German and Canadian Divorce Law – an Overview and Comparison

by

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Insofar as this article adverts to provincial rules, it is usually the case that these rules refer specifically to the Province of Ontario where one-third of the population of Canada lives. These rules may vary from those of other provinces.

We strongly recommend that you seek professional legal advice from a qualified lawyer to resolve your particular legal problem.

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I. Introduction

In 2007 approximately 368,922 marriages were entered into in the Federal Republic of Germany. About. 42,000 marriages thereof were between Germans and non-Germans. In the same year approx. 187,000 couples were divorced[1]. In Canada, approx. 151,695 weddings took place in the year 2007. Approx. 70,000 marriages were divorced in the year 2003[2]. Given these numbers and the fact that Canada is popular among German emigrants in the past and present, it is no surprise that more and more marriages between Canadians and Germans terminate in divorce. This paper deals with the legal issues which can arise in such cases. It does not deal with issues related to children of the marriage, for instance custody and child support.

II. Procedural Issues

First we need to clarify which court has jurisdiction over the divorce application. This is governed by the national procedural law respectively.

1. Jurisdiction according to German law

a) Council Regulation (EC) No 2201/2003

The jurisdiction of German family courts is overridingly governed by the Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. This regulation deals with proceedings regarding divorce, separation without dissolution of the marriage, nullity of marriages and all issues regarding parental responsibility. An important term of this regulation is the "habitual residence" of a spouse. The habitual residence is where the centre of somebody's existence is. Crucial is an integration in the social environment aimed to be in perpetuity[3].

Requirement for the jurisdiction of German courts is, pursuant to Art. 2 Council Regulation (EC) No 2201/2003, that:

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1 Federal Statistical Office Germany (Statistisches Bundesamt Deutschland), *Eheschließungen und Ehescheidungen* (www.destatis.de).

2 Statistics Canada (www.statcan.gc.ca).

3 Zöller, *Zivilprozessordnung*, 26th edition 2007, section 606 Rn.23.

- both spouses have their habitual residence in Germany; that
- both spouses had their habitual residence in Germany and one of them still has his/her habitual residence in Germany; that
- only the applicant has his/her habitual residence in Germany, and he/she has been resident there for at least one year prior to filing the application; that
- the applicant has his/her habitual residence in Germany, has been resident there for at least 6 months prior to filing the application, and is a German citizen; or that
- both spouses are German.

The regulation is also applied if the respondent is neither a habitual resident within the boundaries of the EC nor a citizen of one of its member states[4]. In the event that jurisdiction of German courts is not given pursuant to the regulation, the general rules apply.

b) Jurisdiction pursuant to the general rules

Pursuant to section 98 FamFG the German courts have jurisdiction if

- one of the spouses is German or was German at the time of the marriage; or
- both residents are habitually resident in Germany; or
- one of the spouses has his/her habitual residence in Germany.

The court in which district both spouses or one of the spouses is habitually resident has local jurisdiction pursuant to section 122 FamFG. If both spouses live abroad, the Local Court of Berlin – Schöneberg has jurisdiction according to section 122 No. 6 FamFG.

If a divorce proceeding is pending before a German court, the court automatically has the jurisdiction to hear the ancillary matters, for instance spousal support, equalization of net family property, etc. according to section 137 FamFG.

However, these jurisdictional provisions do not mean that the German courts have exclusive jurisdiction (section 106 FamFG). They do mean that according to German law a divorce application could also be filed with a Canadian court, if the Canadian courts have jurisdiction according to Canadian law.

However, once a divorce application has been commenced in Canada before a proceeding in Germany is pending, it is not possible to file the divorce application in Germany as well. German

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[4] Zöller, *supra*, section 606a, Rdnr.1.

law prohibits the commencement of a proceeding if a proceeding in the same matter is already pending before another court (section 261(3) No. 1 ZPO) (German Code of Civil Procedure). One must be aware of the fact that a proceeding in Germany is pending only after the divorce application has been served upon the respondent. A proceeding in Canada on the other hand is already pending as soon as the divorce application has been filed with the court and issued[5].

2) Jurisdiction according to Canadian law

According to subsection 3(1) of the *Divorce Act*, Canadian Courts have jurisdiction if either spouse has lived at least one year prior to the proceedings in the respective province. If both spouses live in Canada but in different provinces, then ss. *3 (2) of the Divorce Act* will trigger a conflict of jurisdictions pursuant to the *principle of priority* so that the court to which the divorce application was filed first will have jurisdiction.

In case the applications are filed on the same date, the Trial Division of the Federal Court will make a decision pursuant to ss. *3(3) of the Divorce Act*.

When wording s*ection 3 of the Divorce Act*, the Canadian legislature did not consider the situation in which a divorce proceeding is pending before a Canadian and a foreign, e.g. German court. The *principle of priority* is only one of the many factors that needs to be taken into account by the court[6]. Other factors include which court would be most suitable to deal with the matter more comprehensively[7], since it is not permissible to enjoin one party from pursuing a legal proceeding in another state unless this proceeding is a willful harassment[8]. A further reason why, according to Canadian law, German courts would have jurisdiction is the existence of a respective agreement on jurisdiction between the parties or the fact that one of the parties has his or her residence in Germany.

