should bear a common name, the principle itself is eroded in subsection (3).

## B. Marriage Roles and Responsibilities

As it stood at the time of the 1976 reform, Title Five of the Civil Code on the "Effects of Marriage in General" obliged the spouses to live in "matrimonial community of life."<sup>17</sup> Under the Code provisions, life in this community was organized around the model of what has come to be called "housewife-and-maintenance marriage," (*Hausfrauen-und-Versorgungsehe*). Section 1356 stated that the wife's responsibility was to run the household and that she had the right to be employed<sup>18</sup> outside the household only insofar as this was consistent with her duties in the marriage and the family. To aid her in fulfilling these duties, the wife was given the "power of the keys," (*Schlüsselgewalt*), that is, the legal authority to bind her husband in transactions within the scope of her household responsibility.<sup>19</sup> Though both spouses were obligated to contribute to the support of the family, the Code provided that the wife generally fulfilled her support duty by running the household.<sup>20</sup>

The official allocation of sex roles according to traditional notions survived the Equality Law of 1957,<sup>21</sup> which had eliminated the more obviously discriminatory aspects of West German family law. But the constitutionality of these code sections and their appropriateness for modern conditions were increasingly questioned. In a commentary on the new law, Justice Minister Hans-Jochen Vogel

---

<sup>17</sup> BGB § 1353 before it was amended by the 1. EheRG, *supra* note 1 [hereafter pre-1976 sections will be referred to as "former section"].

<sup>18</sup> The terms "employment," "to be employed," etc., are used throughout this article to refer to self-employment as well as employment by another. The German term is *Beschäftigung*.

<sup>19</sup> BGB former § 1357.

<sup>20</sup> BGB former § 1360.

<sup>21</sup> See text and note at note 8 *supra*.

stated that although at the time these provisions seemed to the legislature merely to explain what was then meant by the phrase "matrimonial community of life," by 1974 it had become clear that, with increased numbers of married women employed outside the home, the model of marriage embodied in the Code was unsuitable.<sup>22</sup> In keeping with this perception, the new law does not officially sanction any particular marriage model or any particular allocation of decisionmaking powers or division of labor within the marriage. Consistent with the trends that are transforming husband-and-wife law throughout the industrialized Western world, the 1976 law withdrew most legal guidelines, leaving these matters to be worked out by the individuals involved.

Nevertheless, as Justice Minister Vogel has observed, a new family law in a pluralistic society can be expected to bear the marks of that pluralism and of the struggle that it can engender.<sup>23</sup> As mentioned above, the Code provisions on the General Effects of Marriage now open with the statement that marriage is concluded for life. The section goes on to state, as did the prior law, the obligation to live in marital community. But a new paragraph (2) signals that this community may not have the same meaning under the new law that it had under the old:

§ 1353. (1) Marriage is concluded for a lifetime. The spouses are mutually bound to a matrimonial community of life.

(2) One spouse is not bound to comply with the demand of the other spouse for the establishment of the community, if the demand constitutes an abuse of right or if the marriage has foundered.<sup>24</sup>

Changes in succeeding sections confirm that the former idea of marital community has been relativized and made sex-neutral. Section 1356, which had charged the wife with responsibility for running the household and limited her right to be employed outside the home, now provides:

§ 1356. (1) The spouses regulate the running of the household by mutual agreement. If the running of the household is left to one of the spouses, that spouse manages the household on his own responsibility.

---

<sup>22</sup> Vogel, *Das Erste Gesetz zur Reform des Ehe- und Familienrechts vom 14. Juni 1976* (1. EheRG), 23 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT 481, 482 (1976).

<sup>23</sup> *Id.*

<sup>24</sup> The concept of "foundering" (*Scheitern*) in the new law and its relationship to "breakdown" (*Zerrüttung*) is discussed *infra* at note 36.

(2) Both spouses have the right to be employed. In the choice and exercise of an occupation they must pay due regard to the interests of the other spouse and the family.

Under the new version of section 1357, both spouses, not just the wife, are given the power to represent each other in household transactions, unless they contractually exclude it.

In addition, the rules about economic support during the marriage were reorganized. The 1957 Equality Law had already replaced the idea that one spouse (the husband) should support the family with the idea that *each* spouse should support the other, but it did so in a way that presupposed the traditional division of sex roles:

§ 1360. The spouses are mutually obliged to appropriately maintain the family by their work and property. As a rule, the wife fulfills her obligation to contribute to the maintenance of the family through labor by managing the household. She is obliged to engage in a gainful activity only insofar as the working capacity of the husband and the income of the family do not suffice for the maintenance of the family, and insofar as an inroad into their capital is not commensurate with the circumstances of the spouses.

§ 1360a. The proper (*angemessene*) maintenance of the family includes all that is required in the circumstances of the spouses to cover the costs of the household and to satisfy the personal needs of the spouses and the support of those common children of theirs who are entitled to be supported.

Maintenance is to be supplied in that fashion which is demanded by the marital community of life. The husband is obliged to make available to the wife his contribution to the common maintenance of the family for a reasonable (*angemessenen*) period of time in advance.

§ 1360b. If one spouse furnishes for the maintenance of the family more than he is obliged to furnish, it is to be presumed in case of doubt that he does not intend to obtain restitution from the other spouse.

The Reform Law has amended section 1360 to eliminate those sex-based classifications:

§ 1360. The spouses are mutually obliged to appropriately maintain the family through their work and with their property. If the managing of the household is left to one spouse, that spouse as a rule fulfills his obligation to contribute to the maintenance of the family through labor by managing the household.



In a similar vein, section 1360a, paragraph 2, sentence 2 has been amended to provide:

The spouses are mutually obliged to make available, for a reasonable period of time in advance, the necessary means for the common maintenance of the family.

In keeping with the notion that spouses are two equal and independent individuals associated in a joint enterprise, the new guiding principle governing economic relations between husband and wife thus seems to be that there is a mutual duty to contribute to household expenses, rather than a mutual duty to support one another.

In making these changes, West Germany is in step with well-established trends now transforming American as well as West European family law—the implementation of sex equality, and the adoption of legal neutrality with respect to marriage models and sex roles. Indeed, in the Western non-socialist world, West Germany led the way toward equalizing the legal positions of men and women in the family through its Constitution of 1949 and the Equality Law of 1957. Until the 1957 law, most Western legislation regulating interspousal personal and economic relationships during marriage gave the husband the dominant role in such matters as the choice of residence and the management and control of marital property. Since that time, however, there has been a rapid modernization of the traditional law of the ongoing marriage throughout Western Europe and in the United States, as more egalitarian laws typically replace the express or implicit stereotyping of sex-roles and family types. Implementation of sex equality has generally been followed in the law by a move toward lifestyle neutrality. In code-based systems, like those of West Germany, France, Italy, and Spain, legislatures have replaced the traditional law with a new model of a marital “community” in which there is no fixed pattern of role distribution. This movement has been variously explained in different legal systems as a response to the actual diversity of marriage and family types in society, as a necessary consequence of current notions of privacy, individual liberty or sex equality, or as the effect of a combination of these factors. In West Germany, the slogan, carried over from the Civil Code of 1896, that marriage is a community of life, now presides over marriage laws that mirror the present-day tension, in families and in society, between the ideals of “community of interest” and full self-realization of the individual. In the West German Constitution itself, there is a certain stress, not necessarily amounting to a contradiction, between the individual’s constitutional rights to sex equality and the “free unfolding of his personality” on the one hand, and the constitutional grant of the

“special protection of the state” to marriage and the family, on the other.<sup>25</sup> In the 1976 reform law, too, political compromise produced a document that reflects society’s aspiration for marriages to last a lifetime and its practical desire to provide a decent burial for those that do not. The social ideal of community and cooperation within marriage is tempered by the recognition that marriages and families are composed of individuals with their own distinctive needs and desires.

