

SPOUSAL SUPPORT AFTER DIVORCE IN GERMANY

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Postmarital spousal support is granted in Germany if the codified conditions that vary according to the reason for the claimant's indigence are fulfilled. The amount awarded is determined with regard to the marital living conditions and can be reduced, limited in time and refused on grounds of inequity. Generally, spousal support is paid monthly and can be adjusted to changes in the relevant income and resources. The payment of lump sums instead is principally not ordered by court but is more frequently agreed upon by the spouses. Agreements on spousal support are possible, but subject to judicial review. The German spousal support system has not been without critics, who notably take issue with its complexity, legal uncertainty and the ongoing bond spousal support creates after divorce.

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I. INTRODUCTION/OVERVIEW: SPOUSAL SUPPORT IN GERMANY

German law foresees maintenance claims during marriage, separation time and after divorce. In principle, each spouse is responsible for his or her own maintenance after divorce.¹ However, if one of the ex-spouses is not in a position to provide for him- or herself with appropriate gainful employment, he or she has a spousal support claim against the other if the conditions of one of the six maintenance provisions are fulfilled. These provisions cover *inter alia* maintenance to care for a child, maintenance by reason of old age and maintenance for unemployment.² The amount is not determined with regard to a subsistence minimum, but with regard to the marital standard of living.³

There is only one ground for divorce: the irretrievable breakdown of the marriage.⁴ The breakdown of the marriage is presumed if the spouses have been separated for a year and both spouses petition for divorce or the other spouse consents to the divorce.⁵ The same presumption applies in cases where the spouses have been separated for three years.⁶ Hardship clauses provide for the possibility to grant a divorce without the fulfilment of these conditions in exceptional circumstances.⁷ This non-fault system was introduced with the First Marriage and Family Law Reform Act of 1976.⁸

1. BÜRGERLICHES GESETZBUCHES [BGB] [CIVIL CODE], § 1569, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf.

2. *Id.* §§ 1570–1571, 1573.

3. *Id.* § 1578.

4. *Id.* § 1565.

5. *Id.* § 1566, para. 1.

6. *Id.* § 1566, para. 2.

7. *Id.* § 1568.

8. Erstes Gesetz zur Reform des Ehe- und Familienrechts of 14 June 1976, BGBl. I S. 1421, entered into force on 1 July 1977.

In the original German Civil Code of 1896, divorce and spousal support after divorce were based on fault.⁹ The innocent spouse had a spousal support claim against the guilty party. With the Marriage Act of 1938, amended in 1946, additional grounds for divorce were introduced. Spousal support after divorce varied in accordance to the underlying ground for divorce.¹⁰ With the introduction of the irretrievable breakdown of marriage as sole ground for divorce, spousal support after divorce was detached from the ground for divorce.

In Germany, a marriage can only be dissolved by judicial decision upon the petition of one or both spouses.¹¹ Since 1977, jurisdiction lies with the family law courts, which are special departments within local courts (Amtsgerichte).¹² The family law court is competent for matters of spousal support as a consequence of divorce.¹³ Its jurisdiction on these subjects is exclusive.¹⁴ It is possible for the court to simultaneously decide about the divorce as such and postmarital spousal support, provided the corresponding request occurs in a timely manner.¹⁵ This also means that the pronouncement of divorce and the award of spousal maintenance can occur at different points in time. The request for spousal maintenance can be made at any time and will be fruitful if the claim's conditions are met at the time of the decision.

Within the German system of consequences of divorce, compensation for family work is also provided by the adjustment of pension rights (*Versorgungsausgleich*).¹⁶ Pension rights and

9. BÜRGERLICHES GESETZBUCH FÜR DAS DEUTSCHE REICH [GERMAN CIVIL CODE OF 1896], §§ 1564, 1565–1569.

10. See Ehegesetz [EHEG] [Marriage Act], 7 Jul. 1938, §§ 58–65.

11. BGB § 1564.

12. Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act], § 23b, *translation at* https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html#p0150.

13. See Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit [FAMFG] [Act on Proceedings in Family Matters and in Matters of Noncontentious Jurisdiction], § 137, para. 2, sentence 2, *translation at* http://www.gesetze-im-internet.de/englisch_famfg/englisch_famfg.pdf.

14. GVG, § 23a, para. 1, sentence 1; *see also* FAMFG, § 111, sentence 8 (defining family matters).

15. FAMFG, § 137, para. 1–2.

16. BGB, §§ 1570–1573, 1575–1576, 1587.

expectancies earned during the marriage will be divided equally between the spouses.¹⁷ This division constitutes the third pillar of the economic consequences of divorce in addition to the independent pillars of dissolution of the matrimonial property regime and spousal support after divorce.

II. CODIFIED CONDITIONS FOR POSTMARITAL SPOUSAL SUPPORT

While each spouse only has one integrative claim for maintenance, the Civil Code foresees a number of sets of conditions under which maintenance is granted. Six provisions stipulate the prerequisites for maintenance under different circumstances: maintenance to care for a child, maintenance by reason of old age, maintenance for illness or infirmity, maintenance for professional training, maintenance in case of unemployment and topping-up maintenance, i.e. spousal support if the claimant is gainfully employed, but his income is not sufficient to cover the standard corresponding to the marital living conditions.¹⁸ In addition, Civil Code Section 1576 foresees a claim for maintenance for reasons of equity. According to that provision, a divorced spouse may demand maintenance from the other to the extent that and as long as he or she, for other serious reasons, cannot be expected to be in gainful employment and the refusal of maintenance, taking into account the concerns of both spouses, would be grossly inequitable.¹⁹ Situations that do not fall under one of the more specific provisions can thus lead to a spousal support claim under that catchall clause. Every maintenance claim presupposes the lack of means to maintain him- or herself on the part of the claimant and the ability to pay on the part of the debtor.²⁰

Maintenance law mirrors societal conditions. This is especially true for spousal support in cases of unemployment, topping off maintenance and childcare. Spousal support in case of unemployment and topping off maintenance mirrors the current labour market policy and conditions and is thus not necessarily

17. *Id.*

18. *Id.* §§ 1570–1573, 1575–1576.

19. *Id.* § 1576.

20. *Id.* §§ 1577, 1581.

related to marital life.²¹ In heterosexual marriages, topping off maintenance can also mean that a gender pay gap is compensated on an individual rather than societal level.²² The conditions under which spousal support to care for a child is granted also strongly reflect family policy in Germany. Spousal support for childcare was substantively overhauled in the course of the 2007 reform.²³

According to Civil Code Section 1570 para. 1 of that provision, a divorced spouse may demand spousal support for the care for or upbringing of a child of the spouses for at least three years after the birth.²⁴ The duration of the claim is extended as long as and to the extent that this is equitable under Civil Code Section 1570 para. 1 sentence 2.²⁵ Here, the concerns of the child and the existing possibilities of childcare are to be taken into account. Under Civil Code Section 1570 para. 2, the duration of the maintenance claim is further extended if this is equitable, taking into account the arrangement of childcare and gainful employment in the marriage and the duration of the marriage.²⁶ There are thus three phases of spousal support to care for a child:²⁷ the first phase covers the child's first three years of life, followed by a possible extension for reasons related to the child's well-being and thirdly a possible extension for reasons related to the arrangements between the spouses.

For the first three years of a child's life, the claimant can choose to personally care for the child and live off spousal support.²⁸ There is no obligation to work, as long as the claimant

21. Katharina Kaesling, *Nacheheliche Verantwortung in FRANKREICH UND DEUTSCHLAND* 168 (Katharina Boele-Woelki et al. eds., 2017).

22. *Id.* at 168 *et seq.*

23. *Cf.* NINA DETHLOFF, *FAMILIENRECHT* 190 (32nd ed. 2018); Lore Maria Peschel-Gutzeit, *Der neue Betreuungsunterhalt nach § 1570 BGB – Abschied vom Altersphasenmodell?*, *FPR*, 24 (2008); GERD BRUDERMÜLLER, *PALANDT BÜRGERLICHES GESETZBUCH § 1570*, para. 1 *et seq.* (Brudermüller et al eds., 77th ed. 2018).

24. *BGB*, § 1570, para. 1.

25. *Id.* § 1570, para. 1, sentence 2.

26. *Id.* § 1570, para. 2.

27. BEA VERSCHRAEGEN, *J. VON STAUDINGERS KOMMENTAR ZUM BGB § 1570*, para. 12 (13th ed. 2014).

28. *Cf.* Deutscher Bundestag: Drucksache [BT] 16/6980, p. 8; Bundesgerichtshof [BGH] [Federal Court of Justice], *Neue Juristische Wochenschrift* [NJW] 3369, 3370 (2010); BRUDERMÜLLER, *supra* note 23, § 1570 para. 6. *But see* VERSCHRAEGEN, *supra* note

is the child's primary carer.²⁹ Insofar, the prevailing attitude towards third-person-care in Germany is reflected. Four years ago, 63% of the German population aged 16 to 49 years thought that a child is best cared for by family members at home;³⁰ this number was even higher in the West of Germany with 72%.³¹ 56% of the German population and 62% in the West took the view that a child of two years would probably suffer if both parents worked fulltime.³² This family work is mostly taken over by women both during and after marriage; they are thus still far more frequently claimants of spousal support than men.³³

After the child's first three years, the claimant generally has an obligation to carry out appropriate gainful employment.³⁴ Spousal support to allow the other spouse to personally care for the child can still be granted for reasons related to the child's well-being or, secondarily, for reasons related to parental arrangements.³⁵ With the 2007 reform, the lawmakers wanted to abolish the schematic approach to spousal support for childcare developed by the jurisprudence.³⁶ Before, the duration of the spousal support claim hinged on the child's age (Altersphasenmodell). Up to the completion of the child's eighth year of life, there was no obligation to work for the claimant.³⁷ As of the child's eleventh birthday, the claimant was generally

27, at § 1570 para. 90.

29. HANS-ULRICH MAURER, MÜNCHENER KOMMENTAR ZUM BGB § 1570 para. 28 (Franz Jürgen Säcker et al. eds., 7th ed. 2017).

30. Institut für Demoskopie Allensbach im Auftrag des BMFSFJ, *Familienbilder in Deutschland und Frankreich – Abschlussbericht*, 75 (2015).

