

Family and Succession Law
in
Germany

Peter Gottwald
Dieter Schwab
and
Eva Büttner

KLUWER LAW INTERNATIONAL

Family and Succession Law in Germany

by

Peter Gottwald

Dieter Schwab

and

Eva Büttner

This book was originally published as a monograph in the International Encyclopaedia of Laws/Family and Succession Law

2001

Kluwer Law International

The Hague – London – Boston

Published by:
Kluwer Law International
P.O. Box 85889, 2508 CN The Hague, The Netherlands
sales@kli.wkap.nl
<http://www.kluwerlaw.com>

Sold and Distributed in North, Central and South America by:
Kluwer Law International
101 Philip Drive, Norwell, MA 02061, USA
kluwerlaw@wkap.com

Sold and Distributed in all other countries by:
Kluwer Law International
Distribution Centre, P.O. Box 322, 3300 AH Dordrecht, The Netherlands

A C.I.P. Catalogue record for this book is available from the Library of Congress

Printed on acid-free paper

Cover design: The Bears Communications, Amsterdam

ISBN 90 411 1632 X

© 2001 Kluwer Law International

Kluwer Law International incorporates the publishing programmes of Graham & Trotman Ltd., Kluwer Law and Taxation Publishers and Martinus Nijhoff Publishers.

This publication is protected by international copyright law.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

Table of Contents

The Authors	3
List of Abbreviations	17
General Introduction	19
§1. GENERAL BACKGROUND OF THE COUNTRY (DEMOGRAPHIC DATA)	19
§2. HISTORICAL BACKGROUND OF FAMILY AND SUCCESSION LAW	20
§3. SOURCES OF FAMILY AND SUCCESSION LAW	20
I. Constitution	20
II. Legislation	21
III. Treaties	22
IV. Case Law	23
§4. THE COURTS ADMINISTERING FAMILY AND SUCCESSION LAW	23
Selected Bibliography	25
Part I. Persons	29
Chapter 1. The Status of a Person	29
§1. DEFINITION OF A PERSON	29
§2. CAPACITY	31
I. General	31
II. Minors	31
III. Majors	31
IV. Consent to Undergo Medical Treatment	32

Table of Contents

V. Responsibility for Delict Under Civil Law	32
VI. Criminal Responsibility	33
§3. ABSENTEES	33
Chapter 2. Registration of Civil Status	34
§1. THE REGISTRAR	34
§2. REGISTERS AND CERTIFICATES	34
Chapter 3. Personality Rights	35
Chapter 4. Names	36
§1. COMPOSITION OF A NAME	36
§2. SURNAME	36
I. Acquisition of the Surname	36
II. Change of the Surname	36
§3. FIRST NAME	37
Chapter 5. Nationality	38
Chapter 6. Domicile and Residence	39
Chapter 7. Mentally Handicapped Persons	40
Part II. Family Law	41
Introductory Remarks	41
§1. THE COURSE OF LEGISLATION IN THE AREA OF FAMILY LAW	41
§2. FAMILY LAW AND THE GERMAN CONSTITUTION (BASIC LAW)	42
Chapter 1. Marriage	45
§1. THE ENGAGEMENT	45

Table of Contents

I. Promise of Marriage	45
II. Break-off of the Engagement	45
§2. THE CAPACITY TO MARRY	46
I. Competence to Enter into Legal Transactions (Geschäftsfähigkeit)	46
II. Majority	47
III. Failure of Intention	47
IV. Fraud and Threats	48
V. Fictitious Marriages	48
VI. Impediments to Marriage	49
VII. Annulment	49
§3. FORMALITIES OF MARRIAGE	50
I. General	50
II. The Marriage Ceremony	51
§4. EFFECTS OF MARRIAGE	52
I. Duty of Consortium	52
II. Enforcing Marital Duties	53
III. Duty to Maintain	54
IV. Transactions for the Provision of Necessities ('Schlüsselgewalt')	55
A. General	55
B. Effects	56
V. Presumption as to Ownership	56
VI. Taking of Name in Marriage	57
§5. VOID AND VOIDABLE MARRIAGES	57
Chapter 2. Divorce	58
§1. GROUNDS	58
§2. PROCEDURE	59
§3. EFFECTS	59
I. Duty to Maintain	59
A. General	59
B. Grounds for Maintenance	60