Unlike German law, Canadian law allows ancillary matters to be decided at the date of separation[9]. It is also possible to dissolve the marriage and to separate ancillary matters.

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5 BGH NJW 1987, 3083; BGH NJW-RR 1992, 642: The lex fori of the foreign court decides if and when lis pendence arises.

6 *Kornberg v. Kornberg* (1990), 76 D.L.R. (4th) 379 (Man. C.A.); *Alexiou v. Alexio* [1996] A.J No. 696 (Q.B.).

7 *Kornberg v. Kornberg* (1990), supra.

8 Payne, *Canadian Family Law*, 3rd edition 2008, p.184.

9 *Mitchell v. Mitchell* (1993), 129 N.S.R. (2d) 351 (T.D.).

3) Forum shopping

If German courts and Canadian courts have concurrent jurisdiction, the applicant must exactly evaluate the pros and cons before which court his or her divorce proceeding shall be pending. Therefore the applicant must carefully consider which substantive law is more favorable to him, the amounts of the respective court fees and the lawyer's fees, etc. *Forum shopping* is part of a responsible litigation and is legitimate even though it is not explicitly favored by the Supreme Court of Canada[10].

III) Applicable Law

Once the applicant has decided where the proceedings should be commenced, the question arises whether the court seized of the matter has to apply German or Canadian law.

1) Law to be applied by German Courts

In Germany this decision is made in accordance with Articles 17 I, III, 15 I, 14 EGBGB (Introductory Law of the Civil Code), which are the conflict of law rules on matrimonial matters with a foreign element. German law generally applies *the principle of nationality*. Where this principle fails the *principle of residence* applies.

- If both spouses belong to the same state the law of this state is applicable.
- If the spouses are of different nationalities the German courts would apply the law of the state in which the spouses have their habitual residence or had their habitual residence at the time of their marriage last.
- If the spouses have neither common nationalities nor a common habitual residence, the law of the state to which the spouses have the closest common connection applies.
- If the German-Canadian spouses neither live in Germany nor in Canada, or if the spouses have their habitual residence in different states, then the spouses can choose whether the German courts shall apply German or Canadian law (Article 14 I No.1, III EGBGB).

Sole exemption to the priority of the *principle of nationality* is the law of support pursuant to Article 18 EGBGB. In this case the *principle of residence* takes priority over the *principle of nationality*. This means that the law of the state in which the dependent has his or her habitual

[10] *Amchem Products Inc. v. B.C. (W.C.B.)*, (1993), S.C.M. No 34, 102 D.L.R. (4th) 96.

residence will always apply.

2) Law to be applied by Canadian Courts

The *Divorce Act* of 1985 contains no provisions concerning the law applicable to divorces. Hence, the common law rules apply: the law of the country in which the parties have their domicile is applicable[11].

However, the *Divorce Act* does not apply to matrimonial property rights. This is a provincial matter. In Ontario, section 15 of the *Family Law Act* is relevant in this regard. The law of the state in which both spouses had their last common habitual residence is applicable. This is the place where both parties last cohabited as husband and wife and where they jointly participated in everyday life of their family. The decisive factors hereby are the circumstances of the specific case [12].

IV) Substantive Divorce Law

1) Divorce Requirements

a) Germany

Divorce results in dissolution of a marriage with effect for the future. According to section 1564 BGB (German Civil Code), it is granted by judgment upon application of one or both spouses.

aa) Divorce Requirements

In Germany the *principle of irreconcilability* applies. A marriage can be dissolved if it failed, i.e. when the spouses' marital cohabitation no longer exists and cannot be expected to be resumed. For the clarification of the question whether the marital cohabitation is existent or not, factors such as the marital ethos and the subjective notion of specific common life arrangements are crucial.

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[11] Castel/Walker, Canadian Conflict of Laws, 6th edition, section 17.1.d.

[12] *Pershadsingh v. Pershadsingh* (1987) 9 R.F.L. (3d) 359 (Ont. H.C.), *Adam v. Adam* (1994), 7 R.F.L. (4th) 63 (Ont. Gen. Div.) leave to appeal to C.A. refused 65 A.C.W.S. (3d) 756 (C.A.), *Toder v. Toder* (September 22, 1995), Doc No. 07765/85 (Ont. Gen. Div.) (unreported) [[1995] W.D.F.L. 1804], and *Maharaj v. Maharaj* (1996), 64 A.C.W.S. (3d) 838 (Ont. Gen. Div.)

An indication for the failure of the marriage is the separation of the spouses (sections 1566, 1567 BGB). For this purpose it is required that the domestic community is no longer existent. This is the case when one of the spouses moves out of the common home but also when the spouses live entirely and factually separated within the common home (without further joint housekeeping). Separations which do not arise for marital but for other, e.g. occupational reasons can be assumed if additionally there is an outwardly recognizable intention to separate[13].