31. *Id.*

32. *Id.* at 73.

33. Kaesling, *supra* note 21, at 223; Sabine Berghahn, *Das System des Ehegattenunterhalts – ein Konzept für das 21. Jahrhundert?*, in *UNTERHALT UND EXISTENZSICHERUNG, RECHT UND WIRKLICHKEIT IN DEUTSCHLAND* 27 (Sabine Berghahn ed., 2007); Hans Ulrich Graba, *Zum Unterhalt der Hausfrau nach den ehelichen Lebensverhältnissen*, FAMRZ 1115, 1116 (1999).

34. Bundesgerichtshof [BGH] [Federal Court of Justice], *Neue Juristische Wochenschrift* [NJW] 2430 (2011).

35. Bürgerlichen Gesetzbuches [BGB] [CIVIL CODE], § 1570, para. 1, sentence 3, translation at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf.

36. Cf. German Bundestag: Drucksache [BT] 16/1830, p. 17; Final Recommendation of the Legal Committee as of 07 November 2007, [BT] 16/6980, p. 9.

37. BGH, NJW 1537 (1984); *id.* at 1083, 1084 (1989); *id.* at 1148, 1149 (1995).

expected to work to the extent of 50%³⁸ and full-time as of the child's fifteenth birthday.³⁹ This model based on the child's age was applied rather rigidly.⁴⁰ With the new system, the individual circumstances of the case have gained importance.⁴¹ There is no longer a quasi-automatic extension of spousal support; the appropriate extent of the obligation to gainful employment is defined on a case-by-case basis.⁴² An obligation to work full-time can no longer be negated only by referring to the child's age.⁴³ Age can be one of the relevant factors, but is under no circumstances the only or most important one.⁴⁴

The new system certainly offers more flexibility.⁴⁵ When deciding about an extension of spousal support beyond the first three years of the child's life, reasons related to the child's well-being are paramount.⁴⁶ In that context, all existing options of care are to be considered.⁴⁷ It follows from that express stipulation that the legislature no longer accepts a general priority of personal care by the claimant over other models of care once the child has reached three years of age.⁴⁸ An extension of spousal support is notably granted when the child's physical

38. BGH, FAMRZ 671 (1997); *id.* at 367 (1999).

39. *Id.* at 149, 150 (1984); *id.* at 671, 672 (1997).

40. Kaesling, *supra* note 21, at 254; Jutta Puls, *Der Betreuungsunterhalt der Mutter eines nichtehelichen Kindes*, FAMRZ 865, 871 *et seq.* (1998); JOACHIM GERNHUBER AND DAGMAR COESTER-WALTJEN, *FAMILIENRECHT* 296 (6th ed. 2010); Ina Ebert, *Differenzmethode bei Alleinverdienerehen und § 1615 I BGB: Zwei Unstimmigkeiten, eine Lösung?*, JR 182, 187 (2003).

41. BGH, NJW 2430, 2433 (2011); *id.* at 2646, 2647 (2011); Dieter Pauling, *Betreuungsunterhalt über das dritte Lebensjahr des Kindes hinaus nur noch ausnahmsweise?*, FAMFR 385, 387 (2011).

42. BGH, NJW 3369, 3370 (2010); *Unterhaltsrechtliche Leitlinien und Tabellen der Oberlandesgerichte (Stand: 1. 1. 2018)*, FAMRZ (Sep. 28, 2018, 13:04 p.m.) <https://www.famrz.de/arbeitshilfen/unterhaltsleitlinien.html>.

43. BGH, NJW 3369, 3370 (2010); *id.* at 2430, 2433 (2011); *id.* at 2646, 2646 (2011).

44. BGH, NJW 3369 (2010); *id.* at 1582 (2011); *id.* at 1868, 1870 (2012).

45. Roger Schilling, *Der Betreuungsunterhalt*, FPR 145 (2011); VERSCHRAEGEN, *supra* note 27, § 1570 para. 97.

46. German Bundestag: Drucksache [BT] 16/6980, p. 9; BGH, NJW 3369, 3370 (2010).

47. BÜRGERLICHEN GESETZBUCHES [BGB] [CIVIL CODE], § 1570, para. 1, sentence 2.

48. BGH, NJW 1868, 1870 (2012); Kaesling, *supra* note 21, at 257; Schilling, *supra* note 45, at 146.

condition makes personal care preferable,⁴⁹ particularly when adequate care facilities or other alternatives are not available.⁵⁰ If there is more than one child to be taken care of, the number of children and every child's needs are taken into account.⁵¹ It is crucial that the child's or children's best interests are served,⁵² so that alternative options of care must be evaluated with regard to that benchmark.

Spousal support can also be prolonged for reasons related to arrangements between the parents, i.e. the former spouses under Civil Code Section 1570 para. 2.⁵³ Legitimate expectations of the claimant, shaped notably by the division of roles and arrangements agreed upon during marriage, shall be honoured even after the breakdown of marriage.⁵⁴ The claimant can however only rely on these arrangements as long as he or she also executes his or her obligations accordingly.⁵⁵ Just as with the reasons related to the child's well-being, the individual circumstances of the case are key when deciding about the extension of spousal support to care for a child.⁵⁶

The maximum amount of spousal support in all sets of circumstances is defined with regard to the marital standard of living (Section 3). It can then be reduced or limited in time to make it equitable in the particular case (Section 4).

49. BGH, NJW 1876, 1878 (2009); *id.* at 1956, 1958 (2009); *id.* at 2592, 2595 (2009); BRUDERMÜLLER, *supra* note 23, § 1570 para. 14; Oberlandesgericht [OLG] [Higher Regional Court] Düsseldorf, FAMRZ 301 (2010) (low immunity); OLG Brandenburg, FAMRZ 1947 (2008) (Attention Deficit Disorder); OLG Braunschweig, FAMRZ 977, 978 *et seq.* (2009) (social behavior dysfunction).

50. BGH, NJW 3369, 3372 (2010); for discussion involving accommodation and support for those with need for assistance caused by illness or disability *see* BGH, FAMRZ 846, 847 (2006); OLG Düsseldorf, FAMRZ 301 (2010) (preschool attendance due to illness impossible); OLG Köln, FAMRZ 2011 (2009) (supervision during transition from preschool to school).

51. BGH, NJW 3274 (1990); *id.* at 372, 373 (1999); *id.* at 1956, 1958 (2009); *id.* at 2592, 2596 (2009); OLG Celle, NJW 79, 81 (2010); Bernhard Metz, *Das modifizierte Altersphasenmodell beim verlängerten Betreuungsunterhalt*, NJW 1855, 1856 (2009).

52. *Cf.* German Bundestag: Drucksache [BT] 16/1830, p. 17.

53. *Id.* at 9; BGH, NJW 2277 (2010); Schilling, *supra* note 45, at 147.

54. *Cf.* German Bundestag: Drucksache [BT] 16/1830, p. 9; Schilling, *supra* note 45, at 147.

55. BGH, NJW 2277, 2279 (2010).

56. *Id.* at 2646, 2647 (2011).

III. DETERMINATION OF THE AMOUNT OF SPOUSAL SUPPORT

Spousal support after divorce shall cover the claimant's need. It comprises all 'necessities of life' according to Civil Code Section 1578.⁵⁷

A. Full maintenance according to the Marital Standard of Living

The amount of maintenance is defined in accordance with the marital standard of living.⁵⁸ As a general rule, every spouse is entitled to half the income that defines the marital standard of living.⁵⁹ Full maintenance according to the marital standard of living serves both as basis of calculation and marks the maximum amount of spousal support. Despite the fundamental importance of the term "marital standard of living", the lawmakers did not provide a legal definition. In the relevant jurisprudence, the marital standard of living is determined with regard to all economically relevant factors including employment and health that have had a lasting effect on the living conditions during marriage.⁶⁰ The marital conditions are primarily shaped by the spouses' actual and available income during marriage. However, only expenses corresponding to a reasonable lifestyle under those circumstances actually determine the amount of spousal support.⁶¹ Excessive expenditure or austerity is left aside.⁶² In

57. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1578, para. 1.

58. *Id.*

59. Dieter Martiny & Dieter Schwab, *Grounds for Divorce and Maintenance between Former Spouses*, 1, 33 (2002), <http://ceflonline.net/wp-content/uploads/Germany-Divorce.pdf>.

60. BGH, NJW 1870, 1871 para. 2 (1982); *id.* at 933, 936 (1983); *id.* at 1044, 1045 (1992); *id.* at 2254, 2257 (2001); PETER FRIEDERICI, MÜNCHENER ANWALTSHANDBUCH FAMILIENRECHT § 5 para. 36 (Klaus Schnitzler ed., 4th ed. 2014); NORBERT KLEFFMANN, HANDBUCH FAMILIENRECHT part. H para. 147 (Harald Scholz et al. eds., 26th amendment 2014).

61. BGH, FAMRZ 151, 152 (1982); *id.* at 358, 360 (1984); *id.* at 1532, 1534 (2007); MAURER, *supra* note 29, § 1578 para. 1; BRUDERMÜLLER, *supra* note 23, § 1578 para. 3; KLEFFMANN, *supra* note 60, at part. H para. 144; ULRICH GRABA, § 1578 para. 9 ERMAN BÜRGERLICHES GESETZBUCH HANDKOMMENTAR (Barbara Grunewald et al. eds., 14 ed. 2014).

62. BGH, FAMRZ 151 (1982); *id.* at 1160 (1989); *id.* at 1532 (2007); Oberlandesgericht [OLG] [Higher Regional Court] Düsseldorf, 1418, 1419 (1996);

addition to income from gainful employment,⁶³ capital and investment income is taken into account⁶⁴ as well as the use of real estate as family home.⁶⁵ The amount of spousal support awarded in the individual case is fixed on the basis of the marital standard of living, which is then limited in particular by the extent of the claimant's need (Section 3b) and the debtor's ability to pay (Section 3c).

