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Germany
Family Law

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This country-specific Q&A provides an overview of family laws and regulations applicable in Germany.

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Germany: Family Law

1. What are the jurisdictional requirements for divorce and property division?

Under German law, a divorce order can only be made by the family court. From a German legal perspective, jurisdiction in divorce cases with an international element is primarily governed by article 3 EU Regulation 2019/111[1] (´Brussels IIb Regulation´). As a general rule, in order to file for divorce in Germany one of the parties must have been habitually resident in Germany for a specific period of time (usually six or twelve months) before the petition is filed or if the spouses are both German nationals. If that should not be the case and if the courts of no other member state of the Brussels IIb Regulation should be competent, section 98 Family Proceedings Act (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG*) applies, according to which German courts have jurisdiction for a divorce if only one spouse is a German national or was a German national at the time of the marriage. Alternatively, German courts have jurisdiction if at least one spouse has his/her habitual residence in Germany when the divorce petition is filed, unless the divorce order is clearly not being recognised abroad.

If divorce proceedings are pending with the German court, in general that court is also competent for matters regarding the spouses´ matrimonial property regime pursuant to article 5 (1) EU Regulation 2016/1103[2] (´ancillary jurisdiction´). If no divorce proceeding is pending, article 6 EU-Regulation 2016/1103 applies making reference to the habitual residence of at least one of the spouses at the time the application is made or the joint nationality of both spouses.

Footnote(s):

[1] EU Regulation 2019/1111 of 25 June 2019 on jurisdiction, recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction.

[2] EU Regulation 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

2. In what circumstances (if at all) would your jurisdiction stay divorce proceedings in favour of proceedings in another country?

If divorce proceedings are already pending before the courts of a member state of the Brussel IIb Regulation when the application for divorce is filed with the German court, the court will stay proceedings until such time as the jurisdiction of the court first seised is established. If the jurisdiction of the court first seised is established, the German court will decline jurisdiction in favour of the court first seised, article 20 (1), (3) Brussels IIb Regulation.

If divorce proceedings are pending before the courts of a non-member state of the Brussel IIb Regulation and there is no special treaty in place between Germany and the respective country (e.g. the Treaty concerning the reciprocal recognition and enforcement of judicial decisions in civil and commercial matters between Germany and Israel of 20 July 1977), section 261 (3) Code of Civil Procedure (*Zivilprozessordnung – ZPO*) applies. Under that rule the German court will stay divorce proceedings in favour of the foreign proceedings provided that the foreign divorce order is likely to be recognised in Germany.

It is to note that in matters relating to the divorce, such as matters regarding the matrimonial property regime, maintenance or custody, the issue of lis pendens must be assessed separately on the basis of the relevant EU Regulation or – if a non-member state is involved – any relevant treaties or German national law.

3. Is applicable law relevant in your jurisdiction – when would this apply?

Unlike other jurisdictions as for example the UK, where a court would always apply its own law (´lex fori´), it is a basic concept of German law that in all cases with an international element the governing law must be assessed. In the context of a divorce, this means that the applicable law for the divorce itself as well as any issue related to the divorce (e.g. matters regarding the spouses´ matrimonial property regime, spouse and child maintenance, custody etc.) must be determined on the basis of the relevant EU Regulation, international treaty or, alternatively, the national conflict of laws.

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4. What are the grounds for divorce and are they fault-based?

Until the late 1970ies, the grounds for divorce under German law were indeed fault-based. However, that has changed and section 1566 (1) German Civil Code (*Bürgerliches Gesetzbuch – BGB*) now refers to a breakdown of the marriage as being the ground for divorce, irrespective of the reasons for such breakdown.

The marriage is deemed to have broken down if the spouses have been separated for more than three years, section 1566 (2) BGB. If the spouses have only been separated for at least one year, but less than three years, the spouse who is not the petitioner for divorce must declare his/her consent to the divorce ('consensual divorce'), section 1566 (1) BGB. The latter is the usual procedure in German divorce proceedings. Only in very exceptional circumstances when it would be considered as a case of hardship, it is possible for a spouse to get divorced before the separation year has elapsed, section 1565 (2) BGB.