Table of Contents

1. Child Care, §1570 BGB	60
2. Age, §1571 BGB	60
3. Infirmary, §1572 BGB	60
4. Gross Inequity, §1576 BGB	60
5. Inability to Find Work, §1573 I BGB	60
6. Additional Maintenance, §1573 II BGB	61
7. Education/Retraining, §1575 BGB	61
C. Amount of Maintenance	61
D. The Claimant's Lack of Own Means	62
E. The Financial Capacity of the Debtor	62
F. Gross Inequity	62
G. Mode of Payments	63
II. Equalization of Support ('Pension Splitting')	64
III. Household Effects and the Matrimonial Home	64
 §4. SEPARATION	 65
 Chapter 3. Cohabitation Outside Marriage	 67
§1. INTRODUCTION	67
§2. RULES RELATING TO MARRIAGE	67
§3. GENERAL RULES OF CIVIL LAW	68
§4. EXPLICIT AND IMPLICIT CONTRACTUAL AGREEMENTS	68
 Chapter 4. Filiation	 69
§1. MOTHER AND FATHER OF A CHILD	69
I. Mother	69
II. Father	69
A. Marriage to the Child's Mother	69
B. Declaration of Paternity	70
C. Contesting Paternity	71
D. Establishing Paternity by Judicial Decision	72
E. Artificial Reproduction	73
III. Knowledge of One's Genetic Origins	74
 §2. THE POSITION OF THE CHILD (GENERAL)	 74
I. The Child's Name	74
II. Assistance and Due Consideration	75

Table of Contents

Chapter 5. Adoption	76
§1. APPLICATION AND CONSENT	76
§2. PLACEMENT PRIOR TO ADOPTION	77
§3. THE ADOPTION ORDER AND ITS EFFECTS	77
§4. REVOCATION OF THE ADOPTION ORDER	78
Chapter 6. Parental Care	79
§1. ACQUIRING PARENTAL CARE	79
I. Parental Care Acquired by Law	79
II. Parental Care Acquired by Formal Declaration	79
III. Parental Care Acquired by Court Order	80
§2. PERSONAL CARE	80
§3. THE WELFARE PRINCIPLE	81
§4. LEGAL REPRESENTATION	81
I. Joint Parental Care	81
II. Limits of Legal Representation	82
§5. DISAGREEMENT BETWEEN HOLDERS OF PARENTAL CARE	82
§6. SELF-DETERMINATION OF THE CHILD	83
§7. PROTECTION FOR PARENTAL CARE	83
I. Possession of the Child	83
II. Contact	84
§8. THIRD PARTIES CARING FOR CHILDREN	84
§9. CARE FOR THE CHILD'S PROPERTY	84
§10. CLAIMS BETWEEN PARENTS AND CHILDREN ARISING FROM THE EXERCISE OF PARENTAL CARE	85

Table of Contents

§11. STATE SUPPORT	85
§12. STATE CONTROL	86
I. Personal Welfare	86
II. Management of Financial Affairs	87
§13. CHANGE IN PARENTAL CARE	87
I. Suspension of Parental Care	87
II. The End of Parental Care	88
§14. PARENTAL CARE UPON SEPARATION/DIVORCE	88
I. Joint Parental Care	88
II. Sole Parental Care	89
III. Sole Parental Care of the Unmarried Father	89
§15. PROCEDURE	90
§16. CONTACT AND INFORMATION	90
I. Contact Between the Child and his Parents	90
II. Contact with Other Persons	91
III. Information	91
Chapter 7. Guardianship, Curatorship and Care and Control	92
§1. INTRODUCTION	92
§2. GUARDIANSHIP ('VORMUNDSCHAFT')	92
I. Establishment	92
II. Choosing the Guardian	93
III. Personal Care	94
IV. Legal Representation	94
V. Financial Care	94
VI. The Relationship between Guardian and Ward	95
VII. Ending Guardianship	95
§3. CURATORSHIP ('PFLEGSCHAFT')	95

Table of Contents

I. General	95
II. Forms of Curatorship	96
§4. CARE AND CONTROL ('BETREUUNG')	96
I. Appointment of a Protector	96
II. Forms of Protectorship	97
III. The Protector's Rights and Duties	97
IV. Termination	98
Chapter 8. Financial Support Among Relatives	99
§1. GENERAL	99
§2. FINANCIAL SUPPORT AMONG RELATIVES	99
I. Lack of Means	99
II. Financial Capacity	100
III. Maintenance Claim	100
IV. Restrictions	101
V. Rank	101
VI. Recourse	101
§3. THE PARENTS' DUTY TO MAINTAIN THEIR CHILDREN	102
I. General	102
II. The Child's Lack of Means	103
III. The Parent's Financial Capacity	103
IV. The Maintenance Claim	103
A. Degree of Maintenance	103
B. Mode of Provision	104
V. Procedure	104
§4. SPECIAL PROVISIONS FOR UNMARRIED PARENTS	105
Part III. Matrimonial Property Law	107
Introduction	107
Chapter 1. The Contractual Matrimonial Property Regimes	108
§1. SEPARATION OF PROPERTY	108