B. Extent of the claimant's need

The claimant's need that is covered by spousal support equals the difference between full maintenance according to the marital standard of living and his or her own income from appropriate gainful employment.⁶⁶ A divorced spouse may not demand spousal support as long as and to the extent that he or she can maintain himself from this income and his property.⁶⁷ He or she need however not realize his or her assets if this would be uneconomical or, taking into account the financial circumstances of both spouses, inequitable.⁶⁸

In accordance with the principle of personal responsibility after divorce, the claimant has a duty to take up or continue appropriate gainful employment.⁶⁹ Civil Code Section 1574 para. 2 specifies that gainful employment is appropriate if it suits the training, the skills, former employment, the age and the state of health of the divorced spouse, and to the extent that such work would not be inequitable with regard to the standard of living in the marriage.⁷⁰ If necessary in order to be appropriately gainfully employed, the claimant is also under a duty to undertake

KLEFFMANN, *supra* note 60, at part. H para. 144.

63. BGH, FAMRZ 151, 152 (1982); *id.* at 680, 681 (1982); *id.* at 680, 681 (1983).

64. BGH, FAMRZ 146, 149 (1983); *id.* at 1532, 1535 (2007); KG, FAMRZ 386, 387 (1982); BRUDERMÜLLER, *supra* note 23, § 1578, para. 7.

65. BGH, FAMRZ 453 (1985); *id.* at 899, 989 (1990); *id.* at 869 (1995); *id.* at 901 (1998); *id.* at 1159 (2005).

66. See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1573, para. 2.

67. *Id.* § 1577, para. 1.

68. *Id.* § 1577, para. 3.

69. *Id.* § 1574, para. 1.

70. *Id.* § 1574, para. 2.

training, further training or retraining.⁷¹

C. Extent of the debtor's ability to pay

Additionally, the award of maintenance presupposes the debtor's ability to pay. If the debtor is unable to pay maintenance without endangering his own appropriate maintenance, his obligation is limited to the payment of spousal support that is equitable under these circumstances.⁷² In order to determine the equitable extent of the debtor's obligation, the needs, earnings and property situation of the divorced spouses is taken into account as well as other obligations.⁷³ Like the claimant, the debtor does not have to realize basic assets to the extent that the realisation would be uneconomical or, taking into account the financial circumstances of both spouses, inequitable.⁷⁴

The importance of the separate determination of the full amount of maintenance and the debtor's ability to pay has been highlighted by the jurisprudence of the German Federal Constitutional Court. In 2011, it held that the erosion of these two steps in the Federal Supreme Court's jurisprudence surpasses the limits of judicial development of the law.⁷⁵ The stumbling block and cause for the constitutional court's intervention was the Federal Supreme Court's jurisprudence on the calculation of maintenance in cases with more than one ex-spouse entitled to spousal support after divorce. According to that jurisprudence, full maintenance for both ex-spouses of the debtor was calculated by dividing the debtor's relevant resources by three.⁷⁶ With that approach, the lawmakers' system was set aside in favour of a simpler calculation.⁷⁷ The marital standard of life is not affected by the debtor's second marriage, so that full maintenance cannot

71. *Id.* § 1574, para. 3.

72. *Id.* § 1581.

73. *Id.*

74. *Id.*

75. Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], DNOTZ 291 (2011).

76. Bundesgerichtshof [BGH] [Federal Court of Justice], Neue Juristische Wochenschrift [NJW] 3213 (2008).

77. Werner Gutdeutsch, *Anmerkung zu BVerfG: Berechnung des nachehelichen Unterhalts nach Dreiteilungsmethode verfassungswidrig*, DNOTZ 299 (2011).

be determined in consideration of the second ex-spouse's obligation.⁷⁸

D. Methods for Calculation, Appellate Court Guidelines and Tables

The claimant is generally entitled to half of the income defining the marital standard of living⁷⁹ to the extent he or she cannot cover it with appropriate gainful employment⁸⁰ and the debtor is able to pay⁸¹ without endangering his or her own maintenance. Appellate Courts have issued guidelines and tables pertaining to the precise calculation of the amount of maintenance.⁸² The most important table is the one issued by the Appellate Court of Düsseldorf (*Düsseldorfer Tabelle*), which also influences other Appellate Court guidelines.⁸³

For spousal support after divorce, the tables foresee standard rates that depend on whether or not the debtor is gainfully employed.⁸⁴ The guidelines set an incentive to work by foreseeing a bonus for the gainfully employed debtor. According to the Appellate Court of Düsseldorf's table, the maintenance claim of a claimant with no income against a gainfully employed debtor is limited to 3/7 of the debtor's income from that employment plus half of any other income.⁸⁵ Other tables foresee a different bonus. The Southern Appellate Court Guidelines, for example, take 90% of the income generated by gainful employment into account, so that the bonus amounts to 1/10 only.⁸⁶ It is for the trial judge to

78. BVERFG, DNOTZ 291, 296 (2011).

79. See *supra* Section 3(a).

80. See *supra* Section 3(b).

81. See *supra* Section 3(c).

82. E.g., Unterhaltsrechtliche Leitlinien der Familiensenate des Oberlandesgerichts Braunschweig; Leitlinien des Oberlandesgerichts Hamm zum Unterhaltsrecht; Oberlandesgericht Rostock - Unterhaltsrechtliche Leitlinien der Familiensenat; for an overview of different tables and guidelines see BIRGIT NIEPMANN AND WERNER SCHWAMB, DIE RECHTSPRECHUNG ZUR HÖHE DES UNTERHALTS para. 5 *et seq.* (13th ed. 2016).

83. VERSCHRAEGEN, *supra* note 27, § 1578 para. 195.

84. Table of the Appellate Court of Düsseldorf, Justiz-Online (Jan. 1 2018), available at http://www.olg-duesseldorf.nrw.de/infos/Duesseldorfer_Tabelle/Tabelle-2018/index.php.

85. *Id.*

86. Unterhaltsrechtliche Leitlinien der Familiensenate in Süddeutschland (SüdL)

decide which bonus to apply.⁸⁷ The tables and guidelines also define the minimum amount the debtor shall keep for his own subsistence, which is currently set at 1200 EUR a month, notwithstanding gainful employment.⁸⁸ The courts are free to make use of these tables and guidelines as long as they ensure the adequacy in the individual case at hand.⁸⁹

There are different methods of calculating the amount of spousal support. Traditionally, it is determined according to the addition method (*Additionsmethode*⁹⁰) or the balancing method (*Differenzmethode*⁹¹). With the 'addition method,' the starting point for the calculation is the sum of the relevant income of both spouses during marriage. A bonus given to the gainfully employed is factored in. Half of this sum represents the full maintenance of one of the spouses. The claimant's need equals half this sum minus his or her relevant income. With the 'balancing method,' the claimant's relevant income is directly deducted from the debtor's relevant income. Taking into account a possible bonus for gainful employment of 1/7, the spousal support claim equals 3/7 of the difference between the claimant's and the debtor's income. In contrast to the addition method, the maximum amount of maintenance and the claimant's actual need are determined in one step only. This method is applied in simple, straightforward cases.⁹² The choice of the calculating method also depends on the division of roles during marriage. The balancing method is mostly used when both spouses had relevant income during marriage.⁹³ The operations lead to the amount of spousal support the

(Jan. 1 2018), para. 15.2, available at https://www.justiz.bayern.de/media/images/behoerden-und-gerichte/oberlandesgerichte/bamberg/leitlinien_s_ddeutschland_2008.pdf.

87. BGH, NJW 2886, 2888 (1990).

88. *Table of the Appellate Court of Düsseldorf*, *supra* note 84.

89. Bundesgerichtshof [BGH] [Federal Court of Justice], FAMRZ 365, 366 (1982); *id.* at 678 *et seq.* (1983); *id.* at 1492, 1493 (2000).

90. BGH, FAMRZ 539, 541 (1981); *id.* at 36, 39 *et seq.* (1987); *id.* at 806 (1997); *id.* at 986, 988 (2001).

91. *Cf. eg.*, BGH, FAMRZ 626, 693 *et seq.* (1979); *id.* at 539, 541 (1981); *id.* at 908 (1985); *id.* at 703 (1986); *id.* at 437 (1986); *id.* at 36, 40 (1987); *id.* at 1011 (1987); *id.* at 1163 (1991); *cf.* DETHLOFF *supra* note 23, at 201.

92. Peter Gerhardt and Werner Gutdeutsch, *Die Unterhaltsberechnung bei gleich-rangigen Ehegatten nach dem geplanten Recht*, FAMRZ 778, 779 (2007).

93. Kaesling, *supra* note 21, at 97 *et seq.*

claimant can in principle ask for. However, this amount can be reduced or limited in time if equity calls for it.

IV. REDUCTION AND LIMITATION OF SPOUSAL SUPPORT CLAIMS

Spousal support claims can be reduced or limited in time on grounds of equity under Civil Code Section 1578b (Section 4 a). They can also be restricted or refused on grounds of gross inequity according to Civil Code Section 1579 (Section 4 b).

A. *Reduction and Limitation in Time on Grounds of Inequity*

German law has substantially limited maintenance claims after divorce with the 2007 reform. Since that time, all maintenance claims can be reduced and/or limited in time on grounds of inequity.⁹⁴ Marriage no longer fulfils the same social security functions for housewives that it did in the second half of the 20th century.⁹⁵ The breadwinner model and the number of one income-families are on the decline;⁹⁶ in most marriages, both spouses contribute to the household's income.⁹⁷ Against that background, spouses are not guaranteed to maintain their standard of living after divorce via spousal support.⁹⁸

A similar reform was already proposed in West Germany⁹⁹ in the 1970s, but faced vigorous criticism from both conservative and

94. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1578b.

95. See Albrecht Dieckmann, *Die Unterhaltsansprüche geschiedener und getrennt-lebender Ehegatten nach dem 1. EheRG vom 14. Juni 1976*, FAMRZ 81 (1977). See also Albrecht Dieckmann, *Rückkehr zum Verschuldensprinzip im nahehehlichen Unterhaltsrecht*, FAMRZ 946, 949 (1984).

96. Kaesling, *supra* note 21, at 201 *et seq.*

97. Vgl. Klenner, *Wer «ernährt» wen? Auf der Suche nach einem neuen Leitbild*, WSI Mitteilungen 3/2013, 210 f; vgl. auch DGB/BMFSFJ, DGB Projekt "Familienernährerinnen": Was nun? Wenn Frauen die Familie ernähren, Berlin 2014.