In the event that the spouses have lived separately for at least one year and both spouses agree that the marriage shall be dissolved, the failure of marriage will be irrebuttably presumed pursuant to section 1566 I BGB. In case the spouses do not mutually agree to dissolve the marriage a disputed divorce will be the result[14]. This enables one spouse to dissolve the marriage even against the will of the other spouse, provided that the spouses have lived separately for three years (section 1565 II).

A resumption of cohabitation for a short period of time (upper limit is approx. 3 months, depending on the particular case[15]) which serves as a period of reconciliation has no impact on the expiry of the time limit and therefore, neither suspends nor interrupts time lapse (section 1567 II BGB).

bb) Special Cases

If it is unreasonable for one of the spouses to await the one year separation period for reasons that lie with the other spouse then the marriage may also be dissolved prior to the expiry of that one year, provided that the case is one of hardship within the meaning of s. 1565II, BGB, that is, that it must represent an exceptional situation subject to high requirements. The reasons therefore must be set forth before the court. Surrounding circumstances such as maltreatment or serious assault are considered on a case-by-case basis.

Another hardship clause is found in section 1568 BGB, which does not prohibit a divorce but rather prevents one at an inappropriate time. A divorce is not possible upon expiry of the 3 year separation period if the marriage is exceptionally essential in the interest of minor children born to the marriage (e.g. suicide intentions by the child) or if the divorce would cause such significant stress on one spouse that the continuance of the marriage appears to be necessary despite the other spouse's will to dissolve the marriage (e.g. serious illness). As soon as the particular

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[13] Palandt, *Bürgerliches Gesetzbuch*, 67th edition 2008, section 1567 Rdnr. 2 ff.

[14] Palandt, *supra*, section 1566 Rdnr. 3.

[15] Palandt, *supra*, section 1567 Rdnr. 7.

circumstances no longer apply, a new divorce application can be filed[16].

b) Canada

aa) Divorce Requirements

In Canada the requirement for divorce is also the breakdown of marriage pursuant to ss. 8 (1) of the *Divorce Act.*

This breakdown is deemed to be established pursuant to s. 8(2)(a) *Divorce Act* if the spouses have lived separate and apart for at least one year at the time of the divorce. The divorce application can be filed earlier. However, the marriage will only be dissolved after the one-year period[17].

Similar to German law the intention to bring the marriage to an end is a requirement for a separation to be recognized by the court[18].

Moreover, a physical separation is mandatory. This means that either one of the spouses moves out or, if the spouses continue to live under the same roof that they live independent lives while sharing common accommodations. Whether the latter is the case will be decided by the court in the particular case and in consideration of all circumstances. Possible criteria include the occupation of separate bedrooms, no sexual relations between the spouses, the absence of communication between the spouses, no common meals, no common activities and the failure of the spouses to help each other with the maintenance of the household[19].

While separated, the spouses may, in accordance with ss. 11(3) of the Divorce Act, cohabit for a period of up to 90 days (split in several brief time segments or continuously) in an attempt to reconcile without consequences, e.g. the courts will not consider it as reconciliation and the separation period is not interrupted or terminated.

If during the separation period one of the spouses becomes incapable of forming or having an intention to live separate and apart, this will usually not interrupt or terminate the separation period if it can be assumed that the spouse would probably have continued the separation anyway (Section 8(3b)(i) Divorce Act).

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[16] Palandt, *supra*, section 1568 Rdnr. 1 ff.

[17] Payne, *supra*, p. 199.

[18] *Dupere v. Dupere* (1974), 19 R.F.L. 270 (N.B.S.C.Q.B.).

[19] *Cooper v. Cooper* (1972) 10 R.F.L. 184 (Ont. S.C.).

No waiting time is required if the respondent has committed adultery (Section 8(2b)(i) *Divorce Act*) or has treated the applicant with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses (Section 8(2b)(ii) *Divorce Act*). According to the wording of the law only the victim and not the offender can rely on these grounds for divorce.

bb) Special Cases

Despite adultery or violence, a marriage may not be dissolved pursuant to Section 11(1)(c) *Divorce Act* if at least one of the bars to divorce referred to in Section 11 (1)(c) applies. These are collusion, toleration and condonation, or the lack of a reasonable agreement on child support.

According to ss. 11(4) of the Divorce Act, collusion is defined as every agreement to fabricate or suppress evidence or to deceive the court in other ways. Explicitly excluded are separation agreements, agreements on financial support, division of property or child custody as a result of the separation.

A divorce by reason of adultery or cruelty is not possible where the applicant condones or connives at the actions even though he or she is fully aware of the circumstances. Connivance means consent by the victim to adultery or to cruelty. Condonation requires a willingly controlled behaviour which is aimed at reconciliation and at reestablishment of the marital relationship. However, the court can still dissolve the marriage notwithstanding the condonation or connivance if the divorce is in public interest[20].

Whether there is a reasonable agreement on child support or not will be decided by the court in the particular case.