## II. GROUNDS OF DIVORCE

Until the wave of divorce law reform that began with the English Divorce Reform Act of 1969, West German divorce law was widely regarded as one of the most liberal systems in the Western countries. Divorce on the no-fault ground of insanity had been permitted for the entire country under the German Civil Code since 1900, whereas in France the idea of divorce on the limited ground of impairment of one partner’s mental faculties was still controversial when it was introduced in 1976.<sup>26</sup> Marriage breakdown (*Zerrüttung*) following a three-year period of separation had been a ground of divorce in Germany since the marriage legislation of 1938.<sup>27</sup> One of the most interesting aspects of the 1976 West German reform is that it *repealed* a system resembling the divorce reform legislation *adopted* in England in 1969 and in France in 1975.<sup>28</sup> With its combination of fault-based and objective grounds, the superseded German law also resembled the divorce law existing in the majority of American states.

A brief description of the provisions and operation of the Marriage Law of 1938, as retained in 1946, is helpful in understanding why West Germany decisively rejected the scheme so popular elsewhere. Under the 1938/1946 law, divorce was available for two types of matrimonial misconduct and for two situations in which neither partner was charged with fault. The two fault bases for divorce were adultery and the generalized ground of “serious marital misconduct or dissolute or immoral behavior such that the guilty party has so deeply disrupted the marriage that one cannot expect the restoration of that community of life which is implicit in the

---

<sup>25</sup> GRUNDGESETZ arts. 2, 3 & 6.

<sup>26</sup> Glendon, *supra* note 15, at 206-07.

<sup>27</sup> EheG, *supra* note 5, § 48.

<sup>28</sup> The English Divorce Reform Act, 1969, now consolidated into the Matrimonial Causes Act, 1973, is discussed in P. BROMLEY, *FAMILY LAW* 206-24 (4th ed. 1971); the French legislation, adopted in 1975 and effective in 1976, is discussed in Glendon, *supra* note 15.

nature of marriage.”<sup>29</sup> The two objective, or no-fault, grounds for divorce were (1) the physical or mental impairment of the defendant or (2) breakdown of the marriage and three years’ separation.<sup>30</sup> The version of the latter ground replaced by the 1976 reform read as follows:

§ 48. (1) If the domestic community of the marriage partners has been interrupted for three years and if, owing to a deep-rooted incurable breakdown (*Zerrüttung*) of marital relations, restoration of such a community of life as is implicit in the nature of marriage cannot be expected, either of the marriage partners may petition for divorce.

(2) If the spouse petitioning for divorce is wholly or predominantly guilty of bringing about the breakdown, the divorce cannot be granted against the other spouse’s opposition, except if the opposing spouse lacks attachment to the marriage, and such readiness to continue it as may fairly be expected of him or her (amended in 1961).<sup>31</sup>

(3) The petition for divorce must not be granted if on a true understanding of the interests of one or several minor children of the marriage the maintenance of the marriage is required (added by the Allied Control Council Law of 1946).

This well-known and much-discussed provision has been responsible for the characterization of West German divorce law as “liberal” in comparison with the laws of England, France, and certain American states that remained exclusively fault-based until the reforms of the 1970s. In reality, however, section 48 has not played a very important role in practice in West Germany. In fact, the history of section 48 is suggestive of the probable fate of divorce law reforms that merely tack objective grounds onto fault grounds.

In the first place, section 48, for all its notoriety, was little used. In 1968, for instance, the claim of marital breakdown figured in only 4.4 percent of all divorces,<sup>32</sup> while the general misconduct basis accounted for 93 percent.<sup>33</sup> It has been estimated that, as in England, France, and the United States, about ninety percent of all divorces in West Germany are uncontested.<sup>34</sup> Though most of these divorces are by mutual agreement, they are frequently disguised as divorces

---

<sup>29</sup> EheG, *supra* note 5, §§ 42, 43.

<sup>30</sup> *Id.*, §§ 44-46, 48.

<sup>31</sup> Familienrechtsänderungsgesetz, *supra* note 6, art. 2, § 1(g), incorporating case law that had made it difficult for a plaintiff to overcome the defendant’s opposition in contested divorce cases.

<sup>32</sup> M. RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND THE LAW 393 (1972).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 248, 251.

for marital misconduct. Such divorces were preferred in West Germany because they were the short route to divorce, given section 48's requirement of three years' separation. Judicial hostility to the breakdown ground contributed to the unpopularity of section 48 for a time. In a trend that had reversed before the 1976 reform, courts had reintroduced fault considerations by their interpretations of the vague language of section 48(2) and by broadly exercising their discretion to deny divorces under paragraphs 48(2) and (3).

The coalition government's divorce reform program proceeded on the premise that the breakdown principle should be strengthened and that fault considerations should be eliminated not only from divorce but from the effects of divorce as well. Although controversy surrounded the reform program, by 1976 there was no serious opposition in principle. West Germany, like Sweden, California, and those American states that have adopted the Uniform Marriage and Divorce Act, was ready to replace the prior specific grounds for divorce with a single objective ground: *Scheitern* (foundering, or failure) of the marriage.

The new basis for divorce is set forth in five sections reinserted in the Civil Code at the place left vacant when the original substantive divorce law of the German Civil Code of 1896 was repealed by the Marriage Law of 1938:

§ 1564. A marriage can be dissolved only by the judgment of a court upon the petition of one or both spouses. The marriage is dissolved when the judgment becomes final. The conditions under which divorce can be sought are set forth in the following provisions.

§ 1565. (1) A marriage can be terminated, if it has foundered (*wenn sie gescheitert ist*). A marriage has foundered if the community of life of the spouses no longer exists and it cannot be expected that the spouses will reestablish it.

(2) If the spouses have lived apart for less than one year, the marriage can only be dissolved if the continuation of the marriage would present an insupportable hardship [unzumutbare Härte] for the petitioner for reasons which repose in the person of the other spouse.

§ 1566. (1) It is irrebuttably presumed that the marriage has foundered, if the spouses have lived apart for one year and both spouses petition for divorce or the respondent consents to the divorce.

(2) It is irrebuttably presumed that the marriage has foundered, if the spouses have lived apart for three years.

§ 1567. (1) The spouses are living apart, if no household

community exists between them and one spouse perceptibly refuses its restoration because he rejects the marital community of life. The household community no longer exists in such case even if the spouses live apart within the marital dwelling.

(2) Cohabitation for a short time, that should serve the reconciliation of the spouses, does not interrupt or stop the time periods specified in § 1566.

§ 1568. (1) The marriage may not be dissolved, although it has foundered, if and so long as the maintenance of the marriage is exceptionally necessary for special reasons in the interest of minor children produced by the marriage, or if and so long as the dissolution would pose such severe hardship for the respondent who opposes it, by reason of extraordinary circumstances, that the maintenance of the marriage, even taking into consideration the interests of the petitioner, appears exceptionally required.

(2) Paragraph (1) is not applicable if the spouses have lived apart for more than five years.