98. Bundesgerichtshof [BGH] [Federal Court of Justice], Neue Juristische Wochenschrift [NJW] 2254, 2256 (2001) (citing to BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], §§ 1573 para. 1, 1578 para. 1); see also Ulrich Graba, *Auf dem Weg zu einem Ehegattenunterhalt nach Billigkeit*, FAMRZ 1217 (2008); PETER GERHARDT, DAS UNTERHALTSRECHT IN DER FAMILIENRECHTLICHEN PRAXIS § 4 para. 410 (Hans-Joachim Dose ed., 9th ed. 2015); BRUDERMÜLLER, *supra* note 23, § 1569 para. 3.

99. In the German Democratic Republic, spousal support after divorce was generally limited to two years following the divorce under Family Code of the German Democratic Republic Section 29.

women's activist groups.¹⁰⁰ Their common point of criticism was that women could not be expected to suddenly provide for themselves in light of the recent social and legal framework. Only with the 1986 reform, the possibility of limiting spousal support after divorce was introduced in cases of maintenance for unemployment and topping-off maintenance.¹⁰¹ The lawmakers were clear, however, about the limited scope of application of the new provision. It was only to be applied as an exception¹⁰² and primarily to spouses without children and short marriages.¹⁰³ Reduction and limitation in time according to Civil Code Section 1578b is no longer confined to specific spousal support claims, but is generally applicable to all sets of circumstances.

Civil Code Section 1578b para. 1 foresees the reduction of the amount of maintenance to the "reasonable necessities of life" rather than all necessities of life.¹⁰⁴ The reduction is to be effectuated where spousal support in accordance with the marital standard of living would be inequitable.¹⁰⁵ When determining the equitability of a reduction, three elements have to be primarily taken into account according to Civil Code Section 1578b: the concerns of a common child of the spouses entrusted to the claimant, economic disadvantages linked to the marriage and the duration of the marriage.¹⁰⁶ In addition to those factors specifically named in the provision, all factors that can lead to a maintenance claim being unreasonable are to be taken into

100. Sabine Berghahn and Maria Wersig, *Wer zahlt den Preis für die Überwindung der «Hausfrauenehe»?*, FPR 508, 510 (2005); CHRISTL WICKERT, *Gleichberechtigung und finanzielle Unabhängigkeit – Historische Kämpfe um rechtliche Voraussetzungen für eine eigenständige Existenzsicherung für Frauen auch in der Ehe*, in UNTERHALT UND EXISTENZSICHERUNG RECHT UND WIRKLICHKEIT IN DEUTSCHLAND 169, 180 (Sabine Berghahn ed., 2007).

101. Gesetz zur Änderung unterhaltsrechtlicher, verfahrensrechtlicher und anderer Vorschriften [UändG] [Law amending maintenance law, procedural law and other provisions], Jan. 4 1986, BGBl II at 301.

102. Cf. German Bundestag: Drucksache [BT] 10/4514, <http://dipbt.bundestag.de/doc/btd/10/045/1004514.pdf>.

103. BT 10/2888, <http://dipbt.bundestag.de/doc/btd/10/028/1002888.pdf>.

104. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1578b. para. 1.

105. *Id.*

106. *Id.* § 1587b. para. 1, sentence 1, 2.

account.¹⁰⁷ The family law court has to carry out an overall assessment of all circumstances of the individual case at hand.¹⁰⁸ This means specifically that the court has to study and reflect on all evidence before it.¹⁰⁹ Personal marital fault of the concerned has no bearing on the reduction and limitation in time according to Civil Code Section 1578b, as it is consequential only in the framework of the restriction or refusal of maintenance for gross inequity under Civil Code Section 1579.¹¹⁰

Insofar as disadvantages have occurred with regard to the possibility of taking care of one's own maintenance as a result of the marriage, a reduction of the maintenance claim is considered unfair. Such disadvantages are specified in Civil Code Section 1578b as resulting above all from the duration of the care or upbringing of a child of the spouses, as well as from the organisation of household management and gainful employment during the marriage.¹¹¹ It is the legislature's declared intention that the claimant is being compensated for these disadvantages.¹¹² Comparable disadvantages the debtor incurred do not factor into the determination of the spousal support award.

The trial judge has to make a predictive decision as to how long and in how far the claimant's disadvantages will subsist.¹¹³ In order to measure the economic disadvantages, the claimant's hypothetical income potential without the disadvantages stemming primarily from the marriage is compared to his or her actual income potential.¹¹⁴ In some cases, especially claimants in public service with fairly regular promotion opportunities and

107. See BGB, § 1578b, para. 1, sentence 3 (explaining that disadvantages may result from the duration of the care or upbringing of the spouses' child, as well as from the organization of household management and gainful employment during the marriage).

108. Bundesgerichtshof [BGH] [Federal Court of Justice], *Neue Juristische Wochenschrift* [NJW] 1598 para. 25 (2010); *id.* at 2056 para. 44 (2010); *id.* at 1356 para. 43 (2012).

109. BGH, NJW 1598 para. 37 (2010); *id.* at 1285 para. 14 (2011); *id.* at 2434 para. 25 (2013).

110. BGH, NJW 1761 (1987); Oberlandesgericht [OLG] [Higher Regional Court] Karlsruhe, FAMRZ 2206 (2008).

111. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1578b, para. 1, sentence 3.

112. German Bundestag: Drucksache [BT] 16/1830, <http://dipbt.bundestag.de/doc/btd/16/018/1601830.pdf> (Ger.), p. 18.

113. Kaesling, *supra* note 21, at 133 *et seq.*; OLG Brandenburg, FAMRZ 1947 (2008).

114. BGH, FAMRZ 2104, 2108 (2008); *id.* at 1637 (2010); *id.* at 192, 195 (2011).

foreseeable career paths, the hypothetical income can be identified fairly easily.¹¹⁵ In other cases however, prophetic qualities are needed to retrace the hypothetical occupational developments. Difficulties arise especially when the spouses married young, in particular before completing their vocational training,¹¹⁶ and with freelance careers.¹¹⁷

According to Civil Code Section 1578b para. 1 sentence 1, consideration is also to be given to the duration of the marriage when deciding about reduction and limitation in time on grounds of inequity.¹¹⁸ The duration of marriage had already been taken into account when deciding about a limitation of spousal support under the previous provision and since the introduction of Civil Code Section 1578b.¹¹⁹ Nonetheless, the German lawmakers expressly inserted that criterion to the wording of Civil Code Section 1578b in 2012. The legislature's explanatory memorandum notes that this insertion serves the purpose of clarification.¹²⁰ It was certainly also a political signal for the protection of long-lasting marriages spouses entered into long before the 2007 reform.¹²¹

In that context, a long duration of the marriage supports a claim to full maintenance, as economic ties between the spouses

115. Marina Wellenhofer, *Zur aktuellen Entwicklung des Ehegattenunterhaltsrechts*, FamRZ, 685, 689 (2011).

116. Cf. Oberlandesgericht [OLG] [Higher Regional Court] Hamm, judgement of 18. December 2009 – 13 UF 272/07- juris database, para. 169.

117. VERSCHRAEGEN, *supra* note 27, § 1578b para. 33; Fritz Finke, *Anmerkung zu BGH, Urteil 24.03.2010, XII ZR 175/08*, FamRZ 878 *et seq.* (2010); Wellenhofer, *supra* note 118, 685, 689.

118. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1578b. para. 1, sentence 1.

119. OLG Hamm, FamRZ 908 (1986) (restriction legitimate in case of a duration of marriage under 10 years); OLG Hamm, FamRZ 707 (1987) (limitation in case of a duration of marriage under 4 years); OLG Koblenz, FamRZ 160 (1987) (limitation in case of a duration of marriage under 6 years); OLG Celle, FamRZ 69 (1987); OLG Hamburg, FamRZ 1250 (1987); BGH, FamRZ 307, 310 (1991) (26 years of marriage); *id.* at 691, 693 (1987) (32 years of marriage); *id.* at 265, 266 (1988) (27 years of marriage); *id.* at 1405, 1406 (1995) (36 years of marriage; however the crucial factor was the existence of seven mutual children).

120. German Bundestag: Drucksache [BT] 17/11885, <http://dipbt.bundestag.de/doc/btd/17/118/1711885.pdf>.

121. KAESLING, *supra* note 21, at 189 *et seq.*

are strengthened over time.¹²² It is for the trial judge to assess whether the particular marriage is to be considered as long.¹²³ Premarital life together, including cohabitation, is not considered; it is the legal bond of marriage between the spouses that is relevant in the context of the protection of legitimate expectations. Generally, a marriage of less than 15 years will not be regarded as long.¹²⁴ A marriage of 15 or 20 years may be considered long, which does not necessarily exclude a reduction or limitation in time.¹²⁵ After all, an overall assessment in the individual case at hand has to be carried out. While long marriages generally lead to unlimited and thus higher spousal support awards, a short duration of the marriage may constitute one of the cases of refusal, restriction and limitation for gross inequity under Civil Code Section 1579.¹²⁶

B. Refusal, Restriction and Limitation in Time for Gross Inequity

Under Civil Code Section 1579, a spousal support claim shall be refused, reduced or restricted in time in cases of gross inequity. There are seven cases of inequity enumerated in that provision, which lead to a total or partial loss of maintenance, namely: 1) a short duration of the marriage; 2) whether the claimant lives in a stable long-term relationship; 3) whether the claimant committed a major criminal offence or a serious intentional minor offence against the debtor or against a close relative of his/her; 4) whether the person entitled frivolously induced his own need; 5) whether

122. BGH, NJW 1530, 1533 (2013); ECKART HAMMERMAN, FAMILIENRECHT-SCHIEDUNG, UNTERHALT, VERFAHREN §1578b para. 34 (Dieter Henrich ed., 6th ed. 2015); Tanja Langheim, *Befristung und Herabsetzung von Unterhaltsansprüchen nach § 1578b BGB*, FAMRZ 409, 415 (2010).