2) Support

a) Germany

German law distinguishes support during the separation and post-nuptial support. These are two independently existent claims which do not coincide.

When there are several dependents and the person obliged to provide support is unable to pay the entire amount of support to the entitled persons because of low income, the following order of rank applies pursuant to section 1609 BGB:

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[20] *Maddock v. Maddock* [1958] O.R. 810 at 818 (C.A.).

Unmarried minors and children of full age up to 21 years old who are completing their general school education and who live in the same household with one of the parents take priority over all other persons. Subsequent thereto are parents who take care of a child and are therefore entitled to support or would be so entitled in case of divorce as well as spouses and divorced spouses of long-term marriages. Only then are further spouses and divorced spouses entitled to support.

aa)Support during separation

During the separation the indigent spouse may claim for reasonable support against the solvent spouse pursuant to section 1361 BGB. Reason for this is the continuance of the marriage with mutual fiduciary duties during the separation period.

(1) Criterion for the amount of the required support (=need) is the standard of living during the cohabitation, as the standard of living to which the indigent spouse is accustomed to must be maintained during the separation.

(2) Indigence requires that the indigent person is unable to pay for his or her living costs. The question if and when an indigent spouse who was unemployed prior to the separation must take up employment to make a living, depends on his or her personal circumstances such as number and age of the children in his or her care, the duration of separation, the duration of the marriage etc.

(3) There is a capacity for support if the obligor has the ability to pay. This is the case if money remains from the net income after deduction of "Selbstbehalt" (=amount which payor is allowed to keep for his own needs).

(4) A waiver of separation support is possible for the past but not for the future[21].

Upon the expiry of the appeal period, the right to separation support expires. After that, only a claim for post-nuptial support is enforceable.

bb) Post-nuptial support

A spouse is entitled to spousal support after the divorce pursuant to section 1569 BGB if he or she cannot provide for his or her own support and if one of the legal elements in sections 1570 ff BGB is met.

The need for support is in all cases based upon the matrimonial standard of living pursuant to

[21] Palandt, *supra*, section 1361, Rdnr. 71.

section 1578 BGB. Crucial are the income circumstances as well as liabilities which characterized the marriage (see above).

In the event one spouse runs the household and/ or takes care of the children before the divorce and if he or she takes up employment after the divorce, then the housekeeping as well as child-rearing during the marriage will be taken into account as income if the employment replaces the housekeeping. Its "value" is based upon the income which is gained by the spouse's employment (so called substitute theory by the German Federal High Court of Justice).

Increases to and losses of income will be considered as characterizing the marriage if they can be foreseen during the marriage, that is, if they are not based upon unanticipated developments and do not significantly deviate from the ordinary course[22].

The indigence of one spouse and the capacity of the other spouse are further requirements (for definitions see above).

The legal elements for post-nuptial spousal support are according to sections 1570 ff BGB:

(1) Child Care Support, section 1570 BGB
(2) Age Support, section 1571 BGB
(3) Illness or Infirmity Support, section 1572 BGB
(4) Unemployment Support, section 1573 I BGB
(5) Increased Support, section 1573 II BGB
(6) Education, Advanced Training, or Retraining Support, section 1575 BGB
(7) Support on grounds of equity, section 1576 BGB

A claim for support by the divorced spouse can be subject to a limitation period if the indigence is not based on disadvantages resulting from the marriage. Criteria for this are the duration of care or upbringing of a common child, the arrangement of housekeeping and employment during the marriage as well as the duration of the marriage, as stated in section 1578 b BGB.

Moreover, the amount of support can be reduced, time-confined or entirely refused under the circumstances specified in section 1579 BGB.

b) Canada

aa) General Requirements

Similar to Germany, support can be claimed during separation as well as after the divorce. Support during separation is governed by the law of each province, in Ontario for example by the

[22] Palandt, *supra*,, section 1578, Rdnr. 14 ff.

Family Law Act. However, as soon as the divorce application is filed the federal *Divorce Act* applies.

Similar to Germany child support takes priority over spousal support[23].

If and in what amount a claim for spousal support exists is primarily governed by Section 15.2 *Divorce Act*. This claim is independent from a possible misconduct by one of the spouses pursuant to Section 15.2(5) *Divorce Act.* A claim is substantiated when one of the spouses is in need of support and when the other spouse is able to pay for it. Unlike German law there are no specific legal elements for support required. However, the courts have to consider the factors described in Section 15.2(4) *Divorce Act*, namely the situation, means, needs and other circumstances of each spouse including the duration of cohabitation, distribution of functions among the spouses during their cohabitation, passed court orders, agreements or arrangements concerning spousal support.