#### A. The General Clause, Section 1565(1)

The new guiding principle for the dissolution of marriage is contained in section 1565(1). The former system of differentiated grounds, absolute and relative,<sup>35</sup> fault and no-fault, has been replaced by a single ground in a general clause: a marriage can be dissolved if it has "foundered."

Although the reform law uses a new term, "*Scheitern*" (foundering), rather than "*Zerrüttung*" (breakdown), the term used in repealed section 48, the concepts are said to be similar in content.<sup>36</sup> Thus it can be expected that the interpretation of *Zerrüttung* under prior law will be relevant in interpreting the new law. In particular, the reasons for the foundering of the marriage and the fact that only one partner may consider the marriage to have foundered should continue to be irrelevant in principle, as they were under the old no-fault provision. The legislature is said to have chosen the term *Scheitern* merely to emphasize that failure of a marriage may come about through a course of events over which the spouses have no

---

<sup>35</sup> Absolute grounds encompassed those matrimonial offenses which *per se* entitled the legally innocent spouse to a divorce—for example, adultery. Relative grounds included those violations of matrimonial duties which entitled the innocent spouse to a divorce only if they had led to the breakdown of the marriage.

<sup>36</sup> Indeed, Vogel states that the concepts are identical. See Vogel, *supra* note 22, at 483.

influence, or through their incompatibility of character, and that it is often a misfortune for both.<sup>37</sup>

By the terms of section 1565(1) a marriage has foundered if two conditions are present: the community of life of the spouses no longer exists and it is not expected that they will restore it. It seems that the existence of these two conditions must be established by proof of facts concerning the marital relationship except in those cases where the irrebuttable presumptions of section 1566(1) and (2) operate. In theory, at least, it must be proved that the alleged breakdown is genuine.

In the special case where the spouses have lived apart (as that concept is defined in section 1567)<sup>38</sup> for less than a year, section 1565(2) qualifies the requirements of the general clause of section 1565(1). The petitioner in such a case must show, in addition to the two conditions required by section 1565(1), that the continuation of the marriage would be an insupportable hardship for him or her for reasons that repose in the person of the other spouse. This section, not a part of the original government bill, was added in a late compromise with the Christian Democratic Union and the Christian Social Union. The addition of this "extra requirement" for divorce has been criticized as amounting to a limited reintroduction of fault notions.<sup>39</sup>

## B. The Presumptions of Section 1566

Substitution of breakdown grounds for specific fault grounds does not necessarily eliminate "fault" or "guilt" elements from marriage dissolution proceedings. Unless the law provides otherwise, the petitioner still must allege facts upon which the legal conclusion of "breakdown" can be based. If the facts and conclusion are contested by the other party, the petitioner then must bring in evidence to support his case. Thus, the aggravation of antagonism between the former marriage partners and the revelation of embarrassing or intimate details of their private family life theoretically can be present in a marriage dissolution system from which "fault" has been explicitly eliminated. The irrebuttable presumptions of section 1566(1) and (2) are addressed to this problem. These presumptions make presentation of the factual basis for breakdown unnecessary and the allegation of breakdown incontestable whenever the spouses

---

<sup>37</sup> Diederichsen, *Das Recht der Ehescheidung nach dem 1. EheRG (Scheidungsgründe)*, 30 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 273, 274 (1977).

<sup>38</sup> See text preceding note 35 *supra*.

<sup>39</sup> Die Zeit, April 23, 1976, at 1 (Overseas ed.).

have lived apart for the designated periods of time: (1) one year, if both spouses are seeking the divorce or the respondent agrees to the divorce; (2) three years, if only one spouse is seeking the divorce and the other does not agree to it. The presumptions are conclusive: once the separation period has been established, evidence to show that the marriage has *not* broken down despite the running of the time period is not admissible.<sup>40</sup> It is to be noted, however, that the draftsmen contemplated that the court would investigate the strict observance of the separation period.<sup>41</sup> If complete separation of the spouses for the required period cannot be established, the case remains governed by the basic provisions of section 1565.<sup>42</sup> The effect of the presumption in section 1566(2) (but not of 1566(1)) is mitigated somewhat by the power of the judge, under the revised rules of civil procedure, to postpone a suit based on the fact of three years' separation if he is of the opinion that chances still exist for the marriage.<sup>43</sup>

### C. The "Hardship Clause" of Section 1568

Even though the breakdown of marriage is conclusively presumed under section 1566 or factually demonstrated under section 1565, the marriage may not be dissolved if the exceptional circumstances detailed in section 1568 obtain unless the couple has lived apart for five years. The exceptional circumstances that may delay a divorce for the longer period of separation are of two kinds: where "the maintenance of the marriage is exceptionally necessary for

<sup>40</sup> Diederichsen, *supra* note 37, at 276.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Zivilprozessordnung [ZPO] § 614 as amended by 1. EheRG, *supra* note 1, art. 6. Under this section the judge cannot, however, postpone a divorce against the wishes of both spouses if they have lived apart for a year ( § 614 (2)(ii)).

§ 614 (1) The court shall postpone proceedings for the establishment of the marital life on its own motion, if this is appropriate for the amicable settlement of the proceedings.

(2) The court shall postpone divorce proceedings on its own motion, if it is convinced that there is a prospect for the continuation of the marriage. If the spouses live apart for more than a year, the proceedings must not be postponed against the objections of both spouses.

(3) If the petitioner has moved for the postponement of the proceedings, the court must not decide the petition for the establishment [of the marital life] or grant the divorce, before the proceedings have been postponed.

(4) The postponement may be repeated only once. It must not exceed one year altogether and, in the case of separation of more than three years, it must not exceed six months.

(5) In connection with the postponement, the court shall as a rule suggest to the spouses the use of a marital counselling service.

special reasons in the interest of minor children” of the marriage, or where the divorce would pose for the respondent “such severe hardship by reason of extraordinary circumstances, that the maintenance of the marriage . . . appears exceptionally required.” The section’s redundancy shows the scars of legislative battles over its content.<sup>44</sup>

Under the prior law, a marriage that had broken down was not to be dissolved so long as the opposing spouse had “attachment to the marriage” and readiness to continue it.<sup>45</sup> A more pragmatic view prevailed in the reform law. After the spouses have lived apart for five years, a divorce cannot be denied the petitioning spouse regardless of the hardship it may be claimed will befall the children or the objecting spouse. In this regard, section 1568 is said to reflect a practical judgment that matters concerning a foundered marriage ought to be “settled,” permitting the regularization of new unions which the spouses may have entered.<sup>46</sup>

Because of the five-year limit, the most that the hardship clause offers to a spouse opposed to divorce is the possibility of delay. But, as the repetitious language of the clause indicates, this delay is to be available only under extremely limited circumstances. Thus, it seems that the court, in determining whether the “exceptional” conditions required by section 1568(1) are present, must disregard the usual psychic and economic effects of marriage dissolution upon the children and the opposing spouse. It is too soon to say how the courts will apply the clause within the narrow limits left to them.

#### D. “Living Apart”: Section 1567

Reference is repeatedly made in the 1976 reform legislation to the concept of “living apart”: as a general rule, a marriage cannot be dissolved if the spouses have not “lived apart” for a year (1565(2)); presumptions of marriage breakdown arise if the spouses have “lived apart” for one or three years, depending on whether both spouses or only one spouse seeks the termination of the marriage (1566(1) and (2)); the hardship clause of section 1568 is not applicable after the spouses have “lived apart” five years; special

---

<sup>44</sup> Diederichsen, *supra* note 37, at 278.