123. GISELA KÜHNER, HANDBUCH FAMILIENRECHT part. H para. 226 (Harald Scholz et al. eds., amendment 26 2014); Rainer Kemper, *Besserer Schutz der langjährig verheiratet gewesenen Ehegatten – Änderungen bei der Herabsetzung und Befristung von nahehehlichen Unterhaltsansprüchen*, FAMRB 19, 21 (2013) (promoting a very narrow interpretation for cases with a duration of marriage of 15 or even 20 years).

124. Cf. Rainer Kemper, *Besserer Schutz der langjährig verheiratet gewesenen Ehegatten – Änderungen bei der Herabsetzung und Befristung von nahehehlichen Unterhaltsansprüchen*, FAMRB 19, 21 (2013).

125. BGH, FAMRZ 1006, 1007 (2006); *id.* 2049 *et seq.* (2007).

126. BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], § 1579.

the claimant frivolously disregarded serious property interests of the person obliged; 6) whether the claimant grossly violated his duty to contribute to the family maintenance before the separation; and 7) whether the claimant showed manifestly serious misconduct towards the debtor.¹²⁷ Under Civil Code Section 1579 no. 8, other reasons can also lead to a refusal, restriction, or limitation in time, provided they are just as serious as the reasons set out in nos. 1 to 7.¹²⁸ With all reasons, the concerns of a child of the spouses entrusted to the potential claimant have to be taken into consideration.

To decide whether a marriage is short within the meaning of Civil Code Section 1579 no.1, the period between marriage and the formal initiation of divorce proceedings counts.¹²⁹ While there are no universally applicable standards, a marriage is generally considered short if it lasted two years or less and no longer short if the couple divorced after three years or more of marriage.¹³⁰

Under Civil Code Section 1579 no.2, a claimant's stable long-term relationship can lead to a loss of postmarital spousal support.¹³¹ This is not a sanction of the claimant's behaviour.¹³² With the commitment to a new partnership, the claimant foregoes the bond of postmarital solidarity, making a continued spousal support claim unreasonable.¹³³ It is irrelevant whether the new partner is actually capable or willing to provide for the claimant.¹³⁴ The stability of the new relationship is determined with regard to a number of criteria, notably a common household, the couple's appearance in public and the duration of their relationship.¹³⁵ In the jurisprudence, a relationship is generally considered stable if it has lasted longer than two or three years.¹³⁶

127. *Id.*

128. *Id.* § 1579, para. 8.

129. BGH, FamRZ 699, 704 (2012); *id.* 772, 775 (2012).

130. BGH, FamRZ 483 (1989); BGH, NJW 1630, 1631(1999); BGH, FamRZ 791, 794 (2011).

131. BGB, § 1579, para. 2.

132. BGH, FamRZ 1854 (2011).

133. *Id.*

134. *Id.*

135. BRUDERMÜLLER, *supra* note 23, § 1579 para. 11 *et seq.*

136. *Cf.* Oberlandesgericht [OLG] [Higher Regional Court] Karlsruhe, NJW 860,

As the individual circumstances of each case are decisive, a longer period can be required if there is no common household¹³⁷ and a shorter relationship can suffice if the stability is strongly demonstrated by other factors such as the acquisition of a family home together or the birth of a common child.¹³⁸ The trial court will weigh the factors in the particular case at hand.¹³⁹

Of particular interest within the system of German divorce law is Civil Code Section 1579 no.7, according to which the spousal support claim can be affected if the person entitled is clearly responsible for manifestly serious misconduct towards the person obliged.¹⁴⁰ The notion of serious misconduct has been interpreted to encompass violations of marital duties such as the duty to conjugal fidelity or conjugal community.¹⁴¹ A recent example for misconduct rendering full spousal support unreasonable is the failure of a wife to inform her husband about the possibility of another man's paternity of a child born during the marriage.¹⁴² Intimate relations with a third person can be,¹⁴³ but are not necessarily qualified as, serious misconduct. If the marriage was already irretrievably broken down when the extramarital relationship started, there is no one-sided objectionable misconduct as Civil Code Section 1579 no. 7 presupposes.¹⁴⁴ Even though the grounds for divorce are independent of marital fault, questions of responsibility for failure to fulfil marital duties resurface in the context of spousal support.

V. MODALITIES OF SPOUSAL SUPPORT

In principle, postmarital spousal support is to be paid in periodic payments each month in advance under Civil Code

862 (2009).

137. BGH, FAMRZ 1498, 1501 (2011).

138. *Id.* 810 (2002); *id.* 1201, 1204 (2012); OLG Koblenz, FAMRZ 1938, 1939 (2016).

139. VERSCHRAEGEN, *supra* note 27, § 1579 para. 33.

140. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1579, para. 7.

141. BGH, FAMRZ 492, 495 (1990); Bea Verschraegen, FPR 328 *et seq.* (2005). *But see* Marina Wellenhofer-Klein, FPR 163, 165 (2003).

142. BGH, NJW 1443, 1444 (2012); OLG Hamm, FAMRZ 2067 (2015).

143. BGH, NJW 722 (1986); OLG Koblenz, FAMRZ 290 (2000).

144. BGH, FAMRZ 40 (1980); BGH, NJW 1083 (1989).

Section 1585 para 1.¹⁴⁵ In exceptional cases a lump sum can be awarded on the claimant's request according to the same provision.¹⁴⁶ The debtor on the other hand may not opt for a lump sum payment,¹⁴⁷ nor can the court order the payment of such a lump sum without the claimant's request.

In addition to the claimant's demand, there must be a compelling reason for the award of a lump sum and the person obliged must not be inequitably burdened by it.¹⁴⁸ The most common examples for a compelling reason are the establishment of a new business and plans to emigrate.¹⁴⁹ Criteria for the determination of the amount awarded are the claimant's life expectancy and the foreseeable development of the claimant's need and the debtor's ability to pay.¹⁵⁰ The spousal support obligation has to be fulfilled in money; neither party has the right to demand a substitution, such the transfer of property or usufruct.¹⁵¹ The practical relevance of the lump sum option is negligible.¹⁵² However, if the spouses agree, they can modify the modalities of spousal support in a maintenance arrangement and also include a settlement of the spousal support obligation by other means.¹⁵³

VI. MODIFICATION AND TERMINATION OF THE SPOUSAL SUPPORT AWARD

Following the award of spousal support, circumstances frequently change. The ex-spouses embark on new careers,

145. BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], § 1585, para. 1, sentence 1.

146. *Id.* § 1585, para. 2, sentence 1.

147. BGH, NJW 2105, 2106 (1993); HAMMERMANN, *supra* note 125, §1585 para. 10.

148. BGB, § 1585, para. 2, sentence 1.

149. MAURER, *supra* note 29, § 1585 para. 52; HAMMERMANN, *supra* note 125, §1585 para. 12; BRUDERMÜLLER, *supra* note 23, § 1585 para. 5 *et seq.*; BEA VERSCHRAEGEN, *supra* note 27, § 1585 para. 17.

150. MAURER, *supra* note 29, § 1578 para. 60 *et seq.*

151. *Id.* at para. 11 *et seq.*

152. DETHLOFF *supra* note 23, at 216; HAMMERMANN, *supra* note 125, §15785 para. 15.

153. Sebastian Herrler, *Verstärkende Unterhaltsvereinbarungen nach der Reform und deren Bestandskraft bei Änderung der wirtschaftlichen Rahmenbedingungen*, FPR 506, 509 *et seq.* (2009).

expand their professional activities, retire or become unemployment. Both the debtor's and the claimant's relevant income can thus be subject to changes so that the question arises: which developments affect the spousal support awarded?

The subsequent modification of the spousal support awarded principally depends on its modalities. If the spousal support is to be paid in monthly periodical payments, it is to be adjusted to relevant changed circumstances (Section 6a). Changes in relevant income can affect the debtor's ability to pay, the claimant's need and in some instances also the maximum amount of full maintenance according to the marital standard of living. On the other hand, the award of a lump sum is generally final; later developments do not affect the award (Section 6b).

A. Modification of Periodic Payments

A modification of periodic payments can be required when the debtor's income increases (Section 6 a (1)) or decreases (Section 6 a (2)), when the claimant's income changes (Section 6 a (3)) and finally when grounds for termination occur (Section 6 a (4)).

1. Increase of the Debtor's Income since Divorce

When determining the amount of spousal support, the full amount of maintenance is determined in consideration of the *marital* standard of living.¹⁵⁴ In principle, developments after divorce therefore cannot influence the full amount of maintenance. However, an increase in the debtor's income is taken into account if the basis for that increase already existed during marriage and there was such a high probability it would realize in the future that the spouses already anticipated that increase during their marital life.¹⁵⁵ Such increases have been found with regular promotions in public service,¹⁵⁶ military careers,¹⁵⁷ as well as with the promotion from assistant physician

154. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1578, para. 1.

155. Bundesgerichtshof [BGH] [Federal Court of Justice], *Neue Juristische Wochenschrift* [NJW] 1555, 1557 (1987).

156. BGH, FAMRZ 684 (1982) (discussing promotion in the public service). *See also* BGH, FAMRZ 411, 415 (2009).

157. BGH, FAMRZ 684 (1982).

to senior physician¹⁵⁸ and from sales representative to regional sales manager.¹⁵⁹ The promotion of a small firm's sales manager to senior manager of a multinational enterprise was however seen as surpassing reasonable expectations in the framework of a normal development.¹⁶⁰ Such unexpected developments do not influence the marital standard of living within the meaning of Civil Code Section 1578 and are therefore not able to affect the maximum amount of spousal support. A considerable increase of the debtor's income is taken as indication for an unexpected development.¹⁶¹ Other indications are a change of the professional field of activity or function, for example when an employed engineer becomes a managing director of an enterprise.¹⁶²

2. Decrease of the Debtor's Income

A decrease of the debtor's income is taken into account when determining the amount of spousal support, as long as the debtor does not violate its obligation to work¹⁶³ or frivolously causes the decrease in income.¹⁶⁴ The decrease of the debtor's income then represents nothing more than the realization of an ordinary risk of life, which the claimant would also have had to face had the marriage lasted.¹⁶⁵ According to these principles, the amount of spousal support is reduced when the debtor retires, while this may not be the case when the debtor voluntarily reduces his working hours as part of a pre-retirement plan.¹⁶⁶ If the debtor

158. *Id.* at 145 (1988).

