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Topic I:
Reflections of the Notariat on Family Law and the Law of Succession in the light of new social relationships

Country Report Germany
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A. Introduction

I. Historical outline

Family law and the law of succession are codified in the fourth and fifth volume of the German Civil Code (BGB). The Civil Code entered into force on January 1st 1900. Since then family law has changed in many fields, whereas the law of succession has remained largely unchanged.

1. The development of family law

a) The term "family"

The term "family" can be found in many areas of German law, but it is not legally defined. Therefore, it can assume different meanings, according to wording and purpose of the legal norm in question. For example, section 1360 of the (German) Civil Code [BGB] that regulates family maintenance obligations starts from the assumption of the nuclear family (family in the strict sense of the word)[1] that consists of the spouses and their common, biological or adopted children. Owing to the shift away from the historical extended family, the maintenance obligations of the family members with a remoter degree of relation have accordingly become looser. For instance, the welfare authorities no longer have recourse to maintenance claims against relatives of the second degree (such as the grandparents) or a more remote degree pursuant to section 94 (1) no. 3 of the Social Security Code Volume XII.

On the other hand, Article 6 (1) of the German Basic Law [GG] grants the family special protected constitutional status, which gives the term a significantly broader meaning to cover every "living parent-child community with the rights of parental custody" [2], so that in addition to the classical nuclear family consisting of the married or unmarried parents and their biological children, also one-parent/child relationships of all kinds are included, such as those with single unmarried mothers and fathers, one divorced or widowed spouse and child(ren). According to section 11(1) of the Civil Partnerships Act, also the – same-sex – partner is a family member. Alongside the spouses, relatives and persons related by marriage regardless of the degree are included in the inheritance entitlements pursuant to section 1969 (1) Civil Code, as well as other persons like foster children or friends that the testator regards as and has treated as belonging to the family, or the partner of a consensual union (family in the broader sense)[3].

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1 Dieter Schwab, Familienrecht [Family Law], 20th edition, Munich 2012, margin comment 4, 5.
2 Karlheinz Muscheler, Familienrecht [Family Law], 2nd edition, Munich 2012, margin comment 43.
3 Schwab, margin comment 4.

b) Historical background

The historical development of the family from the beginnings of industrialization to the modern family did not only involve a change of function of the family, but also a juridification of the intra-family relationships. Whereas the historical family in the first place used to be a community of consumption and production, professional training and education, as well as a resort to welfare in times of need and in old age, it was also a public community as part of the estate-based society and implied social constraints for every family member shaped by religion and role models. Given the patriarchal position of the head of the family, there were hardly any legally enforceable claims and liabilities of the family members among each other. By law, the family was considered a unity for which, at best, external proprietary relations needed to be settled.[4]

The modern working world is a phenomenon that predominantly takes place outside of privately owned, small-scale farming and trade enterprises, so that house communities today have turned out to be consumption households.[5] They are characterised by the spatial and organizational separation of work and family life, which causes the problem of reconciling work and family life. Today, public educational institutions take care of child education and training, public systems provide security against old age, illness and situations of need; the regulating function of religion and morals is performed by law and jurisdiction. Patriarchal structures are eliminated by legislation to achieve an equal legal status of women and children. Thus, as part of a parallel process to the decreasing economic importance of the family as a community of production, a legal development has set in that focuses on the increase of freedom of the family members and on the enhancement of their individual rights. With the emancipation of women, social development first led from patriarchy to so-called "parentarchy" (rule of the parents), and from there on to the modern "non-hierarchical" family ("free of authority") [6] in which the rights of all family members are legally equal.

c) Important steps in legal development

The following reforms of family law are highly influential on the current legal situation[7]:

- The Equal Rights Act of June 18th 1957 which introduced the statutory (default) matrimonial property regime of the community of accrued gains (at the time of introduction of the Civil Code the statutory property regime of usufruct and administration by the husband was the default regime)

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4 Muscheler, margin comment 70.
5 Schwab, margin comment 5.
6 Muscheler margin comment 71 et seq.
7 Outline in Schwab 9.

- First Act on the Reform of Marriage and Family Law of June 14th 1976, which further developed equal rights, introduced a new divorce law on the basis of the disruption principle instead of the culpability principle and the pensions equalisation, and established the family courts
- Act on the Reorganisation of the Law of Parental Custody of July 18th 1979: new concept of parental custody (abolishment of the term "parental authority"), consolidation of children's rights
- Act amending the Law of Guardianship and Curatorship for Adult Persons of September 12th 1990 including the abolishment of legal incapacitation, introducing the legal concept of custodianship which in principle retains the legal capacity of the person under custodianship
- Act on the Reform of the Law of parent and child of December 16th 1997 introducing a common law of parent and child for children born inside and outside of marriage, as requested by Article 6 (5) Basic Law (GG), until then not settled
- Act on the Harmonisation of Maintenance Rights of Minors of April 6th 1998 with provisions on the simplified assertion of maintenance claims
- Act on the Reorganisation of the Law of Contracting Marriage of May 4th 1998, repealing the Act of 1938, new arrangement of the law of contracting marriage
- Act on the Ending of Discrimination against Same-Sex Partnerships: Registered Civil Partnerships of January 22nd 2001 introducing an option for a legal union of same-sex couples which is modelled upon marriage
- Act on the Change of Provisions for the Contestation of Paternity and the Contact Rights for reference persons of the child of April 23rd 2004
- Act on the Revision of the Law of Civil Partnerships of December 15th 2004
- Act on the Alteration of Maintenance Law of December 21st 2007 that stresses the principle of personal responsibility following a divorce as a general rule and the granting of post-divorce maintenance of the spouse as an exception
- Act on the Clarification of Paternity independent of the contestation procedures of March 3rd 2008
- Act on the Facilitation of Measures of the Family Court upon Threat to the Well-Being of the Child of July 4th 2008
- Act on the Reform of Procedures in Family Matters and in Matters of Non-Contentious Jurisdiction of December 17th 2008 that reorganizes the rules of procedure in non-contentious matters