<sup>45</sup> See text following note 30 *supra*.

<sup>46</sup> Diederichsen, *supra* note 37, at 278. Thus, the legislative conception of marriage dissolution proceedings under the new law has been likened to a kind of “marriage bankruptcy,” in which the broken-down marriage is “liquidated,” with financial matters, child-related matters and the marriage termination itself included in a single judgment. *Id.* at 273.



rules are established in sections 1361 and 1361a for support and household goods where the spouses "live apart." The meaning of this term is set forth in section 1567.

The section was drafted so as to clear up ambiguities that existed under the prior law in two situations: where the spouses continue to occupy the same dwelling, and where they resume cohabitation for a short time. Under the reform law, a marriage can have legally "foundered" even though the parties are still living under the same roof, because "living apart" is so defined that no period of living in different dwellings is necessary before a divorce can be granted. Where it is claimed that the spouses have "lived apart" within the same dwelling, however, it is probable that complete factual separation of their lives will have to be shown.<sup>47</sup> Thus the statutory requirements are likely to be met if the spouses divide the home, sharing only the kitchen and bath facilities, but not if a wife continues to cook, launder, and shop for her husband.<sup>48</sup> It is said that continued cooperation of the spouses in the interests of common children or a family business will not necessarily be evidence against "living apart."<sup>49</sup> As for resumed cohabitation during the period of separation, the reform law provides that cohabitation for a short time with the aim of reconciliation will not toll the running of the separation period.

Mere physical separation of the spouses due to illness, war, or the occupation of a spouse does not of itself destroy the "household community" or constitute evidence of "living apart" within the meaning of section 1567.<sup>50</sup> To convert such a physical separation into "living apart," a spouse must manifest in an unmistakable manner his intent to do so.<sup>51</sup>

## E. Summary

Viewed in conjunction with recent reforms pertaining to the grounds of divorce in several other Western countries, these new West German divorce provisions are part of a process that appears to be transforming marriage from a relationship terminable only for serious cause to a relationship dissoluble at will. By more fully eliminating consideration of marital misconduct and by extending unilateral no-fault divorce to a limited degree,<sup>52</sup> West Germany has

---

<sup>47</sup> *Id.* at 277.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See BGB § 1566(2).

gone further on the spectrum of change than England, France, and most American states, where present divorce law resembles the 1938/1946 German law.

The new West German law, by its use of conclusive presumptions,<sup>53</sup> provides for even less judicial intrusion into the termination of marriage than does the American Uniform Marriage and Divorce Act, which, in form, still requires judicial inquest into the fact of marriage breakdown.<sup>54</sup>

When one compares West German divorce law with that of Sweden, however, one finds that, in addition to eliminating marital misconduct as a ground for divorce, Sweden has minimized state regulation of marriage dissolution even further. In 1973, Sweden repealed a liberal law under which the principal ground of divorce was factual breakdown of the marriage (proved by a period of separation and the mutual consent of the parties) and unilateral divorce was obtainable with little difficulty.<sup>55</sup> The Swedish reform law, which went into effect on January 1, 1974, made unilateral divorce a matter of legal right.<sup>56</sup> No fault need be alleged; no "reasons," such as breakdown of the marriage, need be given. Thus, the court need not even appear to make findings concerning these matters. There is no waiting period for a divorce unless one spouse opposes the petition or has custody of children under 16 years of age. Even in these cases, the petitioner need only observe a six-month waiting period, after which the court has no discretion to deny a divorce. Political compromise in West Germany produced a law that is far from furnishing the no-fault, no-reasons, no-inquest divorce available with little or no delay in Sweden. Nevertheless, the West German divorce reform represents a conscious retreat from official involvement in marriage dissolution.

In evaluating recent reforms of the grounds for divorce, it is essential to distinguish between divorce as an event that terminates marriage, and divorce as an event that triggers economic and child-related consequences. While there seems to be a clear trend, of varying degrees in different countries, toward less regulation of marriage termination as such, a consensus is emerging that economic and child-related matters are the crucial issues for legal and social

---

<sup>53</sup> *Id.*

<sup>54</sup> See UNIFORM MARRIAGE AND DIVORCE ACT § 305 and comment thereto.

<sup>55</sup> The former Swedish system is described in detail in M. RHEINSTEIN, *supra* note 32, at 126.

<sup>56</sup> For a description of the Swedish family law reform of 1973, effective in 1974, see M. GLENDON, *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* 222 (1977).

policy. As to these matters, most recent reforms are characterized not by a lessening of but by an increase in state intervention. This is especially true of the new West German treatment of economic issues, as the next sections of this article demonstrate. Indeed, when the new grounds of divorce are read with the new provisions on the economic aspects of divorce, it may be concluded that, overall, divorce in West Germany has been made more difficult, or at least more expensive. Unhappy spouses, though generally saved from having to disclose embarrassing details of their personal lives in court, may have been delivered into the hands of bureaucrats and lawyers.

### III. THE ECONOMIC CONSEQUENCES OF DIVORCE

In West Germany, as in the United States, post-divorce support has been recognized to be a precarious remedy. The enforceability of periodic payments for an indefinite future is uncertain for the claimant, traditionally the wife, and payments can turn out to be a crushing burden for the debtor, traditionally the husband, and for the new family he may establish. For both sides, a continuing post-divorce financial relationship can be a persistent source of litigation and bitter memories. Like the Uniform Marriage and Divorce Act in the United States and divorce reform acts in England, France, and other countries, the West German reform act tries to shift the weight of post-divorce economics from a continuing duty of support to a once-and-for-all settlement at the time of divorce.

#### A. Settlement of Property and Pension Benefits

The basic step in this direction had already been taken by the West German Equal Rights Law of 1957. Up to that time, marriage did not bring about an amalgamation of the property of the husband and the wife, unless the parties had so arranged by solemn marital contract.<sup>57</sup> In the overwhelming majority of marriages, the combined property of husband and wife was managed by the husband, but title remained separate. Upon termination of the marriage, the husband walked away with his assets and the wife with hers. But what did the wife own if the husband, as breadwinner, had accumulated savings while she earned nothing during years of caring for household and children? Clearly, in the great majority of cases, the wife's post-divorce support could be assured only by giving her a claim for periodic payments against her former husband. The claim was de-

---

<sup>57</sup> BGB former §§ 1363 ff.

nied, however, if her misconduct was held to have brought about the breakdown of the marriage.

The Equal Rights Law of 1957<sup>58</sup> changed this traditional system of marital property law by introducing a system of *Zugewinnausgleich*, an "equalization of increase" that may be excluded by marital contract. Like the Nordic laws of the earlier part of the twentieth century, this system combines the essential features of separation of assets—individual ownership and management during marriage, limited in some respects—with a sort of community property sharing upon divorce and, in certain cases, upon death. If, by his gainful activity, one spouse has increased the value of his estate more than the other spouse has, the one who has achieved the greater "increase" must pay the other spouse one-half of the difference. No partition of jointly owned assets is necessary upon marriage termination; the equalization of property increase is brought about by a simple arithmetic computation and the payment of a sum of money. If a husband accumulated savings while his housewife spouse earned nothing, he must, upon divorce, pay her a sum of money equal to one-half of the savings he achieved during their marriage. If both parties earned wages and increased their estates, the increases of each are computed and compared, and the party whose increase was greater pays one-half the difference to the other.<sup>59</sup>

The *Zugewinnausgleich* system presupposes that there are property assets whose value can be computed. But this assumption becomes problematic when savings are represented not by traditional assets of real or personal property but by rights to or prospects of future annuities or pensions. In a steadily increasing number of households this "new property" has become a more important means of savings than traditional types of property. The prospect of a pension payable at retirement age or possibly at the time of an earlier incapacity constitutes a significant, or even the principal, saving of many families. However, pensions were not subject to division under the 1957 *Zugewinnausgleich*. Upon divorce, each spouse retained his or her own entitlements. Where a divorced wife had had little outside employment she was frequently left without security for old age and was forced to seek public aid. That there were over 308,000 divorced women over 55 in West Germany at the end of 1973 and only 13,600 of them were receiving pensions in 1974

---

<sup>58</sup> GleichberG, *supra* note 8.