When making decisions regarding the amount of post-nuptial support the court must, pursuant to Section 15.2(6) *Divorce Act*

- recognize any economic advantages and disadvantages which may arise from the marriage or divorce of the spouses
- apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage
- relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time

None of these factors or purposes has priority over the others. In fact, there must be an overall view of the circumstances of each case. The assessment of the amount and duration of support will be within the discretion of the respective judge. As a result, different rulings have resulted from similar cases. In order to establish legal certainty, several professors drafted the so-called "Spousal Support Advisory Guidelines" [24] for the federal Department of Justice which is intended to help judges and lawyers to find a consistent dispensation of justice. Meanwhile, many lawyers and judges use these guidelines in their everyday work. The guidelines are,

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[23] See section 15(3) *Divorce Act.*

[24] Download: http://www.justice.gc.ca/eng/pi/pad-rpad/res/spag/ssag_eng.pdf.

however, not binding.

Regarding the calculation of spousal support the Guidelines distinguish between marriages with children and marriages without children. However, the formulas do not result in a certain support amount or certain duration. Moreover, the formulas merely provide a lower and an upper limit for the amount and duration of support. The final assessment is in the discretion of the respective judge since the determination of the support period depends on the facts of each case and can deviate significantly due to education, skills and work experience of the spouse in need, and due to the children's age as well as child care facilities.

3) Apportionment of Assets and Liabilities

a) Germany

aa) Separation Period

Section 1361a BGB provides that each spouse can ask for the return of the objects he or she owns, insofar as the other spouse does not need them to run his or her household independently, and as long as the surrendering of use appears to be reasonable under the circumstances of the particular case (for instance because children live in the household). This does not change the ownership of the objects. Objects that are jointly owned should be distributed fairly and justly.

A spouse can demand on separation that the other spouse grants him or her the right to use the matrimonial home solely or partly if this is deemed necessary, having regard to the other spouse's interests, to avoid an unjust hardship. An unjust hardship can also be the case if the well-being of children living in the household is affected (section 1361 b BGB). It has particularly to be taken into account if one spouse is the owner of the matrimonial home.

bb) After the divorce

The manner of equalization of property depends on the matrimonial property regime. The German law distinguishes between three kinds of matrimonial property regime. Each of them can be modified by a marriage contract.

(1) Statutory matrimonial property regime

The default statutory property regime, unless the spouses agreed on different provisions, is set out in section 1363 BGB. Under its terms, each spouse owns and independently administers his or her own property, and he or she is liable only for debts incurred by him- or herself. Any

additional wealth created during the period of the regime (surplus) remains the property of the spouse who created it. It will, however, be equalized on termination of the regime. In order to determine the value of the additional wealth, one first needs to determine the assets owned by one spouse at the beginning and then at the end of the statutory regime.

The assets owned at the beginning of the statutory regime are the value of the actual assets after the deduction of liabilities. Until September 1, 2009 the value was zero if the liabilities were higher than the actual assets. In some cases this led to inequitable results when determining the equalization. Pursuant to section 1374 III BGB it is now possible to take liabilities into account that are higher than the actual assets. Therefore the value of the assets owned by one spouse at the beginning of the statutory regime can now be below zero. Inheritances, legacies, gifts and property which were obtained with respect to a future right to share in a deceased's estate are deemed to be part of the assets owned at the beginning of the statutory regime. The other spouse did not contribute to the acquisition of these assets and is therefore not entitled to a share [25]. The assets owned at the end of the statutory regime are the value of the actual assets after the deduction of liabilities (section 1375 BGB).

Pursuant to section 1373 BGB, "surplus" is the amount by which the assets owned by a spouse at the end of the statutory regime exceed those owned at the beginning. If the accrued gains of one spouse are higher than the accrued gains of the spouse, the other spouse is entitled to half of the amount by which the accrued gains of the other spouse exceed his or her accrued gains (section 1378 I BGB). This equalization of accrued gains compensates economic advantages that were obtained in connection with the common life style. Pursuant to section 1383 I BGB, on application the domestic relations court can order the party obliged to compensate to transfer certain objects to the other spouse while the value of these objects is set off against the equalization claim.

According to section 1381 BGB the party obliged to compensate can refuse the payment, if the payment has to be considered as serious injustice, for instance if the spouse with the lower accrued gains did not fulfill his or her economic obligations arising from the marriage for a longer period of time.

(2) Separation of goods

The spouses can agree on separation of goods (section 1414 BGB). This means that each spouse owns and administers his or her own property independently before, during and after the marriage. No equalization will take place.

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[25] BGH NJW 1995, 3113.

(3) Community of property

The spouses can also agree on a community of property in a marriage contract (sections 1415 ff. BGB). A community of property comprises all assets owned by both spouses at the beginning of the marriage and those acquired during the marriage. They are owned jointly by both spouses,except for those assets designated in the marriage contract as reserved property and assets received by way of gift or succession under a stipulation that they be reserved from the community of property and property replacing any of theses assets (substitute). “Sondergut” (or special property) comprises assets incapable of transfer by legal transaction (e. g. inalienable salary rights). The special property is in the sole ownership of the spouse in question and is administered by him or her personally but on behalf of and for the benefit (or detriment) of joint marital property.