- Act on the Structural Reform of the Pensions Equalisation Act of April 3rd 2009 by which the contractual freedom of the spouses over pension equalisation is extended
- Act amending the Law of the Equalisation of Accrued Gains and the Law of Guardianship of July 6th 2009 that makes smaller corrections especially in the equalisation of accrued gains

2. The development of the law of succession

a) Fundamental principles of the law of succession

The law of succession of the German Civil Code [BGB] can be traced back to principles of Roman law as well as to those of German legal traditions: [8]

- The principles of universal succession, testamentary freedom and the relatives' right to inherit are taken from Roman law. The legal concept of the legacy and the testamentary burden as well as the principle of limitation of the heirs' liability also originate from Roman law.
- In German law of the Middle Ages the joint will and the contract of inheritance developed as joint forms of passing on property by disposition mortis causa.

These principles merge in German law:

Unlike in Roman law, the intestate succession is not superseded altogether by a last will, but intervenes alternatively insofar as the will does not contain valid or explicit arrangements and also its interpretation does not lead to a designation of heirs. Exceptions from the principle of universal succession such as the *legatum per vindicationem* ["Vindikationslegat", a legacy by which the beneficiary directly becomes owner of the bequested assets] or directions to distribution with direct *in rem* effects have not been included in the German legal system. From Germanic law the idea of a law of succession as succession of the relationship by blood originated, normally the children, but not as universal succession, but by partitioning the estate in different portions, for each of which a separate succession was applicable. Accordingly, male relatives inherited arms and horses, female relatives clothing and jewellery. There were no wills.

b) Historical development

In the Middle Ages a testamentary succession also developed in Germanic law, at first only for the benefit of the church. In order to prevent the partitioning of farm estates, the so-called "Anerbenrecht" emerged [according to which an entire farm was handed over to just one heir], which still exists as partial federal law in the Farms and Forestry Code ["Höfeordnung", law relating to the inheritance of farms and forest land] in some of the Länder [Federal States of Germany].

[8] Knut Werner Lange, Erbrecht [The Law of Succession], München 2011, § 1 margin comment. 1 et seq.

In the 16th century provisions for entailed estates [“Fideikomissbestimmungen”] developed to secure the undivided continuity of larger properties in the hands of the nobility and wealthy merchants.

With the Enlightenment and the French Revolution, the idea of individual freedom and equality became increasingly important, also in the law of succession. Compared with the great civil law codifications of the General State Laws for the Prussian States [Preußisches Allgemeines Landrecht] of 1794, the French Civil Code of 1804 and the General Civil Code [Allgemeines Bürgerliches Gesetzbuch] of 1811, the will of the testator and its implementation was moved to the focus before all other principles of succession law in the German Civil Code [BGB] enacted 100 years later, which harmonised the hitherto strongly diverging succession laws on German territories. Limitations to the testator’s will were introduced only in the form of provisions for creditor protection and the claim to a compulsory share as a mere payment claim in accordance with the law of obligations. Thus, the legislator deliberately decided against a compulsory right of inheritance of close relatives with an immediate share in the estate.

Through the Second World War the property of many in Germany was completely destroyed. However, in the decades of reconstruction afterwards, population groups that had hitherto been excluded from accruing wealth generated property on an unprecedented scale. Therefore, alongside the simultaneous development of equal rights in family law and of the improvement of educational chances for children, it became necessary in succession law to provide for the spouses of the post-war generation that lived longer and to strengthen their rights compared to the children and further relatives.[9] The legislator implemented this (only) by raising the inheritance share of living spouses in the statutory property regime of accrued gains as compared to the (still inheriting further) relatives in the sections 1371, 1931 (3), 2303 (2-2) of the Civil Code [BGB] and refrained from granting the spouse special rights within a community of heirs for the protection of the jointly accrued assets from destruction by partitioning [Erbteilung] or claims based on compulsory share rights.

A further important step was the Act on the Legal Status of Children Born Outside of Marriage [Nichtehelichengesetz] of August 19th 1969 that eliminates the fiction that a child born outside of marriage is not related to the father. At first, a child born outside of marriage was not treated on equal terms with the descendants of married parents, but obtained a so-called substitutional inheritance claim to the equivalent of his or her statutory share in the estate.