<sup>59</sup> BGB §§ 1363-70, 1372-84 (incorporating amendments made by the Equality Law of 1957), *supra* note 8.

indicates the scope of this problem.<sup>60</sup>

West Germany and other countries have found it difficult to include this kind of savings in the property settlement upon divorce. The reform law of 1976 perhaps opened a way out of these difficulties. Vested rights in future pension benefits and even contingent expectations of pensions for which the foundation has been laid during marriage are now the subject matter of a program of "equalization of security benefits" (*Versorgungsausgleich*). The new institution requires that such rights and expectations of divorcing spouses be appraised, compared with each other, and equalized insofar as they have been accumulated during marriage.<sup>61</sup>

1587. (1) An equalization of security benefits takes place between divorced spouses, insofar as, for one or both of them, expectations or prospects for maintenance for old age or vocational or occupational incapacity of the type enumerated in § 1587a(2)<sup>62</sup> are established in or are to be preserved through the marriage (*Ehezeit*). Expectations or prospects which are established or preserved neither with the help of the property nor through the work of the spouses remain outside consideration.

(2) Marriage (*Ehezeit*), in the sense of the provisions on the equalization of security benefits, includes the time from the beginning of the month in which the marriage was celebrated to the end of the month in which the divorce decree went into legal effect.

(3) Only the following provisions are to apply to expectations or prospects upon which equalization of security benefits takes place; the provisions of the marital property law are not applicable.

The idea is simple, but the statutory scheme is complex and implementation is difficult. Though the underlying theory of the equalization of security benefits is the same as that of the equalization of property increase, the new institution has been organized by the reform law of 1976 to operate independently of the older equali-

---

<sup>60</sup> Ruland, *Der Versorgungsausgleich*, 29 NJW 1713 (1976).

<sup>61</sup> BGB §§ 1587-1587p (incorporating amendments made by the 1. EheRG, *supra* note 1). See generally Belchus, *Einführung in den Versorgungsausgleich*, 30 MONATSSCHRIFT FÜR DEUTSCHES RECHT 793 (1976); Ruland, *supra* note 60. The provisions are to apply in principle to all divorces after the effective date of the law, with transitional provisions for cases where the spouses have lived apart for a long period. Constitutional objections have been raised, however, to the equalization of benefits between spouses who were married prior to the time the new rules went into effect. See, e.g., Müller, *Verfassungswidrigkeit des Versorgungsausgleichs bei "Altehen"?* 30 NJW 1745 (1977).

<sup>62</sup> See text at note 65 *infra*.

zation. A parallel doctrine developing in the caselaw of American community property jurisdictions,<sup>63</sup> as well as in the so-called common law states,<sup>64</sup> treats pension rights and expectations established during marriage as assets or property existing at the time of divorce. Under the West German system, however, increases in pension benefits are to be computed, compared, and equalized separately from all other assets. The actuarial processes for ascertaining the monetary value of future pension rights and prospects acquired during marriage are regulated by elaborate provisions for each type of benefit: social security, civil service, armed forces, pension funds established by private employers, private annuity insurance, and so on.<sup>65</sup> Once the values of the pension rights and prospects both spouses acquired during the marriage have been ascertained, these values are compared with each other. One-half of the difference between the higher and the lower value is transferred from the pension account of the spouse with the higher value to the pension account of the spouse with the lower value. If no pension account yet exists for that latter spouse, a new one is established for her or him. As a general rule, the new account to which the transfer is made will be established in the general social security system in which almost the entire population participates.<sup>66</sup> The account that receives a transfer is independent of the account from which the transfer is made. Thus, if the latter account is contingent or vested subject to divestment, its failure to vest or its divestment does not affect the account to which the transfer has been made.

In a typical situation of a wife who established a pension account of her own through employment before marriage, but stopped adding to it during marriage, transfer from her divorced husband's account will increase her future pension, and post-divorce employment will result in further additions. On the other side, the decrease in the husband's account, and thus of his future pension, may be replenished eventually by his voluntary payment of the requisite amounts into his account.

By providing for separate pension accounts, the statutory scheme attempts to make the rights of the obligee-spouse indepen-

---

<sup>63</sup> *E.g.*, *In re Marria of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); *Guy v. Guy*, 98 Idaho 205, 560 P.2d 876 (1977); *Taggart v. Taggart*, 552 S.W.2d 661 (Texas 1977); *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355 (1975); *DeRevere v. DeRevere*, 5 Wash. App. 741, 491 P.2d 249 (1971).

<sup>64</sup> *E.g.*, *Hutchins v. Hutchins*, 71 Mich. App. 361, 248 N.W.2d 272 (1976); *Kruger v. Kruger*, 73 N.J. 464, 375 A.2d 659 (1977).

<sup>65</sup> BGB § 1587a (inserted by 1. EheRG, *supra* note 1).

<sup>66</sup> *Id.*, § 1587b (inserted by 1. EheRG, *supra* note 1).

dent of the fate of the obligor's pension rights or prospects. In some cases, however, the transfer of part of one spouse's existing pension account to the social insurance account of the other spouse is not possible. If a pension account has been established with a foreign insurance carrier, for example, it cannot be affected by a decree of a West German court. In the exceptional cases where an immediate transfer is not possible or feasible, the obligee-spouse must wait until the old age or disability pension rights of the other spouse mature. At that time he or she may claim an appropriate part of each installment from the pension recipient when it is received (the so-called *schuldrechtlicher Versorgungsausgleich*).<sup>67</sup> In cases of exceptional hardship or inequity, the equalization of security benefits can be omitted or temporarily suspended by the court.<sup>68</sup>

Viewed as a matter of policy, the equalization of benefits (*Versorgungsausgleich*) is an extension of the principle of equalization of marital property increase (*Zugewinnausgleich*) but there are differences in the operation of the two processes. *Zugewinnausgleich* takes place on divorce only where the couple has been living under the basic statutory regime of matrimonial property (*gesetzlicher Güterstand*), and not where a different marital property regime has been chosen by matrimonial contract, or where the statutory regime has been terminated by operation of law or judicial decree. *Versorgungsausgleich* applies in all divorces, irrespective of whether the parties have been living under the statutory marital property regime, unless the equalization of benefits was excluded by marriage contract, executed before a notary at the time of the marriage or at a later time.<sup>69</sup> Such an agreement is invalidated, however, if a petition for divorce is filed within a year after the agreement was executed.

While a divorce proceeding is pending, spouses are normally given considerable freedom to make their own arrangements concerning property equalization and post-divorce support, subject only to the general requirements of legality and good morals (West German Civil Code sections 134 and 138).<sup>70</sup> Thus, alteration of the *Zugewinnausgleich* is basically left to the parties and their lawyers. On the other hand, the parties' freedom to modify or exclude the *Versorgungsausgleich* during the pendency of a divorce proceeding

---

<sup>67</sup> *Id.*, §§ 1587f-1587n (inserted by 1. EheRG, *supra* note 1).