Upon divorce the common property has to be settled. For this purpose the liabilities have to be deducted first. Any surplus will be divided between the spouses. Division can be made either by distributing the objects (section 752 BGB) or by selling the common property and sharing the proceeds (section 753 BGB). Either spouse can take over objects that are designated for his or her own exclusive use if he or she pays compensation. This includes clothes, jewellery and equipment in particular (sections 1475 ff. BGB).

b) Canada

The equalization of matrimonial property is governed by provincial law (see above). In the following we will discuss the marriage property law of the Province of Ontario, in particular the provisions of the *Family Law Act*.

The F*amily Law Act* does not know a community of property. The assets of both spouses are and stay separate. Nevertheless it is possible for the spouses to acquire property as joint tenants. Similar to German law, the *Family Law Act* allows modifications to the matrimonial property regime by means of a marriage contract.

The provisions of the *Family Law Act* regarding equalization of the net familyproperty are similar to those regarding equalization of accrued gains under German law.

In general, each spouse retains his or her own property on the breakdown of the marriage or death. There will be, however, an equalization of the value of all assets accumulated by either spouse during the marriage. According to section 5(1) *Family Law Act* the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference

between them. Exempt is the matrimonial home to which special rules apply.

The net family property is defined in section 4(1) *Family Law Act* as the value of all the property that a spouse owns on the valuation date (generally the separation date), after deducting,

(a) the spouse's debts and other liabilities, including, for greater certainty, any contingent tax liabilities in respect of the property, and

(b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities, other than debts or liabilities related directly to the acquisition or significant improvement of a matrimonial home, calculated as of the date of the marriage.

Excluded from the net family property is according to section 4(2) Family Law Act the value of the following property that a spouse owns on the valuation date:

1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage.

2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property.

3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages.

4. Proceeds or a right to proceeds of a policy of life insurance, as defined under the *Insurance Act*, that are payable on the death of the life insured.

5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced.

6. Property that the spouses have agreed by a domestic contract is not to be included in the spouse's net family property.

7. Unadjusted pensionable earnings under the *Canada Pension Plan.*

Jointly owned property will be considered in each spouse's net family property with half of its property[26].

If a spouse's net family property is less than zero, it is deemed to be equal to zero according to section 4(5) *Family Law Act.*

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[26] *Hoar v. Hoar* (1993), 45 R.F.L. (3d) 105, 62 O.A.C. 50 (C.A.).

The spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them (section 5(1) *Family Law Act*).

Pursuant to section 5(6) Family Law Act, the court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable. Reasons are for example that one spouse depleted intentionally or recklessly his or her property to receive a higher equalization payment, or that the cohabitation lasted for less than five years and the equalization payment would therefore be disproportionately large or if part of a spouse's net family property consists of gifts made by the other spouse.

Special rules apply to the house or apartment which was used as the matrimonial home and is owned by one of the spouses. In general, each spouse is entitled to half of the value of the matrimonial home regardless who the owner is and who contributed to the purchase of the home.

4) Pension rights adjustment

In addition to the issues of support and equalization of net family property the court also has to address the issue of handling pension rights acquired during the marriage. Starting point in Canada and Germany is the equal value of housekeeping and employment during the marriage. If the division of functions within the marriage leads to an imbalance of pension rights, then this should be adjusted in the event of a divorce.

a) Germany

aa) Legal position to September 1, 2009

Sections 1587 ff BGB apply with respect to pension rights adjustment and not the provisions regarding matrimonial property rights.

According to sections 1587 I, 1587 a II BGB (old wording) the pension rights adjustment scheme applies to expectancies and prospects of a pension because of age or impairment of earning capacity which were built up with the spouse's own income or assets. This comprises for instance entitlements to statutory pension schemes, pension scheme for civil servants, company pension scheme and private pension plans (without endowment insurance). The relevant time is the period from the beginning of the month when spouses entered into the marriage until the end of the month before service of the divorce petition (section 1587 II BGB (old wording)).

No pension right adjustment takes place where the spouses were already entitled to pension

payments throughout the marriage, and did not build up entitlements[27].

Similar to the equalization of the net family property, before the adjustment can be made, the expectancies of both spouses have to be valued. Only those built up during the marriage will be considered.Claims against different pension funds will be considered as well. Then the expectancies of both spouses will be compared.

Regarding statutory pension schemes, half of the difference will be transferred to the spouse with lower expectancies (section 1578 b I BGB (old wording)).

As far as an expectancy or pension from an employment contract under public law or pension pursuant to principles applicable to civil servants are concerned, the additional expectancies will be credited to the spouse entitled to an adjustment (section 1578 b II BGB (old wording)) or pursuant to sections 1 II, III VAHRG (old wording) the spouse acquires an expectancy with the respective pension fund outside the statutory pension scheme.

Where this adjustment is not possible, either spouse can apply for an adjustment under the law of obligations pursuant to sections 1587 f ff. BGB (old wording). This means the spouse with less expectancies has a claim against the other spouse for payment of half the amount that exceeds his or her pension. The claim is due when the spouse obligated to pay is entitled to the payment of his or her pension and the spouse entitled to the adjustment has reached the age of 65 or becomes disabled.