5. What are the requirements for serving the application for divorce on the Respondent?

Serving of the application for divorce must be done via the local family court. After the divorce petition has been filed with the competent court, the court will request the petitioner to pay an advance on court fees in accordance with section 12 (1) German Court Fees Act (*Gerichtskostengesetz – GKG*). The divorce petition will be served on the respondent by the court once payment has been received. Further, the court will check whether certain formal requirements (e.g. name and address of the respondent) have been met that are necessary for service to take place.

If the respondent spouse lives abroad, service will take some time which has to be calculated when filing for divorce. Service abroad is carried out on the basis of the relevant treaties with the state where the respondent is resident, such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965, or otherwise on the basis of national German law.

6. When is a foreign marriage, and when is a foreign divorce, recognised?

Marriage: There is no specific procedure for the recognition of a foreign marriage in Germany. If one of the spouses is registered in the German civil status register (usually if he or she is a German national), he or she can apply for the subsequent certification of the foreign marriage in Germany, section 34 Civil Status Act (*Personenstandsgesetz – PStG*). Typically, the validity of a foreign marriage is to be considered as a preliminary question, e.g. if a spouse needs to prove his or her civil status as being married. From a German legal perspective, the validity of a marriage is governed by the law of the spouses' home country or, alternatively, German law, article 13 EGBGB.

Divorce: A divorce order of a member state of the Brussels IIb Regulation is automatically recognised unless such recognition would be contrary to German public policy (´ordre public´). A violation of public policy can be grounded in substantive or procedural law. Recognition of the divorce order may also be refused if the respondent was not served with the divorce application in sufficient time and in such a way as to enable him to arrange for his defence, unless it is determined that he has accepted the judgment unequivocally.

If the divorce order was made by the courts of a non-member state of the Brussels IIb Regulation, the recognition of the decision is based on German national law, sections 107, 109 FamFG which provide for similar requirements to those set out in the Brussels IIb Regulation such as the violation of public policy. Such violation of the German ordre public may for example be considered in the case of an Islamic divorce if the divorce is based on a unilateral repudiation by the husband (talaq) – unless the woman explicitly agrees to the (repudiation) divorce, and not just to the termination of the marriage in general.[3]

Footnote(s):

[3] Sternal/Dimmler FamFG § 109 Rn. 20.

7. Are same sex marriages permitted in your jurisdiction and/or is there another scheme? Do you recognise same sex marriages that have taken place in another jurisdiction?

Until 2017, it was not permitted for same-sex couples to enter into a marriage under German law, but to enter into a so-called registered civil partnership which provided for similar, but not identical legal consequences as the marriage between heterosexual couples. Despite the introduction of same-sex marriage nowadays, there are still differences between same-sex and heterosexual couples, e.g. when it comes to questions of descent and adoption.

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Regarding the recognition of same-sex marriages that have taken place in a foreign jurisdiction, the same provisions apply as for the recognition of any other marriage (please see above).

8. What are the substantive financial orders (e.g. capital, property and maintenance) the court can make and how are claims determined?

The substantive financial orders the court can make in connection with a divorce refer to capital (equalisation of accrued gains – ´*Zugewinnausgleich*´), adjustment of pension rights (´*Versorgungsausgleich*´) and maintenance (spousal support and child maintenance). Except from the pension rights adjustment which is a mandatory part of each divorce proceeding, as long as the spouses have not entered into a different agreement, orders will only be made by the court upon an application of one of the spouses to deal with such issue.