Table of Contents

§2. COMMUNITY OF PROPERTY	108
§3. FORMALITIES	109
§4. THE REGISTER OF MARITAL PROPERTY	110
Chapter 2. The Statutory Matrimonial Property Regime	111
§1. DISPOSAL OF PROPERTY IN ITS ENTIRETY, §1365 BGB	111
§2. DISPOSAL OF HOUSEHOLD ITEMS, §1369 BGB	112
§3. CONSENT	112
Chapter 3. Equalization of Accrued Gains	113
§1. THE ACCRUED GAINS	113
§2. ADJUSTMENTS	114
§3. THE CLAIM FOR EQUALIZATION	114
I. Gross Inequity	114
II. Contractual Modifications	115
§4. FURTHER CLAIMS FOR EQUALIZATION OUTSIDE §1363 <i>sq.</i> BGB	115
§5. SPECIAL PROVISION FOR EQUALIZATION UPON DEATH	115
Part IV. Succession Law	117
Chapter 1. Introduction	117
§1. BASIC CONCEPTS OF THE LAW OF INHERITANCE	117
I. Subject-Matter	117
II. Legal Sources	117
III. Probate Court Rules	117
§2. FUNDAMENTAL PRINCIPLES OF THE LAW OF SUCCESSION	118
I. Universal Succession	118
II. Succession to Liabilities	118
III. Bequest of Specific Assets	118

Table of Contents

IV. Possible Heir	118
V. Entry of Succession	119
VI. Intestate Succession	119
VII. Testamentary Succession	119
VIII. Burial	119

Chapter 2. Provisions Made and Succession the Event of Death 120

§1. INTESTATE SUCCESSION 120

I. Relatives' Right of Succession	120
A. System of Parentelic Succession	120
B. Secondary Heirs	120
C. Tertiary Heirs	121
D. Further Heirs	121
E. Status of Illegitimate Children	121
F. Status of Adopted Children	121
II. Spouse's Inheritance Rights	122
A. Community of Accrued Gain	122
B. Separation of Property	123
C. Joint Marital Property	123
III. The State's Right to Succeed	123

§2. TESTAMENTARY SUCCESSION 124

I. Testamentary Freedom	124
A. Constitutional Guarantees	124
B. No Proxy in Making the Will	124
C. Cancelling of the Will	124
D. Illegality of the Will	125
II. The Competency of the Testator to Make a Will	125
A. Full Capacity	125
B. Capacity of Minors	126
C. General Incapacity	126
D. Restrictions for Handicapped	126
III. Creation and Revocation of a Will	126
A. Creation	126
B. Revocation of a Will	127
C. Challenging the Will	128
IV. Contents and Interpretation of Wills	129
A. Permissible Contents	129
B. Interpretation	129

Table of Contents

V. The Joint Will of Spouses	131
A. The Object of a Joint Will	131
B. The Creation of a Joint Will	132
C. Contents of the Joint Will	132
D. Challenging A Joint Will	134
VI. The Contract of Inheritance	134
A. Admissibility	134
B. Concluding a Contract of Inheritance	135
C. Contents of the Contract of Inheritance	135
D. Obligations Arising from a Contract of Inheritance and their Removal	135
 §3. THE RIGHT TO A COMPULSORY PORTION	 137
I. The Compulsory Portion	137
A. Entitled Persons	137
B. Debtor of the Legal Portion	138
C. Extent of the Legal Portion	138
D. Donations to be Set off Against the Legal Portion	138
II. Protection of the Compulsory Portion	138
A. The Claim for the Remainder of the Compulsory Portion	138
B. Protection from Liabilities	139
C. Right to a Supplement to the Compulsory Portion	139
III. Exclusion of the Compulsory Portion	140
A. Loss of the Right to Inherit	140
B. Divestment of the Compulsory Portion	140
C. The <i>bona fide</i> Confinement of the Compulsory Portion	140
D. Statutory Bars	141
E. Delay in Paying out the Compulsory Portion	141
 §5. LEGAL TRANSACTIONS ON SUCCESSION	 141
I. Power of Agency	141
II. Donations on Succession	141
A. Form of Promises <i>mortis causa</i>	141
B. Donations Executed <i>inter vivos</i>	142
III. The Contract for the Benefit of a Third Party Effective on Death	142
A. Admissibility	142
B. Covering Relation Between Testator and beneficiary	142
IV. Succession Clauses in Partnership Contracts	143
A. Consequences of Death of Partner	143
B. Continuation Clauses	143
C. Succession Clauses	143
D. Qualified Succession Clauses	144