The pension adjustment can be reduced partly or entirely if the spouse entitled to the adjustment brazenly violated his or her duty to grant maintenance to the family, or manipulated his or her expectancies in such manner that adjustment increases, or the right to an adjustment is unjust because of blatant and serious transgressions of the spouse entitled[28].

bb) Legal situation since September 1, 2009

New rules apply effective September 1, 2009. They aim to bring more justice and clarity. The aforementioned sections 1587 ff. BGB (old wording) got replaced by the Pension Rights Adjustment Act.

The former adjustment method regarding expectancies in various pension funds built up during the marriage through the statutory pension scheme often led to distortions. The new rules apply the principle of internal division. This means each spouse receives his or her own claim against

[27] Palandt, *supra*,, Vorb. v. section 1587, Rdnr. 3.

[28] Palandt, *supra*,, Vorb. v. section 1587 c, Rdnr. 12.

the respective pension fund and the claims will no longer be settled cumulatively through the statutory pension scheme. An external division can only be conducted if the spouse entitled to the adjustment gives his consent. If consent is given, the pension fund of the spouse obligated to adjust will pay the corresponding amount to a pension fund of the spouse entitled to adjustment. The latter can decide if he or she applies the amount to a new pension or to increase an existing pension insurance.

Another alteration is the introduction of a de minimis exception. No adjustment will be realized if the adjustment amount is less than 25 Euros per month. Moreover, if the marriage lasted less than 3 years, the pension right adjustment will only be carried out on the application of a spouse.

These new rules apply to all divorces that are filed with the family court on or after September 1, 2009, and for all pension right adjustment proceedings that are no longer tied to the divorce proceeding and are dealt with independently[29].

b) Canada

aa) Federal law

The pension rights adjustment under the statutory pension scheme (Canada Pension Plan) is governed by section 55 ff *Canada Pension Plan* (“CPP“). It is called "credit splitting". This means the credits earned during the time of marriage are combined and split equally (section 55(4) CPP). As a result, the person with fewer credits - the lower earner - gets some of the credits earned by the other person - the higher earner. Credit splitting takes places upon divorce automatically (section 55.1(1) CPP).

No credit splitting will be carried out if for instance the sum of the annual incomes does not exceed twice the Year’s Basic Exemption for the period before which one of the former spouses reached eighteen years of age or after which a former spouse reached seventy years of age, or for the period in which one of the former spouses was already a beneficiary of the CPP or any provincial pension plan (s. 55(6) CPP).

bb) Law of Ontario

According to section 4(1)(c) Family Law Act, a spouse’s rights under a pension plan form part of the net family property and will therefore be eligible for equalization. The equalization can either be made by a lump sum payment which usually requires costly expert actuarial evidence, or by

[29] www.bmj.de/versorgungsausgleich.

division of pension benefits using the so called "if-and-when" formula. This means that the total number of months or years of matrimonial cohabitation in which pension contributions were made is divided by the total numbers of months or years during which pension contributions were made. The result will be multiplied by 0.5 and then multiplied by the actual pension received[30].

Bill 133, Family Statute Law Amendment Act, S.O. 2009 C. 11, brings a sweeping change to this system. The valuation of a pension plan member's entitlement will be provided to spouses directly by pension plan administrators on the request of either spouse. Additionally, up to 50% of a spouse's pension entitlement attributable to the period of a marriage may be paid out to his or her spouse from the pension plan itself, if the transfer is provided for by a court order, a family arbitration award or separation agreement. This will streamline the determination of spouse's net family property and redundantize costly expert actuarial evidence in most cases.

V) Recognition of Divorce Judgments

1) Recognition of Canadian Judgments in Germany

A divorce in Canada can be recognized in Germany upon application (section 107 IV FamFG). The application is to be addressed to the administration of justice of the federal state where one spouse has his or her habitual residence. In the event that neither spouse has his or her habitual residence within the country, the administration of justice of that federal state is responsible in which a new marriage is to be entered into or a civil partnership is to be established. If thereafter no jurisdiction is thereby attained, the administration of justice for the state of Berlin will have jurisdiction. If the marriage is not recognized by the administration of justice, a recognition procedure before the Higher Regional Court may be initiated (section 107 V FamFG).

The substantive requirements for the recognition are governed by section 328 ZPO, while Art. 7 FamRÄndG merely regulates the procedure and form for the recognition of divorce judgments. The legal bars for the recognition are listed in section 109 FamFG. The recognition is precluded if the Canadian court did not have jurisdiction for the divorce according to German law; if the defendant was not granted the right to be heard, if the judgment is opposed to a previous German or foreign decision or if the judgment is not in compliance with fundamental principles of German law.

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[30] Payne, *supra*,, 582.

The recognition of a divorce judgment does not imply that the recognition automatically extends to any rulings regarding ancillary matters in the Canadian divorce judgment. It is, however, a precondition.

The recognition of the divorce judgment is not a precondition for the recognition of child support claims because the child's right to support is independent from the existence of the parents' marriage.