<sup>68</sup> *Id.*, §§ 1587c-1587d (inserted by 1. EheRG, *supra* note 1), where the situations are defined in great detail.

<sup>69</sup> *Id.*, § 1408 (incorporating amendments made by 1. EheRG, *supra* note 1).

<sup>70</sup> *Id.*, § 1363(1) (incorporating amendments made by the Equality Law of 1957, *supra* note 8).

is strictly limited. *Versorgungsausgleich* is generally to be initiated by the court on its own motion, and is to be carried out in inquisitorial fashion. Any agreement suggested by the parties on the equalization of benefits in connection with the divorce must not only be executed before a notary, but must be submitted to the family court judge for approval.<sup>71</sup> Approval may be withheld if the judge finds that the agreement, viewed in conjunction with the support and property arrangements made by the spouses, will not provide appropriate security against old age or incapacity for a spouse who would otherwise be entitled to pension equalization, or that the agreement does not effect an appropriate equalization between the spouses.

The West German *Versorgungsausgleich* is an attempt to deal with the novel problem of "new property" that has attracted rapidly increasing attention in a number of places. It has, of course, been tailored to the disability and retirement plans that exist in West Germany. Though details differ from country to country, similar plans apparently exist everywhere. The West German reform law may furnish valuable suggestions for treatment of these plans upon divorce. As its effective date was July 1, 1977, time will be needed to see how it will work in practice. Fear has been expressed already that both partners will often be left with insignificantly small "dwarf pensions" under the statute. But the *Versorgungsausgleich* is meant to be seen in a social setting where both partners to a marriage, male and female, are active participants in the labor force, at least before and after marriage, and where women engage in at least some gainful employment during part of the marriage. In such a setting the husband's insurance account would not be affected too seriously, and the wife's account could be expected to increase eventually through her own gainful activity.

## B. Post-Divorce Spousal Support

Prior to the reform law, the right of a spouse to post-divorce support depended in important respects on the judicial determination of "guilt." If a husband was found to be at fault, he was obliged to maintain his wife—insofar as her own resources were insufficient—at the same economic level enjoyed during married life.<sup>72</sup> If,

---

<sup>71</sup> *Id.*, § 1587o (inserted by 1. EheRG, *supra* note 1). For a discussion and comparison of § 1408(2), governing exclusion of the *Versorgungsausgleich* through marriage contract (note 69 *supra*,) and § 1587o governing its exclusion through agreement in connection with divorce, see Rohde, *Vertraglicher Ausschluss des Versorgungsausgleichs*, 30 NJW 1763 (1977).

<sup>72</sup> EheG, *supra* note 5, § 58.



on the other hand, the wife was found to be at fault, she was obligated to maintain her husband after divorce at a mere subsistence level, and that was required only if he was incapable of supporting himself.<sup>73</sup>

The 1976 reform replaced these rules with a fundamentally different system. Not only is marital fault made irrelevant to the settlement of the spouses' economic affairs, but, as a general rule, spousal support is not even to be available after divorce except as needed to help an economically weaker spouse adjust to a new situation and become economically self-sufficient. As under the American Uniform Marriage and Divorce Act,<sup>74</sup> each spouse is expected to be self-supporting, and the basic mechanism for adjusting the spouses' financial affairs upon divorce is to be property division rather than maintenance. As explained above, the new German system of property division includes both the sharing of a superior increase in one spouse's net worth during the marriage (the *Zugewinnausgleich*)<sup>75</sup> and a similar sharing of such "new property" as pension and insurance rights (the *Versorgungsausgleich*).

The basic principle governing post-divorce support under the new system is stated in section 1569: "If a spouse cannot take care of his support after divorce by himself, he has a claim for support against the other spouse according to the following provisions." Thus, a claim for support (*Unterhalt*), as distinct from the sharing of marital property increase and the equalization of future benefits, may be made only if a spouse meets one of several enumerated conditions. New Civil Code sections 1570 through 1576 specify the six classes of spouses who may claim support.

The first category involves spouses caring for a child of the marriage:

§ 1570. A divorced spouse can demand support from the other so long and insofar as employability<sup>76</sup> cannot be expected of him on account of the care or upbringing of a common child.

Spouses who cannot be self-supporting because of age are also given a claim:

---

<sup>73</sup> *Id.*

<sup>74</sup> UNIFORM MARRIAGE AND DIVORCE ACT, *supra* note 54, § 308.

<sup>75</sup> The West German marital property system established in 1957 has not been changed significantly by the 1976 reform law. For a description of the system, see Rheinstejn & Glendon, *Marriage: Interspousal Relations*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 4 (A. Chloros ed., to be published in 1978).

<sup>76</sup> The German word is *Erwerbstätigkeit*—the capacity of a person to earn his own living by self-employment or employment by another.

§ 1571. A divorced spouse can demand support from the other, insofar as at the time of

- (1) the divorce,
- (2) the termination of the care or upbringing of a common child, or
- (3) the cessation of the conditions for a support claim under §§ 1572 and 1573,

employability can no longer be expected of him on account of his age.

The third category envisions a claim for support by a physically or mentally incapacitated spouse:

§ 1572. A divorced spouse can demand support from the other, so long and insofar as at the time of

- (1) the divorce,
- (2) the termination of the care or upbringing of a common child,
- (3) the termination of training, continued education or re-education, or
- (4) the cessation of the conditions for a support claim under § 1573,

employability cannot be expected of him on account of sickness, or other impairment or weakness of his physical or mental faculties.

The fourth category of claims relates to a spouse's unemployment, inability to find "appropriate" employment, or inability to earn sufficient income:

§ 1573. (1) If a divorced spouse has no claim to support under §§ 1570 to 1572, he can nevertheless demand support so long and insofar as he is unable to find any appropriate employment after the divorce.

(2) If the income from an appropriate employment is insufficient for full support ( § 1578),<sup>77</sup> he can claim the difference

<sup>77</sup> The section referred to describes in a general way the measure of support.

§ 1578 (1) The measure of support is determined according to the marital standard of living. Support includes all necessities of life.

(2) To the necessities of life belong the cost of appropriate insurance for illness as well as the costs of educational or vocational training, or continued training, or retraining under §§ 1574-1575.

(3) If the divorced spouse has a support claim under §§ 1570-1573 or 1576, the costs of appropriate insurance for old age as well as vocational or occupational incapacity are included in the necessities of life.

between his income and full support, if he does not already have a support claim under §§ 1570 to 1572.

(3) Paragraphs (1) and (2) apply correspondingly, if support was granted under §§ 1570 to 1572, or 1575, but the preconditions of these provisions have lapsed.

(4) A divorced spouse can also claim support, if the income from an appropriate employment ceases, because he does not succeed, despite his efforts, in assuring his support after divorce in a lasting fashion through employment. If he succeeds in assuring his partial support in a lasting fashion, he can claim the difference between the support thus assured and full support.

The concept of "appropriate employment" is explained in the following section:

§ 1574. (1) A divorced spouse need undertake only an employment which is appropriate for him.

(2) An appropriate employment is one which corresponds to the education, ability, age and state of health of the divorced spouse as well as to the circumstances in which the couple lived while married; in connection with the aforementioned circumstances, the duration of the marriage and the duration of care or upbringing of a common child are to be taken into consideration.