159. BGH, NJW 3140 (2000).

160. Oberlandesgericht [OLG] [Higher Regional Court] Hamm, FAMRZ 515 (1994).

161. BGH, FAMRZ 576 (1982) (illustrating an increase of monthly income from under 1000 Deutsche Mark to more than 10.000 Deutsche Mark due to increased work input in individual's own company). *See also* OLG Köln, FAMRZ 1114 (2004) (demonstrating an increase of income by 20% due to a new job position). *But see* OLG Celle, FAMRZ 704 (2006) (showing a salary increase of 300% but career promotion declined).

162. BGH, NJW 2886 (1990) (showing the transition from the position of an employed Ingenieur to the Managing Director of an LLC).

163. BGH, FAMRZ 590, 591 *et seq.* (2003).

164. *Cf.* BGH, FAMRZ 590, 591 (2003); *id.* at 1045, 1047 (1992); *id.* at 281, 284 (2012).

165. BGH, FAMRZ 968 (2008); *id.* at 111, 114 (2010); *id.* at 281, 284 (2012); Monica Clausius, *Das Ende des Karrieresprungs?*, FF 131, 134 (2007).

166. HAMMERMAN, *supra* note 125, §1578 para. 26; NICOLE SIEBERT, *DAS UNTERHALTSRECHT IN DER FAMILIENRECHTLICHEN PRAXIS* § 4 para. 568 (Hans-Joachim Dose ed., 9th ed. 2015).

does not fulfill his duty to work to a reasonable extent,¹⁶⁷ fictitious income is added to the actual income in order to determine the just amount of spousal support.¹⁶⁸

A decrease of the debtor's income can also influence his ability to pay, which is considered only in a second step after the amount of maintenance has been determined. The operation of adding fictitious income if the debtor does not comply with reasonable working obligations is the same when determining the debtor's capacity to pay. The debtor is treated as if he earned as much as he would with a reasonable type and extent of work.¹⁶⁹

3. Changes in the Claimant's relevant income and resources

In principle, the claimant can only ask for the difference between the amount of maintenance according to the marital standard of living and his or her own income from reasonable working activity. It is only insofar as the claimant is in need. The postmarital spousal support awarded will be adjusted if the need changes, most notably following a change of income from appropriate gainful employment.¹⁷⁰

However, there is also an extraordinary case in which a postmarital increase of the claimant's income can influence the marital standard of living and thus the full amount of maintenance. This is due to the fact that the determination of the marital standard of living is especially challenging when one of the spouses applied himself to family work during marriage and only takes up gainful employment after divorce. In that situation, the Federal Supreme Court exceptionally takes postmarital income into account when determining the marital standard of living.¹⁷¹ The family work done during marriage is factored in

167. BGH, FamRZ 1304, 1306 (1993).

168. *Id.* 683, 684 (2006); *id.* at 1040, 1044 (2012); MAURER, *supra* note 29, § 1578 para. 548; HAMMERMANN, *supra* note 125, §1578 para. 26.

169. MAURER, *supra* note 29, § 1578 para. 548; BGH, FamRZ 1304, 1306 (1993).

170. Dieter Martiny & Dieter Schwab, *Grounds for Divorce and Maintenance Between Former Spouses*, <http://ceflonline.net/wp-content/uploads/Germany-Divorce.pdf>.

171. BGH, NJW 2254, 2258 (2001); BGH, FamRZ 88, 90 (2002); BGH, NJW 2190 (2012).

with the amount of postmarital income.¹⁷² This jurisprudence aims at the protection of housewives and househusbands.¹⁷³ It is seen as unjust that the postmarital income of these spouses is fully taken into account when determining their need. Instead, the subsequent gainful employment is considered to be the surrogate for the former family work during marriage, which undoubtedly also positively affected the standard of living. Postmarital income of housewives and house-husbands therefore does not reduce their maintenance claim, but actually inflates the full maintenance according to Civil Code Section 1578.

This jurisprudence has rightly caused criticism.¹⁷⁴ In an attempt to value family work, the Federal Supreme Court attributes a random economic value to the performed family work.¹⁷⁵ As the postmarital income is equated with the economic value for the family work during marriage, a dentist's housework and child care is worth a lot more than a bartender's. The jurisprudence favours women, as they take on family work far more frequently than men. It is based upon the assumption that a woman's income potential is generally inferior to that of her husband. This neglects that women of all income levels restrict their commitment to their careers precisely because of traditional gendered roles in marriage and family.¹⁷⁶ While women generally no longer give up their careers when entering marriage, differences in occupational biographies of men and women come with the birth of children.¹⁷⁷

172. BGH, NJW 2254, 2258 (2001); Martiny & Schwab, *supra* note 173.

173. BGH, NJW 2254, 2258 (2001). *See also* Helmut Borth, *Die ehelichen Lebensverhältnisse nach BGB § 1578*, FAMRZ 193, 200 *et seq.* (2001); Helmut Büttner, *Kinderbetreuung und Abzugsmethode*, FAMRZ 893, 896 (1999); Ulrich Graba, *Zum Unterhalt der Hausfrau nach den ehelichen Lebensverhältnissen*, FAMRZ 1115, 1119 (1999).

174. Karlheinz Muscheler, *Anmerkung - Zur Gleichwertigkeit von Familienarbeit und Erwerbsarbeit bei der Bemessung nachehelichen Unterhalt*, JZ 661 *et seq.* (2002); Thomas Rauscher, *Surrogatsthese contra ökonomische Logik*, FF 135 *et seq.* (2005); Graba, *supra* note 176, 1115 *et seq.*

175. Kaesling, *supra* note 21, at 237; Thomas Rauscher, *supra* note 177 (referring to these numbers as "wrong numbers").

176. Kaesling, *supra* note 21, at 237.

177. Sarah Kersten, *Kinderreichtum dank Geschlechtergleichheit? Ein Vergleich von Deutschland und Frankreich*, 9 NEWSLETTER LEHRSTUHL SOZIOLOGIE, SOZIALPOLITIK UND SOZIALARBEIT 19 *et seq.* (2011).

In addition, there is already an incentive for housewives and –husbands to expand their professional activities, as the income during the separation time preceding the divorce will still affect the marital standard of living and thus the full amount of maintenance.¹⁷⁸ Within the new system after the introduction of Civil Code Section 1578b, housewives and husbands are already especially protected, as economic disadvantages flowing from that division of roles are to be compensated and speak against a limitation of spousal support.¹⁷⁹

4. Termination of the Award

The spousal support claim finds its end with the change of circumstances resulting in the discontinuation of need or ability to pay, with the occurrence of gross inequity and with the passage of time in cases of a temporal limitation.¹⁸⁰ The claimant's stable de facto relationship can in particular lead to a gross inequity. The claim also expires in case of remarriage or the establishment of a civil partnership¹⁸¹ and in case of the claimant's death.¹⁸² Claims for performance or damages for non-performance for the past are not affected.¹⁸³ The monthly payment is due at the time of the remarriage, the establishment of a civil partnership or the death still has to be paid; the person obliged owes the full monthly amount even if the maintenance claim expires in the course of the month as a result of remarriage or death of the person entitled.¹⁸⁴

The spousal support claim may experience a revival. If the ex-spouse's new marriage or civil partnership is dissolved, he or she can demand spousal support to care for a child from the first marriage or civil partnership.¹⁸⁵ Other than that, the second

178. Kaesling, *supra* note 21, at 238.

179. *Id.* at 239 *et seq.*

180. See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1579.

181. Since October 2017, marriage is available to same sex couples as well; since then, German law no longer provides for the possibility to enter a registered life partnership.

182. BGB, § 1586 para. 1

183. *Id.* § 1586 para. 2.

184. *Id.* §§1585, 1586 para. 2.

185. *Id.* §1586(a) para. 1.

ex-spouse is liable before the spouse of the marriage dissolved earlier.¹⁸⁶ On death of the debtor, the postmarital spousal support obligation is not extinguished. Instead, it passes to the heir as a liability of the estate.¹⁸⁷ The heir's liability is however limited to the sum corresponding to the compulsory portion of the inheritance, had the marriage not been divorced.¹⁸⁸

5. In Practice: Adjusting the Periodical Payments Awarded

The spouses not only have an obligation to foreclose information relevant to the determination of the just amount of spousal support when it is first awarded, but also in case of subsequent significant changes of these circumstances.¹⁸⁹ Under the principle of good faith (*Treu und Glauben*, Civil Code Section 242) the spouses have to offer information on such changes without being solicited.¹⁹⁰ Non-disclosure in bad faith can lead to an obligation to pay damages.¹⁹¹

Following a judicial award of spousal maintenance, the decision can be adjusted to changes in circumstances under Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction Section 238. The adjustment request is admissible if the applicant presents facts that substantiate a significant change in the factual or legal circumstances the judicial decision was based on.¹⁹² The court will then examine whether such changes occurred.¹⁹³ If that is the case, the judicial award will be adjusted to the new circumstances while preserving the original decision's foundation.¹⁹⁴ Whether a change is considered significant is decided on a case-by-case

186. *Id.* §1586(a) para. 2.

187. *Id.* §1586(b) para. 1.

188. *Id.*

189. DETHLOFF *supra* note 23, at 217; BGB §§1580, 1605.

190. BGH, NJW 2047 (1986); DETHLOFF *supra* note 23, at 217.

191. BGH, FamRZ 1186 (1993); Oberlandesgericht [OLG] [Higher Regional Court] Bamberg FamRZ 1178 (1994).

192. Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit [FamFG] [Act on Proceedings in Family Matters and in Matters of Noncontentious Jurisdiction], § 238.

193. JULIA PASCHE, MÜNCHENER KOMMENTAR ZUM FAMFG § 238 para. 4 (Thomas Rauscher ed., 2nd ed. 2013).

194. FamFG, §238, para. 4.

basis. Changes affecting 10% of the spousal support awarded are generally substantial ones.¹⁹⁵ The request to adjust the spousal support award can only be based on changes that occurred after the last proceedings of fact before the court.¹⁹⁶ As a result, procedural economy is served.¹⁹⁷ Other than that, requests to adapt the periodical payments of spousal support awarded remain constantly possible. As such, spousal support creates a long-lasting bond surpassing divorce between the spouses.