2) Recognition of German Judgments in Canada

A non-appealable divorce granted by German courts will be recognized in Canada pursuant to section 22 (1), (2) *Divorce Act* if one of the spouses had his or her habitual residence in Germany for at least one year prior to the divorce or if the wife had her residence in Germany prior to her marriage.

Moreover, section 22 (3) *Divorce Act* expressly preserves any other rule of law respecting the recognition of divorces granted otherwise than under the *Divorce Act.* The most important rules in this regard can be summarized as follows[31]:

- Jurisdiction was assumed on the basis of the domicile of the spouses[32];
- The foreign divorce, though granted on a non-domiciliary jurisdictional basis, is recognized by the law of the domicile of the spouses[33];
- The foreign jurisdictional rule corresponds to the Canadian jurisdictional rule in divorce proceedings[34];
- The circumstances on the foreign jurisdiction would have conferred jurisdiction on a Canadian court if they had occurred in Canada[35]
- Either the petitioner or the respondent has a real and substantial connection with the country where the foreign divorce was granted[36]; and
- The foreign divorce is recognized in another country with which the petitioner or respon-

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[31] Summarized in *Janes v. Pardo*, [2002] N.J. No. 17 (S.C.); *Orabi v. El Qaoud* [2002] N.S.J. No. 76 (C.A.).

[32] *Le Mesurier v. Le Mesurier* [1895] A.C. 517.

[33] *Armitage v. Attorney General* [1906] P. 135.

[34] *Travers v. Holley* [1953] P. 246 (Eng. C.A.).

[35] *Robinson-Scott v. Robinson-Scott*, [1958] P. 71.

[36] *Indyka v. Indyka* [1969] 1 A.C. 33 (H.L.); *Mayfield v. Mayfield*, [1969] P. 119.

dent has a real and substantial connection[37].

Recognition of the German divorce pursuant to section 22 Divorce Act does not imply that the recognition automatically extends to any rulings regarding ancillary matters in the German divorce judgment[38].

3) Support Claims

The Federal Republic of Germany entered into a reciprocal agreement with all Canadian provinces and territories (except Quebec) [39] concerning the enforcement of support claims. The purpose is the facilitation of prosecution and enforcement of support claims abroad as well as the facilitation of the enforcement of dependents living abroad against domestic support debtors in the course of reciprocity. The *Reciprocal Enforcement of Support Act* (AUG)[40] was established in Germany as a statutory basis. The Ontario counterpart is the *Interjurisdictional Support Orders Act*, 2002, S.O. 2002, CH. 13[41] and its regulations[42]. Other provinces and territories have enacted similar laws. The Central Authority in Germany is the Federal Office of Justice and its Ontario counterpart is the Family Responsibility Office – ISO Unit.

Concerning the procedure there is a distinction as to whether a judgment regarding the support claim has already been made or not. If a judgment has not yet been made, the dependent must file an application with the court containing all important information required for the support claim. The court then examines whether a proceeding would be successful according to its domestic law. If so, the application will be forwarded to the domestic central authority which opens communications to the competent authority in the foreign state. The foreign competent authority will then forward the application to a competent court of the foreign state along with a certificate of the original domestic court confirming that the claim is justified.

If a German court has made a judgment, the judgment can simply be registered and has the same

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37 *Mather v. Mahoney* [1968] 3 All E.R. 223.

38 *Vargo v. Saskatchewan (Family Justice Service Branch)*, [2006] S.J. No 350 (Q.B.).

39 See Bekanntmachung über die Feststellung der Gegenseitigkeit gemäß section 1 (2) AUG vom 19.12.1986 (BGBL. I, 1986 S. 2563), http://www.bundesjustizamt.de/cln_101/nn_257780/DE/Themen/Zivilrecht/AUG/AUGInhalte/Staatenliste.html.

40 German version: www.gesetze-im-internet.de; English version: http://www.bundesjustizamt.de/cln_101/nn_259304/sid_AD566394E20CC99B9CE0D09FDB83FB87/DE/Themen/Zivilrecht/AUG/AUGInhalte/AUGGesetz__eng.html?__nnn=true.

41 http://www.e-laws.gov.on.ca/index.html.

42 Ontario Regulation 53/03 und 55/03, http://www.e-laws.gov.on.ca/index.html.

effect as an Ontario support order. If merely an application for support has been filed or the court granted only a provisional support order, the Ontario court will first hear the debtor before making a decision.

If an Ontario court has granted a support order, then this order will be declared enforceable by the responsible German court. If no judgment has been made, a proceeding has to be started aiming for a judgment against the debtor living in Germany. The German authorities will always grant legal aid to the foreign person entitled to support. The legal aid need not be paid back.

VI) Final Remark

Canadian and German divorce law are similar in their basic principles such as the renunciation of the principle of obligations, the divorce requirements and the equalization of employment and housekeeping, which however, differ in their implementation.

The explanations above are intended to give only an overview of the most important problems that need to be dealt with in international divorces. However, they do not replace the consultation of a lawyer.