(3) Insofar as it is necessary for his entrance into an appropriate employment, it is the duty of the divorced spouse to have himself trained, to obtain additional training or to be retrained, if a more successful outcome of training is to be expected.

The fifth category of cases in which post-divorce support may be claimed reflects a concern that has begun to appear in American cases as well. Section 1575 permits one spouse to obtain temporary support from the other in order to finish an interrupted course of studies or to secure more advanced training in a professional field, particularly where the spouse's employment opportunities have been impaired by what the West German law refers to as "marriage-conditioned delays," such as the devotion of years to child care or the interruption of studies upon marriage.

§ 1575. (1) A divorced spouse, who in anticipation of marriage or during the marriage has not undertaken or has broken off educational or vocational training, can seek support from the other spouse, if he undertakes this or a corresponding training as soon as possible in order to obtain appropriate employment that assures enduring support, and if a successful out-

come of such training is to be expected. The claim exists, at the most, for the time generally needed for the conclusion of such training; in connection therewith, marriage-conditioned delays to training are to be taken into consideration.

(2) Correspondingly, this section applies if the divorced spouse continues his education or is retrained in order to compensate for disadvantages incurred because of the marriage.

(3) If the divorced spouse, after the termination of training, continued training or retraining, claims support under § 1573, his improved higher educational status remains outside consideration in ascertaining what is an employment appropriate for him (§ 1574 paragraph 2).

The sixth and last category of eligibility for post-divorce spousal support is more general, leaving open the possibility of a spouse's receiving support by showing that he or she cannot be expected to be employed for "grave reasons" other than child care, age, incapacity, unemployment, or because he or she is receiving training under section 1575. Recognizing the potential this general clause offers for reintroduction of the marital misconduct factor, the legislature provides that "grave reasons" that may have led to the breakdown of the marriage shall not be decisive in themselves. On the other hand, such evidence is not totally excluded from the decision to grant a support claim:

§ 1576. A divorced spouse can claim support from the other, insofar and so long as employment cannot be expected of him for other grave reasons, and the denial of support, considering the interests of both spouses, would be grossly unfair. Grave reasons should not be taken into consideration solely because they have led to the foundering of the marriage.

This section is expected to be applied, for example, in situations where a spouse, at a sacrifice to his or her own professional development, has devoted years to working in the business of the other spouse, or where a spouse has shown exceptional loyalty in times of particular hardship.<sup>78</sup>

Even though a claimant meets the threshold requirements for post-divorce support, he may be denied it on other grounds. A court may refuse the claim of a spouse otherwise entitled to support who has sufficient personal resources to be self-supporting or where an

---

<sup>78</sup> Diederichsen, *Ehegattenunterhalt im Anschluss an die Ehescheidung nach dem 1. EheRG*, 30 NJW 353, 357 (1977).

allowance of support would be "grossly unfair" under all the circumstances of the case.

The situations in which a spouse's personal resources disqualify a claim for support are regulated by section 1577:

§ 1577. (1) The divorced spouse cannot claim support under §§ 1570 to 1573, 1575 and 1576, so long and insofar as he can support himself from his own income and property.

(2) Income is not to be taken into account insofar as the obligor does not supply the full support (§ 1578).<sup>79</sup> Income that exceeds the full support is to be counted, insofar as this corresponds to fairness in the light of the mutual economic circumstances.

(3) The basic capital of his property need not be cashed in by the claimant insofar as the realization would be uneconomic, or unfair, in view of the mutual economic circumstances.

(4) If it was to be expected at the time of the divorce that the support of the claimant from his own property would be lastingly assured, no claim for support lies if the property later on turns out to be insufficient. This does not apply, if, at the time of the insufficiency of the property, employment of the spouse cannot be expected on account of the care or upbringing of a common child.

The difficult question of what constitutes such unfairness that support ought to be denied an otherwise eligible spouse is tackled in section 1579. An effort was made to exclude ordinary marital misconduct from consideration and the entire question of gross unfairness is made irrelevant where a spouse claims support on the basis of his duties in connection with a child of the marriage.

§ 1579. (1) A support claim does not exist insofar as the claim against the liable spouse would be grossly unfair, because

1. the marriage was of short duration; the duration of the marriage includes the time during which the claimant was entitled to support under § 1570 on account of the care or upbringing of a common child,
2. the claimant has been guilty of a felony or a serious intentional misdemeanor against the obligor spouse or a near relative of the obligor spouse,

---

<sup>79</sup> See note 77 *supra*.

3. the claimant has maliciously brought about his own state of need, or
4. another ground exists, as grave as those set out in numbers 1 to 3.

(2) Par. (1) does not apply so long and insofar as employment cannot be expected of the claimant on account of the care or upbringing of a common child.

Paragraph (1) reflects a concern widely expressed in modern divorce legislation that the termination of a relatively short marriage should not furnish an occasion for far-reaching alteration of a spouse's financial affairs. However, since marriage "duration" under this paragraph is deemed to include the time in which a divorced spouse has cared for a child of the marriage, a marriage of only a few months' legal existence can have a "duration" of many years. The general unfairness ground of paragraph (1)(4) was added as a late compromise. Originally, the drafters of the government bill had limited the cases of gross unfairness to the three enumerated instances, fearing that a general clause would undermine the purpose of the reform law to eliminate marital misconduct evidence from divorce litigation.<sup>80</sup>

Where support is awarded, it is generally to be provided through monthly payments, although in exceptional cases, it may be awarded as a lump sum.<sup>81</sup> The support claim binds the estate of the obligor spouse,<sup>82</sup> but ceases with the remarriage or death of the claimant spouse.

It has been questioned whether the principle of individual responsibility after divorce has been submerged by the six wide-ranging exceptions just discussed. Commentators have suggested that the principle of self-sufficiency will be implemented in fact only in three groups of marriage dissolution cases: those involving double-earner marriages, marriages of relatively short duration, and marriages of young childless couples.<sup>83</sup> On the other hand, the practical importance of the broad categories in which support is theoretically available is bound to be somewhat diminished by the mandate that the court consider the resources and the other obligations of the

---

<sup>80</sup> Diederichsen, *supra* note 78, at 357.

<sup>81</sup> BGB § 1585. This section also regulates the conditions under which security for support obligations may be required.

<sup>82</sup> *Id.*, §§ 1586-1586b. Under certain circumstances, the support obligation may revive upon the divorce of a remarried claimant-spouse. Section 1586a.

<sup>83</sup> Diederichsen, *supra* note 78, at 353.

obligor spouse (including obligations to a new family) in fixing the amount of support.<sup>84</sup>

Finally, the support provisions apply only if the parties have not otherwise agreed.<sup>85</sup> By contract, support can be given to a spouse who is not legally eligible for it, or support can be renounced by an eligible spouse. The level of support might also be fixed at a point above or below that which the law would require in the absence of private agreement. The draftsmen intended to facilitate such agreements in order to avoid unnecessary conflict in the divorce proceeding itself and to prevent post-divorce controversies over support.<sup>86</sup>

In sum, West Germany provides three types of security for the economically weaker party in a divorce: equalization of property increase, equalization of future benefits, and claims for periodic support. The latter remedy is given the subordinate role of supplementing the other two in situations of special need. When granted, support is to be temporary only, save in exceptional cases. As far as possible, post-divorce litigation and post-divorce obligations are sought to be avoided. To what extent this aim will be achieved cannot be predicted.