The determination of the claims is complex and often leads to disputes, especially in the absence of a prenup or marriage agreement. However, in general all claims are governed by the principle of ´sharing´, i.e. the increase in value of assets and pension rights during the marriage has to be distributed equally between the spouses. Maintenance claims are further based on the principle of ´needs´, that is to cover all reasonable living expenses of the spouse who is not able to fully support him- or herself provided that the lack of income has its reason in a marriage-related interruption of professional activity (e.g. due to childcare commitments). As the claims are based on statutory law their determination is not to the sole discretion of the court.

9. What orders can be made in relation to pensions and what are the guiding principles?

The general idea of the pension rights adjustment that is automatically carried out upon divorce is that half of the value of all pension rights and entitlements acquired by each spouse during the marriage with state and certain private pension providers are transferred to the respective other spouse (into an own pension account of that spouse). As not all kinds of private provision for old age is subject to the pension rights adjustment there are circumstances in which the application of the statutory rules do not provide for adequate and fair results, e.g. in a case where the wealthier spouse is self-employed and not contributing to the state or a private pension scheme while the weaker spouse has acquired rights and entitlements as employee that would be split half. In such case, it may be reasonable for the spouses to enter into an agreement in order to fully or partially waive their rights to the adjustment of (specific) pension rights. However, such agreement is subject to judicial review and must be either recorded in court or in a notarial deed.

10. Can the court make interim provision (including for legal costs) during the proceedings?

Upon application of one of the spouses, the court can make an interim provision (for the spouse or joint children). In order to do so, the court must determine the respective claims in a summary procedure, i.e. the claims must be likely to exist.

The spouse can also claim for coverage of legal costs from the other spouse by way of an interim provision which is often done. Coverage of legal costs is to be considered as being part of the claim for maintenance during separation until divorce. If no claim against the other spouse should exist, the spouse in need can claim for legal aid from the state. However, the amount of the legal costs that can be claimed is always limited to the statutory legal fees according to the German Lawyers' Fees Act (*Rechtsanwaltsvergütungsgesetz – RVG*). The RVG provides for the legal fees to be calculated based on the value of the issue in question, not based on hourly rates, which are certainly common in some law firms.

Furthermore, it should be noted that the applicant may have to repay the legal costs granted after the proceedings have ended if his/her personal or financial circumstances have changed (e.g. due to a successful capital or property claim).

11. Can financial claims be made after a foreign divorce?

If the spouses have divorced outside of Germany, financial claims can still be brought before the German courts if there is no lis pendens or a previous decision by a foreign court in the specific matter, and further provided the German courts have jurisdiction based on general statutory principles. In the context of a divorce and related matters, usually at least one of the spouses must be habitually resident in Germany so that German courts have jurisdiction to entertain an application for financial claims.

12. What is the process for recognising and enforcing foreign financial orders (including

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orders relating to pensions situated in your jurisdiction)?

If an order regarding property/capital (with pensions it would first need to be considered whether such order would fall under property) was made by the courts of a member state of the EU Regulation 2016/1103, the order is to be recognised in Germany without any special procedure being required, article 36 (1). Under no circumstances may a foreign judgment be reviewed as to its substance. However, where there is a particular interest for such confirming order, a party can apply for a formal recognition of the foreign order according to article 36 (2).

According to article 37, a foreign order will not be recognised if such recognition is manifestly contrary to German public policy, or if certain formal requirements in the proceeding leading to the foreign order have not been met, or if the foreign order is irreconcilable with a judgment given in a dispute between the same parties in Germany, or if the foreign order is irreconcilable with an earlier judgment given in another EU or non-EU country involving the same cause of action and the same parties provided the earlier judgment is to be recognised in Germany.

The German court may stay the proceedings for recognition of the foreign order if an ordinary appeal against the foreign order has been lodged.

A foreign judgment is to be enforced in Germany when, on the application of any interested party, it has been declared enforceable by the German courts, article 42. The parties may appeal against a decision on an application for a declaration of enforceability.

Recognition and enforcement of foreign orders of the courts of a member state regarding maintenance are governed by article 23 et seq. EU Regulation 4/2009[4]. The requirements and the process is similar to that as set out above for foreign orders in issues of marital property.