6. Modification of the Lump Sum Award

The amount of a lump sum payment is determined in consideration not only of the relevant circumstances at the time of the judicial decision, but also of relevant foreseeable future developments.¹⁹⁸ Even if the spousal support awarded becomes grossly inequitable, or another reason for termination, such as remarriage or death of the person entitled occurs, the spousal support claim subsists.¹⁹⁹ The claimant who opted to request a lump sum instead of monthly payments took the risk that the amount awarded was based in part on estimations and prognoses.²⁰⁰ He or she knowingly gave the options for adjustment up.²⁰¹ Once the lump sum is awarded, the debtor can count on fulfilling his duty by paying the lump sum set.²⁰² There is thus no substantive law provision nor procedural law mechanism allowing for a modification. Only in exceptional cases of fraudulent attainment of the award, for example by making false pretenses about the compelling reason to award a lump sum payment instead of the regular monthly ones, the disadvantaged

195. DIETRICH SCHMITZ, DAS UNTERHALTSRECHT IN DER FAMILIENRECHTLICHEN PRAXIS § 10 para. 196 (Hans-Joachim Dose ed., 9th ed. 2015); PASCHE, *supra* note 196 § 238 para. 69.

196. FAMFG, § 238 para. 2.

197. SARAH EICKELMANN, GESETZ ÜBER DAS VERFAHREN IN FAMILIENSACHEN UND IN DEN ANGELEGENHEITEN DER FREIWILLIGEN GERICHTSBARKEIT § 238 para. 97 (Martin Haußleiter ed., 2nd ed. 2017). Regarding § 323 II ZPO *see* Bundesgerichtshof [BGH] [Federal Court of Justice], Neue Juristische Wochenschrift [NJW] 161, 162 (1998).

198. *See* BGH, NJW 818, 820 (1981); *id.* at 3282-83 (2005).

199. *See id.* 3282 (2005); JULIA PASCHE, *supra* note 196 § 238 para. 13.

200. BGH, NJW 818, 820 (1981); *id.* at 3282-83 (2005).

201. *Id.* at 3282-83 (2005).

202. *Id.*

party has a claim for damages under Civil Code Section 826²⁰³ for intentional damage contrary to public policy.²⁰⁴ It goes without saying that the spouses can however contract on the modification of spousal support awarded. Postmarital spousal support in form of a lump sum stems much more often from consensual arrangements between spouses than from judicial decisions.

7. (Prenuptial) Agreements

Spouses can enter into agreements on postmarital spousal support before marriage, during marriage and in the course of divorce and maintenance proceedings. Oftentimes, spouses think ahead and want to regulate future consequences of divorce before entering into marriage. An agreement that is entered into before the divorce becomes final must be recorded by a notary public or in matrimonial proceedings before the trial court.²⁰⁵

Under a prenuptial agreement, spousal support claims after divorce may be waived for the future.²⁰⁶ However, the spouses' freedom of contract is considerably restricted in two respects. First, there are limits to the extent to which a waiver is valid. An agreement contradicting good morals according to Civil Code Section 138 is void.²⁰⁷ There is thus a judicial review of the agreement's content at the time of the agreement's conclusion. Second, spouses cannot rely on an agreement if its implementation would be considered bad faith within the meaning of Civil Code Section 242 in light of the circumstances at the time of the invocation of the agreement.²⁰⁸ Both limits have been developed by the jurisprudence of the Federal Supreme Court on the basis of the general provisions on good morals (Civil Code Section 138) and good faith (Civil Code Section 242) over the

203. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 826 (describing that a person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage).

204. MAURER, *supra* note 29 § 1578 para. 62.

205. BGB, §§ 127a, 1585c.

206. *Id.* § 1585c.

207. *Id.* § 138.

208. Bundesgerichtshof [BGH] [Federal Court of Justice], Neue Juristische Wochenschrift [NJW] 930, 933 (2004); *id.* at 1359, 1361 (2013).

course of the last fourteen years²⁰⁹ following the landmark decision of 2004,²¹⁰ in which the jurisprudence turned away from a far-reaching contractual freedom for prenuptial agreements.

a. Ranking of consequences of divorce

Both with regard to good morals and bad faith, the extent to which postmarital rights can be waived depends on the relevance of those rights for the entitled party. With regard to that criterion, the jurisprudence has developed a priority ranking of the legal consequences of divorce. Generally, maintenance claims rank higher than claims to the distribution of goods or the equalization of pension rights.²¹¹ In the area of spousal support, the jurisprudence distinguishes between the different set of circumstances in which spousal support is awarded. Maintenance to care for a child has the highest priority, followed by maintenance in case of unemployment, maintenance by reason of old age and maintenance for illness or infirmity.²¹² Subordinated to those are maintenance for professional training and topping-up maintenance.²¹³ The higher the maintenance claim ranks within that system, the more likely it is that a waiver will not pass judicial review under Civil Code Section 138 or 242.²¹⁴

b. Invalidity of an Agreement for Violation of Moral Principles

The invalidity of an agreement under Civil Code Section 138 presupposes the violation of moral principles. Courts carry out a general assessment of the circumstances of the individual case at hand in order to determine whether an agreement waiving

209. See BGH, FAMRZ 26 (2005); *id.* at 1097 (2006); *id.* at 197 (2007); *id.* at 386 (2008); *id.* at 198 (2009); *id.* at 195 (2013); *id.* at 884 (2017).

210. *id.* at 601 (2004) (with remarks by Helmut Borth); Barbara Dauner-Lieb, FF 65 *et seq.* (2004) (providing detailed analysis); Herbert Grziwotz, FAMRB 199 *et seq.*, 239 *et seq.* (2004); Meo-Micaela Hahne, DNOTZ 84 *et seq.* (2004); Jörg Mayer, FPR 363 *et seq.* (2004); Christof Münch, FAMRZ 570 *et seq.* (2005); Ingeborg Rakete-Dombek, NJW 1273 *et seq.* (2004).

211. DETHLOFF *supra* note 23, at 109.

212. BRUDERMÜLLER, *supra* note 23, § 1408 para. 10 *et seq.*

213. See DETHLOFF *supra* note 23, at 109.

214. *Id.* at 108.

spousal support is in contradiction of these moral principles.²¹⁵ To that end, objective and subjective elements are taken into account. These include the spouses' income levels and financial situation, their organization of marital life, and consequences for the spouses as well as potential children.²¹⁶ As subjective elements, the spouses' motivations and objectives pursued with their agreement are considered. For an agreement to violate good morals, an exploitation of a predicament asserted that lead to an imbalance of negotiating powers between the contracting spouses generally has to be asserted.²¹⁷ Classic examples would be social or economic dependence, pregnancy,²¹⁸ and intellectual inferiority of one party.

Primarily, waivers that touch the core area of spousal support after divorce without adequate compensation are void under Civil Code Section 138.²¹⁹ The protective purposes of the provisions shall not be frustrated. A waiver of spousal support to care for a common child will generally be void, as this type of maintenance is provided in the interest of the child rather than the parent alone.²²⁰ It can also violate good morals to forgo spousal support claims when the social security system is then burdened with securing the spouse's subsistence.²²¹

c. Limits to the Reliance on Valid Agreements

Valid agreements are reviewed again when one of the parties invokes the agreement in the course of the divorce or maintenance proceedings.²²² Reliance on the agreement can constitute a misuse of a legal position and therefore bad faith if it is considered inequitable in light of the factual developments.²²³ The relevant

215. *Id.* at 110.

216. Bundesgerichtshof [BGH] [Federal Court of Justice], *Neue Juristische Wochenschrift* [NJW] 1835 (1985); *id.* at 776 (1987); *id.* at 3164 (1992).

217. BGH, *FAMRZ* 195 (2013).

218. *Id.* at 1310, 1311 (2007); *id.* at 2011, 2014 (2008).

219. DETHLOFF *supra* note 23, at 111; Ludwig Bergschneider & Annette Wolf, *Rechtliche Inhaltskontrolle von Eheverträgen Aufsatz*, *NZFAM* 61, 63 (2018).

220. See DETHLOFF *supra* note 23, at 111.

221. BGH, *FAMRZ* 198, 202 (2009).

222. Bundesgerichtshof [BGH] [Federal Court of Justice], *Neue Juristische Wochenschrift* [NJW] 930, 933, 935 (2004);

223. *Id.* at 930, 935 (2004); Bergschneider & Wolf, *supra* note 223, 61, 63 (2018).

date for that examination is the moment the agreement is invoked, i.e. after marital life has come to an end.²²⁴ The court then assesses whether the agreement provides for an unfair burden-sharing in light of the developments during the marriage.²²⁵ When the factual developments strongly differ from what the spouses anticipated at the time of forming the agreement, it may be unreasonable for one spouse to hold the other one to it.²²⁶ This is especially the case when both spouses planned on focusing on their respective careers, but one of them then took over household chores and childcare for years. The debtor's reliance on a waiver of spousal support would then be considered bad faith within the meaning of Civil Code Section 242.

The legal consequence of such a finding is however not the nullity of the agreement, but rather an adjustment of the terms of the agreement in consideration of the statutory regulations. Above all, the economic consequences of the division of labour during marriage must be compensated within the framework of the adjusted agreement.²²⁷

8. Criticism and Reform Perspectives

Spousal support in Germany has been criticised primarily for its complexity and the legal uncertainty created. The extent of postmarital solidarity imposed by the law on spousal support is in need of reform to adapt to social realities.

a. Complexity and Legal Uncertainty

The German spousal support system described above has been referred to as the most complex in Europe²²⁸ and worldwide.²²⁹ The complexity goes hand in hand with legal uncertainty,

224. BGH, NJW 930, 935 (2004).

225. *Id.*

226. See DETHLOFF *supra* note 23, at 113.

227. BGH, FamRZ 582, 586 (2008).

228. Ulrich Schellenberg Press Release, German Bar Association (Deutscher Anwaltsverein), Das Unterhaltsrecht muss übersichtlicher werden (Jan. 31, 2017), <https://anwaltsverein.de/de/newsroom/pm-2-17-das-unterhaltsrecht-muss-uebersichtlicher-werden>.