#### IV. COURT ORGANIZATION AND PROCEDURE

The desire for a unified disposition of all issues involved in the dissolution of a marriage resulted in a far-reaching innovation in West German judicial organization and procedure.<sup>87</sup> Under pre-reform law, the dissolution of the marriage and the consequences of dissolution were independently handled in separate proceedings. The questions of whether a marriage could be dissolved and who, if anyone, was the "guilty" party were decided by the Civil Chamber of the *Landgericht* consisting of three judges. The law enumerated the exclusive situations in which a marriage could be dissolved, and required the court to find the facts independent of the parties' allegations and admissions. The possibility of intervention by the State's Attorney was to be additional protection against collusive attempts to present untrue or incomplete facts in divorce cases and in cases involving allegations of void or voidable marriage. Once the

---

<sup>84</sup> BGB § 1581. As a rule, the support obligation to the divorced spouse takes precedence over the obligation to a new spouse. See § 1581(1).

<sup>85</sup> *Id.*, § 1585c.

<sup>86</sup> Diederichsen, *supra* note 78, at 362-63.

<sup>87</sup> See 1. EheRG, *supra* note 1, arts. 5, 6 & 7, amending the Law on Judicial Organization (*Gerichtsverfassungsgesetz*), the Code of Civil Procedure (ZPO), and the Law on Non-Litigious Jurisdiction (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*).

marital proceeding (*Ehesache*) reached a judgment of dissolution, remaining issues were to be handled in separate proceedings before different courts with partially adversary and partially inquisitorial procedures. The one-man *Amtsgericht* had jurisdiction as Guardianship Court (*Vormundschaftsgericht*) in matters of child custody and visitation rights, and as Court of Litigation (*Streitgericht*) in matters of support. Property settlements were to be decided by the *Landgericht* if the value of the assets involved was DM 3,000 (about \$1,500) or more, and by the *Amtsgericht* if the value was less, or, independent of value, if the matter in controversy was the marital dwelling or household equipment.

Such at least was the scheme on the books. In fact, the *Landgericht* made no use of its investigatory powers and the State's Attorney practically never intervened. Representation by an attorney was necessary only before the *Landgericht*. In about ninety percent of all divorce cases the defendant did not contest the plaintiff's prearranged allegations, did not appear in court, and did not use the services of an attorney. The issues of support and property settlement were often determined out of court and with only one attorney, if any. In matters of custody and visitation rights, parties sought representation by an attorney only in exceptional circumstances.

All this has been changed by the reform act. At the *Amtsgerichte*, newly established Divisions of Family Matters (*Familiengerichte*) have comprehensive jurisdiction in marital proceedings (*Ehesachen*), that is, matters of divorce, dissolution of marriage because of defective formation or nullity, actions for declaratory judgment of existence or non-existence of marriage, actions to bring about the establishment of marital community of life, and actions for separation. In matters of divorce, all issues of marriage termination and its consequences are, as a general rule, to be decided in a single proceeding yielding a single judgment.

In all phases of these "compound proceedings" (*Verfahrensverbund*) the parties must be represented by attorneys. Theoretically, it still suffices that the "petitioner" is represented by counsel, but the court is to appoint an attorney to assist the other party if that other party "asserts his rights insufficiently or not at all" in matters concerning the divorce or the parental authority.

If the parties wish to obtain the divorce without contest, in principle they must present to the court their detailed agreement on all the consequences,<sup>88</sup> except the equalization of pension rights and

---

<sup>88</sup> Diederichsen, *Die Einführung der Familiengerichte durch das 1. EheRG*, 30 NJW 601, 606 (1977).



expectations which is to be regulated by the court upon its own initiative and investigation even in a consent divorce.

In cases where the spouses are not in agreement, the rules of procedure afford considerable possibility of delay to an opposing spouse. As a rule, the court may not dissolve the marriage before it has reached its decision concerning the effects of divorce.<sup>89</sup> In this decision, the court is *required* to rule on the parental authority over any common children and to perform the equalization of property and future pension rights.<sup>90</sup> Issues relating to other effects of divorce such as maintenance, visitation, division of household goods and so on may be raised by either spouse in the petition or even during the proceeding.<sup>91</sup>

While the reform law has simplified divorce procedure in some respects, marriages, as before, can be dissolved only by the decision of a court. Not even the presumptions of section 1566 completely eliminate the role of the judge, or permit "mail-order" divorce. Although judicial inquest into the fact of breakdown is supposedly eliminated where the section 1566 presumptions are used, the revised rules of civil procedure applicable to divorce cases prescribe that, in principle, the spouses are to be personally heard before the judge in every divorce case.<sup>92</sup>

### CONCLUSION

When the new provisions on the grounds of divorce are placed in the context of the accompanying procedural rules and the new legal provisions regulating the economic effects of divorce, it appears that the principal future impediment to divorce in West Germany may be the complex and rigorous regulations governing support and equalization of property and pension benefits.<sup>93</sup> The proce-

---

<sup>89</sup> ZPO § 629 as amended by 1. EheRG, *supra* note 1, art. 6.

<sup>90</sup> *Id.*, § 623 as amended by 1. EheRG, *supra* note 1, art. 6.

<sup>91</sup> *Id.*, §§ 621 & 623 as amended by 1. EheRG, *supra* note 1, art. 6.

<sup>92</sup> *Id.* § 613 as amended by 1. EheRG, *supra* note 1, art. 6.

<sup>93</sup> At a meeting of German family court judges on December 5, 1977, participants estimated that no more than 5000 divorces would have been granted under the new law during its first six months of operation (from July 1 to December 31, 1977). This contrasts with more than 50,000 divorces granted during the same period the preceding year. Petitions for divorce were down fifty percent from the same period the preceding year. The drop in divorces granted was explained in part by the initial difficulties in putting the new system into operation. The drop in petitions appears to be due to a variety of factors. A disproportionately high number of marriages were dissolved in the first half of 1977, many for the apparent purpose of avoiding the uncertainties about the new law, in particular, about how the complex provisions of the *Versorgungsausgleich* would be interpreted and applied in practice. The same uncertainty, shared by lawyers and the population at large, is said to continue to hold down, temporarily at least, the number of divorce petitions. Another factor is that the cost

dural innovations of the reform law are likely to increase the cost of divorce and to delay the time when divorcing parties obtain the freedom to remarry. Under the pre-reform law, the cost of a divorce was about DM 3000 (\$1500). Under the new system it is expected to be DM 5000 to 10,000 (\$2500-5000). The establishment of the waiting periods of one, three, or five years of separate living is expected to invite uncontested false allegations that such periods have elapsed. While the reform law seems to facilitate the dissolution of marriage by the general introduction of no-fault divorce, it may merely result in a change in the form of time-honored subterfuges or a further increase in the substitution of free unions for formal legal marriage. The aspiration of the innovative economic provisions of the reform law to minimize financial hardship upon divorce, like the hope expressed in the first section of the act that marriage will last a lifetime, represents an ideal that will prove difficult to realize for persons of modest means in a world of ever-increasing divorce and remarriage. The West German Marriage and Family Law Reform, like the recent French, English, and American efforts in the area, invites reflection on the limits of law.

---

of divorce under the new law is up fifty percent over the old. The cheapest divorce is estimated to cost about 5000 DM (\$2500), and the expense climbs rapidly if a *Versorgungsungleich* is involved. *Schwerer Start für neues Eherecht*, Handelsblatt, December 6, 1977, at 1.