Chapter 3. The Legal Position of the Beneficiary	145
§1. DEVOLUTION OF THE INHERITANCE AND LEGAL POSITION OF THE HEIR	145
I. Devolution of the Inheritance, Waiver and Acceptance	145
A. Autonomic Transfer of Ownership	145
B. Waiver of the Inheritance	145
C. The Legal Position of the Provisional Heir	146
II. Disqualification from Succession	146
III. The Claim for the Inheritance	147
A. Special Claim for Restitution	147
B. Subject to the Claim	147
C. Assets to be Restituted	148
§2. THE CERTIFICATE OF INHERITANCE/GRANT OF PROBATE	148
I. The Function of the Certificate of Inheritance	148
II. Procedure for Issuance of the Certificate of Inheritance	148
A. Probate Court	148
B. Application	149
C. Interim Order	149
D. Withdrawal of the Certificate	149
E. Ordinary Proceedings with Regard to Succession Rights	149
III. The Effects of the Certificate of Inheritance	150
A. Presumption of Accuracy	150
B. The Irrebuttable Presumption of the Accuracy of the Certificate of Inheritance	150
§3. THE HEIR'S CONSTRAINTS	150
I. Estates of the Provisional and Reversionary Heir	150
A. Provisional and Reversionary Heir	150
B. Time of Reversionary Heir's Succession	151
C. Legal Position of the Prior Heir	151
D. The Legal Position of the Preliminary Heir Exempted from a Number of (Otherwise Applicable) Statutory Restrictions	152
E. The Legal Position of the Reversionary Heir	152
II. The Bequest and its Testamentary Burdens	152
A. Bequest	152
B. The Testamentary Burden	153
III. The Executor	153
A. Purpose of Appointing an Executor	153
B. Types of Executors	154
C. Duties of Executor	154

Table of Contents

D. Civil Proceedings with Regard to Assets	154
E. Position of Executor with Regard to Commercial Enterprise	155
F. Relationship Between Heir and Executor	155
§4. THE HEIR'S LIABILITY	155
I. Unlimited Liability which is Capable of being Limited	155
A. Possibilities of Limiting Liability	156
B. Loss of Possibility to Limit Liability	156
C. Public Citation of Creditors	156
D. Debtor of Estate's Liabilities	156
E. Confinements of the Heir's Liability	157
II. Possibilities to Restrict the Liability to the Estate	157
A. The Administration of the Estate	157
B. Proceedings on an Insolvent Estate ('Nachlassinsolvenzverfahren')	158
C. Limiting Liability when the Estate is Meagre	159
§5. THE COMMUNITY OF HEIRS ('ERBENGEMEINSCHAFT')	159
I. Joint Commitment and Joint Share in an Inheritance	159
A. Estate as Common Assets	159
B. Joint Ownership	160
C. Joint Disposition on Items	160
D. <i>Surrogatio in rem</i>	160
E. Disposition on Parts of Estate	160
F. Pre-emptive Right of Co-heirs	160
II. Administration of the Estate	161
A. Internal Management	161
B. External Management	161
III. The Dissolution of the Community of Co-heirs	162
A. Possibility to Dissolve	162
B. Rules for Settlement	163
C. Settlement Contract	163
D. Compensation for Advancements	163
IV. The Joint Heirs' Liability for Estate Debts	164
A. Liability before the Division of the Estate	164
B. The Heirs' Joint Liability After Division of the Estate	165
Index	167

Family and Succession Law in Germany

by

Peter Gottwald
Dieter Schwab
and
Eva Büttner

This book was originally published as a monograph in the International Encyclopaedia of Laws/Family and Succession Law

2001

Kluwer Law International
The Hague – London – Boston

Published by:

Kluwer Law International
P.O. Box 85889, 2508 CN The Hague, The Netherlands
sales@kli.wkap.nl
<http://www.kluwerlaw.com>

Sold and Distributed in North, Central and South America by:

Kluwer Law International
101 Philip Drive, Norwell, MA 02061, USA
kluwerlaw@wkap.com

Sold and Distributed in all other countries by:

Kluwer Law International
Distribution Centre, P.O. Box 322, 3300 AH Dordrecht, The Netherlands

A C.I.P. Catalogue record for this book is available from the Library of Congress

Printed on acid-free paper

Cover design: The Bears Communications, Amsterdam

ISBN 90 411 1632 X

© 2001 Kluwer Law International

Kluwer Law International incorporates the publishing programmes of Graham & Trotman Ltd., Kluwer Law and Taxation Publishers and Martinus Nijhoff Publishers.

This publication is protected by international copyright law.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.