If the foreign order does not originate from the courts of a member state of the relevant EU regulation and there is no specific treaty between Germany and the relevant third country in place, recognition of the foreign orders is likely to be based on sections 108, 109 FamFG. Obstacles to recognition are also examined, on the basis of which the German courts could refuse recognition.

Footnote(s):

[4] EU Regulation No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

13. Are matrimonial property regimes recognised and if so, in what circumstances?

German law provides for different matrimonial property regimes. If the spouses have not agreed otherwise, their marriage is governed by the statutory matrimonial property regime of the community of accrued gains (‘*Zugewinngemeinschaft*´). This property regime provides for a complete separation of assets with a compensatory payment for the gain realised during the marriage when the matrimonial property regime is terminated: the spouse who has realised the higher surplus during the marriage is obliged to make a compensatory payment equal to half of the amount of his or her gain insofar as it exceeds the gain of the other spouse. The surplus generated by the spouses is calculated on the basis of the total assets of each spouse at the time of the termination of the marriage, minus the assets that each spouse had at the time of the marriage (initial assets), and minus any gifts from third parties and inheritances during the marriage to the respective spouse.

The spouses may deviate from the statutory matrimonial property regime of the community of accrued gains at any time before or during the marriage by means of a notarised prenuptial agreement or marriage contract. They can modify the statutory matrimonial property regime or agree on a completely different property regime like the separation of property (‘*Gütertrennung*´) or the community of property (‘*Gütergemeinschaft*´).

14. How are pre and post nuptial agreements treated? Is it different if the prenuptial or post nuptial agreement was concluded in your jurisdiction (as opposed to another jurisdiction)?

Generally, a pre- or postnuptial agreement will be recognised as valid under German law if a) it meets the formal requirements of the law of the state where it has been entered into and b) the nuptial agreement is in line with the law applicable to its contents. As under German law, a marriage agreement can also be entered into any time after the marriage, there is no difference between a pre- and a postnuptial agreement regarding their recognition in Germany.

If a marriage contract is recognised under German law, its content is decisive, i.e. such marriage contracts usually block the application of the statutory provisions as far as the matter is addressed in the agreement. Whether the

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agreement was concluded in Germany or in another jurisdiction generally makes no difference, provided the relevant formalities have been meet. The only exception to this is if the agreement was concluded in another jurisdiction but German law is applicable to its contents. German law may be governing either because of a respective choice of law contained in the agreement or – in the absence of such choice of law – based on the relevant EU regulation (e.g. article 22 of EU Regulation 2016/1103 for issues of matrimonial property), specific treaties or national conflict of laws rules. If and to the extent German law is applicable, the agreement is subject to special judicial review under German law ('*Inhalts- und Ausübungskontrolle*'), i.e. a specific two-step test for the validity of nuptial agreements – irrespective whether the agreement has been concluded in Germany or in a foreign jurisdiction.

15. How is maintenance for a child dealt with in your jurisdiction?

In principle, the legal parents are both responsible for their child's maintenance. However, when the child is minor, the parent who primarily takes care of the child, i.e. with whom the child lives, is to be considered as contributing to the maintenance by non-financial means, whereas the other spouse is obliged to support the child financially by way of a monthly cash payment. Once the child has turned 18, this rule changes and both parents become responsible for cash paying maintenance, depending on their respective income. The child is then allowed to claim child support from its parents to be paid directly to him/her.

The amount of the so-called basic child maintenance, i.e. maintenance covering the basic living expenses, depends on the age of the child and the income of the person obliged to pay maintenance, since the needs of the child are to be considered as being dependent on the living conditions of the obliged parent. The courts in Germany regularly publish tables of flat-rate child maintenance payments based on the principles set out above (so-called '*Düsseldorfer Tabelle*'). In addition to this basic child maintenance, further maintenance payments may be claimed for special needs (e.g. health insurance or education-related expenses) (so-called ´*Mehr- und Sonderbedarf*´).