229. Werner Gutdeutsch, *Anmerkung zu BVerfG: Berechnung des nachehelichen Unterhalts nach Dreiteilungsmethode verfassungswidrig*, DNotZ 299 (2011).

as the predictability of the outcome is considerably reduced by the number of variables that are susceptible to affect the family law court's decision. A number of elements introduce legal uncertainty. The basis of calculation, the determination of the marital standard of living, can still be influenced by reasonably expectable developments after the divorce.²³⁰ Equity can frequently lead to limitations of the spousal support awarded. The extent to which such a limitation will be considered equitable is difficult to predict, specifically since disadvantages flowing from the division of tasks during marriage are to be defined in that context.²³¹ This legal uncertainty cannot be comprehensively avoided by reaching a valid premarital agreement, as there are also limits to the implementation of such agreements that can only be defined retrospectively in light of the actual developments during the marriage.²³²

There have been proposals for a reform from academia and practitioners. It has, *inter alia*, been proposed to introduce more standardized rates in order to overcome excessive complexity and legal uncertainty²³³ and to reduce the number of sets of conditions with specific prerequisites.²³⁴ In 2017, the German Bar Association put forward reform proposals aiming at a simplification of spousal support law.²³⁵ It proposes to reduce the seven sets of circumstances under which postmarital spousal support is granted to only three: 1) spousal support for childcare for the child's first three years (*Betreuungsunterhalt*); 2) spousal support to compensate for economic disadvantages a spouse

230. Cf. *infra* Section 6(a).

231. Cf. *infra* Section 4(a).

232. Cf. *infra* Section 7.

233. Nina Dethloff, Werner Gutdeutsch & Marcel Kremer, *Bemessung des nachehelichen Unterhalts – Überwindung von Rechtsunsicherheit durch pauschalierende Berechnungen*, FAMRZ 1708 *et seq.* (2010); NINA DETHLOFF, GUTACHEN A FÜR DEN 67. DEUTSCHEN JURISTENTAG 2008, p. A 66 *et seq.* (2008).

234. GERD BRUDERMÜLLER, GESCHIEDEN UND DOCH GEBUNDEN? EHEGATTENUNTERHALT ZWISCHEN RECHT UND MORAL 167 *et seq.* (2008).

235. Initiativstellungnahme des Deutschen Anwaltvereins durch den Ausschuss Familienrecht zur Reform des nachehelichen Ehegattenunterhaltsrechts, Stellungnahme Nr.: 04/2017 (Berlin 2017), <https://anwaltverein.de/de/newsroom/sn-4-17-reform-unterhaltsrecht?file=files/anwaltverein.de/downloads/newsroom/stellungnahmen/2017/DAV-SN%204-2017.pdf>.

suffered as a consequence of the division of labour during marriage (Kompensationsunterhalt) and 3. spousal support to allow for a transition period of up to two years after divorce (Übergangsunterhalt).²³⁶

In comparison to spousal support schemes in other legal orders, the current German system is characterized by a high regulatory density with codified conditions for spousal support in different set of circumstances as well as tables and guidelines provided by the Appellate courts. The jurisprudence of Appellate Courts and the Federal Supreme Court have a unifying function ensuring a uniform interpretation of key terms and a standardized application of the codified prerequisites for spousal support claims.

Legal uncertainty is one side of the coin; judicial discretion and thus the possibility to creatively tailor spousal support to the situation at hand is the other. As Carl E. Schneider put it: "Discretion is necessary, where no satisfactory rule can be written."²³⁷ In Germany, legal certainty and predictability of results appears to be given a fairly high priority in comparison to the adjustment of spousal support to all circumstances of the individual case at hand. The trial court's jurisprudence is much more standardized than other legal orders would strive for. The family law court has to determine what gainful employment is appropriate,²³⁸ when to extend maintenance to care for a child,²³⁹ when to grant spousal support independent of the codified sets of conditions for reasons of equity²⁴⁰ as well as when spousal support is to be refused or limited due to (gross) inequity.²⁴¹ Prominent discretionary elements were notably introduced with the introduction of the provisions on limitation in 1986 and 2007.²⁴² Foreseeable developments as to the spouses' careers and the future impact of the division of domestic work and gainful

236. *Id.* at 43 *et seq.*

237. Carl E. Schneider, *The Tension Between Rules and Discretion in Family Law: A Report and Reflection*, 27 FAM. L. Q. 229, 235 (1993).

238. BURGERLICHEN GESETZBUCHES [BGB] [CIVIL CODE], § 1574 para. 2.

239. *Id.* § 1570 para. 1 sentence 2, para. 2.

240. *Id.* § 1576.

241. *Id.* §§ 1578b, 1579.

242. *Cf. infra* Section 4(a).

employment during marriage have to be assessed by the family law court.²⁴³ Compared to the discretion conferred to their counterparts in other legal orders,²⁴⁴ the role of German family law courts is still fairly restricted.

Since the reform of 2007, spousal support awards reflecting the circumstances of the case at hand have especially been required regarding spousal support to care for a child older than three years.²⁴⁵ The German legislature explicitly demanded an abolition of the judicial attempt to standardize spousal support and the claimant's obligation to carry out appropriate gainful employment in these circumstances on the basis of the child's age.²⁴⁶

The more limited role of German family law courts regarding spousal support in comparison to their counterparts in other legal orders fits well with the no-fault-system of divorce law. It is not seen as their function to manage family conflicts; invasions of privacy are to be generally avoided in proceedings regarding divorce and its consequences.²⁴⁷ Notwithstanding this approach, in some instances evidence has to be taken that clearly encroaches on the private life of the concerned, e.g. when the establishment of a stable *de facto* relationship as ground for termination is at issue. Also, elements of marital fault can be of relevance for the granting of spousal support in the context of gross inequity and ensuing refusal, restriction and limitation in time and thus set boundaries to spousal support after divorce.²⁴⁸

b. Boundaries of postmarital solidarity

Before and even after the introduction of the possibilities to limit spousal support to the amount that is equitable, the German spousal support has been described as one of the most opulent in Europe.²⁴⁹ Societal changes, especially the increased participation

243. Cf. *infra* Section 4.

244. Compare CODE CIVIL [C. CIV.] [CIVIL CODE] art. 270 (Fr.); Matrimonial Causes Act 1973 §§ 23, 25 (Eng.).

245. Cf. *infra* Section 2.

246. Government Draft, German Bundestag: Drucksache [BT] 16/1830, p. 17.

247. Karl G. Deubner, *Der Weg in die Unterhaltsknechtschaft*, ZRP 153, 155 (1972).

248. Cf. *infra* Section 4(b).

249. Schellenberg, *supra* note 232.; Thomas Rauscher, *supra* note 177, 135, 139

of women in the workforce after marriage and childbirth²⁵⁰ has lead to more economic independence after divorce. This economic independence translates into the underlying principle of spousal support, the principle of personal responsibility.²⁵¹ While a number of sets of conditions exist under which spousal support can be granted, postmarital solidarity is limited by equitable considerations. First and foremost, compensation for marital disadvantages is to be secured; once these disadvantages have been made up for, the claimant will regularly have to maintain him- or herself. With the system change introduced in 2007, spousal support can be reduced and limited in time.²⁵² It is no longer the objective of spousal support to maintain the marital standard of living.²⁵³ While lifelong obligations to pay spousal support might still be the dogmatic rule, they have become the exception in practice, especially with double income households.²⁵⁴

Nonetheless, as long as the conditions for spousal support including the claimant's need are fulfilled, the maintenance claim subsists. With the regular award of monthly payments, the end of the spousal support claim is hard to predict. It is questionable whether the German law on spousal support provides adequate incentives for the spouses to start over on their own following a divorce and to take up gainful employment rather than relying on spousal support paid by the other. The German Bar Association has criticized that the current law consolidates dependencies between the ex-spouses.²⁵⁵

The option of awarding a lump sum payment affords superior incentives for a transition to postmarital autonomy of both

(2005). See also Harald Scholz, *Von der Anrechnungs- zur Differenzmethode – Wirft das Urteil des BGH, vom 13.6.2001 neue Gerechtigkeitsprobleme auf?*, FAMRZ 265, 272 (2003).

250. See BGH, NJW 2254, 2257 (2001); BVerfG, FAMRZ 527, 530 (2002); Harald Scholz, *supra* note 253, 265, 267 *et seq.* (2003).

251. See BURGERLICHEN GESETZBUCHES [BGB] [CIVIL CODE], § 1569.

252. See *id.* § 1578(b).

253. GERHARDT, *supra* note 100; GERD BRUDERMÜLLER, *supra* note 23, § 1569 para.

3.

254. VERSCHRAEGEN, *supra* note 27, § 1578b, para. 36.

255. Schellenberg, *supra* note 232.

spouses.²⁵⁶ Still, it has lead a shadowy existence in practice.²⁵⁷ Rather than making its award dependent on the claimant's request and a compelling reason, it should be put on equal footing with periodical payments.²⁵⁸ Such a clean break favours the establishment of peace between the divorced spouses; recurring litigation in light of alleged substantial changes in the living conditions of both parties is avoided. Both spouses gain certainty as to their financial situation after divorce.²⁵⁹ They are both free to design their individual lives on that basis.

So far, criticisms expressed and the rather recent German Bar Association's reform initiative have not resulted in legislative action, as the German lawmaker's focus is currently not on a spousal support reform. With a progressing equality of spouses, amendments would however be crucial for spousal support law to reflect the contemporary living conditions of married couples and families in Germany.

256. Kaesling, *supra* note 21, at 287 *et seq.*

257. *Id.* at 284.

258. *Id.* at 323-27 *et seq.*

259. Ludwig Bergschneider & Ralf Engels, *Leibrente statt Unterhalt – Überlegungen zu einer Alternative*, FAMRZ 436, 440 (2014); Walter Kogel, *Leibrente statt Unterhalt – Anmerkung zu dem Beitrag von Bergschneider/ Engels*, FAMRZ 1172, 1173 (2014); Ludwig Bergschneider & Ralf Engels, *Erwiderung zu der Anmerkung von Kogel* FAMRZ 1174 (2014); Kaesling, *supra* note 21, at 288.