If parenting time is shared equally between the parents (´*Wechselmodell*´), different rules apply. The parents can also enter into an agreement on the payment of child maintenance. However, by doing so the statutory claims for child maintenance can only be modified but not waived.

16. With the exception of maintenance, does the court have power to make any orders for financial provision e.g. housing and/or capital sums for a child? If so, in what circumstances?

Under German law, the basic child maintenance (see question 15.) is calculated so as to cover all basic living expenses of the child including housing. Therefore, the courts do not have power to make any further orders for financial provision of the child beyond maintenance. Advance maintenance payments can be made, but only for a period of three months (sections 1614 (2), 760 (2) BGB). There is not option for the court to make an order for a capital sum instead.

17. Are unmarried couple relationships recognised (eg. as a civil partnership?)

Up to this date, unmarried couple relationships are not legally recognised. They cannot be registered either (registered partnerships for same-sex couples no longer exist since same-sex marriage has been established, see question 7.).

18. What financial claims, if any, do unmarried couples have when they separate and how are such claims determined i.e. what are the guiding principles?

As unmarried couple relationships are not legally recognised (see question 17.), there are no specific financial claims unmarried couples have when they separate. Any potential claims are limited to general claims between third parties based in civil law, such as the repayment of a loan or the reclaim of a gift. It is also possible that the couple's way to organise their financial affairs may lead to contractual obligations between them, such as the foundation of a civil law partnership under German law (´*Gesellschaft bürgerlichen Rechts*´). However, this will only be the case in very specific circumstances.

The situation is, however, different with regard to common children of an unmarried couple: When one of the partners is the primary caretaker for the child and not able to work due to childcare commitments, he or she may demand maintenance due to child care from the other parent for a minimum of three years after the child was born (similar to post-divorce maintenance claims of a formerly married spouse taking care of the children after the divorce).

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19. What is the status of separated parents in relation to their children? Does it make a difference if the parents were never married?

If the parents of a child are married when the child is born, the parents automatically exercise joint custody for the child. By law joint custody does not terminate if the parents should separate later. Custody may be transferred by way of a court order to one parent ('sole custody') only upon application and only in specific circumstances. When the child mainly lives with one parent after separation and irrespective of whether there is joint or sole custody, the other parent has a right of contact, that is to see the child in regular intervals.

If the parents are not married when the child is born, they must submit a joint declaration of custody to the competent authority in order to be able to exercise joint custody. Otherwise, custody is solely with the mother; this would not change automatically if the parents were to marry later.

20. What are the jurisdictional requirements for child arrangements/child custody?

From a German legal perspective, jurisdiction in matters relating to child living arrangements/child custody is governed by the Brussels IIb Regulation. Generally, the decisive factor when determining jurisdiction is the child's habitual residence at the time of the application, article 7. However, in case of relocation of a child, jurisdiction remains with the courts of the place of the last habitual residence for a further three months. In the event of child abduction, jurisdiction remains with the courts of the place of the last habitual residence until a new habitual residence has been established and the parent with custody who is not with the child is aware of the child's whereabouts and has not objected to the change. Agreements on jurisdiction are possible under Brussels IIb Regulation subject to certain conditions, article 10.

If the provisions of the Brussels IIb Regulation are not applicable and if there is no specific treaty with the relevant third party state in place, German international law is to be applied in order to determine jurisdiction.

21. What types of orders can the court make in relation to child custody/a child's living arrangements and what are the guiding principles? What steps are followed to hear the voice of the child?

The court can make an order on child custody in general, or only on specific aspects of child custody (such as the child's primary place of residence), or only on a specific situation such as the child's school or a specific medical treatment. The guiding principle for any decision of the court is the child´s best interest. The older the child is, the more relevant is the child´s own opinion. The child will be personally heard by the court as soon as the child is trusted to express his/her own wishes and it is considered for the hearing to do not more harm than good to the child. To safeguard the child's best interest, a procedural representative will be appointed for any minor child (usually a legally qualified person who independently represents the interests of the child in the court proceedings). Further, the youth welfare office will also be involved in order to find an amicable solution and mediate between the parents where possible. Often, the court would follow the recommendation of the youth welfare office on the issue in question (e.g. the child´s living arrangements) when making the order.

22. What are the rules relating to the relocation of a child within and outside your jurisdiction and what are the guiding principles?

The right to determine the child's place of residence derives from the right of custody. If the parents have joint custody, they must decide on the child's place of residence by mutual agreement. If no agreement can be reached, the parent who wants to relocate with the child must make an application to the court.

The court seised must decide on the basis of the child's best interest and take into account all factors of the child's (social) life as well as other relevant circumstances (e.g. the reasons for the desired move). If the child has a very close bond with the other parent or other family members or friends or other material social connections, and it is likely that the child will suffer more from being away from his former living environment than it will benefit from the relocation, this could be a reason to reject the application. Of course, the age of the child and his/her own wishes regarding relocation are also to be considered. The greater the distance between the former place of residence and the place of the planned relocation, the stricter the court's examination will be. This is even more the case when the child is about to relocate abroad outside Germany.

23. What is the process for recognising and

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enforcing foreign orders for contact/custody of children? Does your court operate a system of mirror orders?

If the foreign order for custody was made by the courts of a member state of the Brussels IIb Regulation, the order is to be recognised in Germany without any special procedure being required, article 30 (1). However, a parent may, where there is a particular interest, apply for a specific declaration of the German courts that a foreign order is or is not to be recognised based on the grounds set out in article 39.

Foreign orders for contact (including orders for the return of a child) are so-called privileged decisions under the Brussels IIb Regulation. Privileged decisions are also to be recognised in Germany without any special procedure being required, article 43 (1). As a special rule, recognition and enforcement of privileged decisions can only be refused due to incompatibility with a later decision of the enforcing member state or a later decision of a third country that is eligible for recognition in this member state, article 50.

For recognition and enforcement, certificates prescribed by the Brussels IIb Regulation are to be issued – usually by the courts having made the original order – and presented in the country in which the order is to be recognised or enforced. However, a declaration of enforceability as it is needed for the enforcement of orders regarding issues of marital property (see question 12.), is not necessary regarding orders for custody and contact.

If the order was not made by a court of a member state of the Brussels IIb Regulation and there is no specific treaty between Germany and the relevant third party state in place, recognition of a foreign court order for custody and contact is governed by sections 108, 109 FamFG; enforcement follows the rules of German national law.

24. What is the status of surrogacy arrangements and are surrogates permitted to be paid?

Surrogacy is generally not permitted in Germany, as is the case in most European countries. The same applies to egg donation.

However, if a child has been born by a surrogate mother in a foreign country where this is legal, and a court decision on the parenthood of the intended parents has been made in that country, and one parent is genetically related to the child, the decision of the foreign court is likely to be recognised in Germany. In such cases, parenthood on the basis of surrogacy does not necessarily violate German public policy, as the Federal Court of Justice (BGH) has ruled in its landmark decision in 2014. The decisive factor again is the best interest of the child when establishing parenthood.

25. What forms of non-court dispute resolution (including mediation) are available in your jurisdiction?

When it comes to separation and divorce, the spouses may submit a specific dispute to mediation or arbitration. They are often invited by the court to do so when financial claims (e.g. maintenance, property/capital) are involved. However, the divorce order itself must always be made by a state court so that any form of non-court dispute resolution can only be of ancillary nature. Further, the powers of an arbitration court are limited, especially when it comes to child-related matters or the adjustment of pension rights (‘*Versorgungsausgleich*’). This is the reason why arbitration in practice is not very common in Germany. Mediation is done quite frequently, as – if successful – it is much faster and more cost effective than fighting in the courts. However, no orders can be made in mediation, so that the parties must find an amicable solution.

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