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[9] For the “Gap in the solidarity between couples and generations” ["Zwiespalt zwischen partnerschaftlicher und Generationensolidarität"] and for the development of the law of succession of the spouse in German law Siegfried Willutzki, Generationensolidarität versus Partnersolidarität - quo vadis, Erbrecht? [Solidarity between generations versus the solidarity between couples – quo vadis, law of succession?] In Lettke (ed.) Erben und Vererben [Inheriting and Bequeathing], Konstanz 2003

Not until the Succession Law Equality Act [Erbrechtsgleichstellungsgesetz] of December 16th 1997 was the equal treatment of all descendants reached in terms of succession law.

The Act amending the Law of Guardianship and Curatorship for Adult Persons Act of September 12th 1990 also had consequences for succession law because the appointment of a custodianship no longer automatically involves the assumption of a lack of testamentary capacity, rather this question must now be determined individually from case to case.

Testamentary freedom as a part of the general freedom to act enjoys constitutional status in accordance with Article 2 of the Basic Law [GG], just like the law of succession in accordance with Article 14 of the Basic Law, in the process of which the guarantee of succession law refers to both sides: it guarantees the testators that they can bequeath their material possessions to the heirs of their choice as well as the heirs to take possession of the estate or, as a close relative, to be made a beneficiary with a minimum share in the form of a compulsory portion.[10] However, the law of succession is subject to the reservation of being tied to social reponsibility, so that the state is by all means granted considerable interventions in the rights of individuals, such as an extensive taxation of estates[11] which plays a recurrent role in political debate and constitutional jurisdiction as a source of state income. Also the question of the tension between testamentary freedom and the claims of close relatives to an estate time and again gives occasion to reform proposals and court decisions.[12] A virtually inverse point of dispute is the rising life expectancy of the parents as argued by future heirs and the costs of (nursing) care that it entails, as it conflicts with the descendants' expectations of inheritance and compulsory share and often makes claims obsolete after the death of longer living parent.

II. Significance of the topic for the Notariat in Germany

For the Notariat in Germany, family law as well as the law of succession present a challenge in competition with other public authorities, lawyers and tax and business consultants.

The further individualisation of society proceeded, the greater the demand for consultation and arrangements became. While at the beginning of industrialisation only a small and prosperous part of the population needed assistance with marriage contracts and other legal family matters such as succession planning and the settlement of estates,[13] this has changed considerably.

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[10] For the significance of the compulsory share Lange § 83 margin comment 1 et seq.; its constitutionality was recently confirmed by the Federal Constitutional Court, cf. BVerfG 112,332

[11] Lange § 2 margin comment 16 et seq.

[12] Lange § 83 margin comment 3 et seq., BVerfGE 112, 332

13 Treated in literature by Honoré de Balzac - Bundesnotarkammer (ed.): Der Notar 21. Deutscher Notartag, Berlin 1981; Umberto Eco, The Cemetery of Prague, Milan 2010 (German: München 2011)

This fact can be confirmed on the one hand by the percentage of the workload of the average notariat,[14] and on the other by the growing number of lawyers specialized in the law of succession and family law that do not only take over contentious legal matters, but also offer constitutive legal counselling.[15]

Only in such legal matters that for their legal effect require notarial authentication, especially marriage contracts and contracts of inheritance, the civil law notary is exclusively competent as an official office holder appointed by the state. Apart from that, although the number of legal transactions requiring public authentication in family and succession law is high, there are concurrent competences with other public authorities (for example with the youth welfare offices for the acknowledgement of paternity, the establishment of child maintenance claims or with the probate courts for disclaiming an estate or for the application of certificates of inheritance).

Sometimes, in the case of prosperous clients, contact with the civil law notary is not established directly, but via lawyers and tax consultants to which they have a permanent mandate. However, the large number of persons that come and see the civil law notary for advice directly shows that the office of notary enjoys an exceptionally high level of trust in the population. The challenge for the notary consists in providing all the parties involved, independently of profession, origin, education and economic situation, high quality legal service that ensures them the best possible pursuit of their individual rights.

In the next years, family and succession law will become significantly more important, since the "post world war II generation" will pass on their assets that have accrued in the last decades, or rather the "generation of heirs" will inherit them mortis causa and now, in turn, has a specific need for arranging their matters. In doing so, the question is already being asked how it is possible to hand down assets for more than one generation, given the exhausted social systems in the light of the current demographic developments with a rising life expectancy and a decreasing birth rate.[16]

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14 In the year 2010, the Bundesnotarkammer determined the structure of costs of German notariats in a survey. According to it, 4.1 % of notarial procedures of the total turnover involved family law, 9,4 % the law of succession, 6.0 % preventive powers of attorney ["Vorsorgevollmacht"] and 8.9 % the transfer of property, mostly associated with arrangements in the law of succession or family law. As a result, 28.4 % of the turnover of a German notariat on average involves legal transactions in the law of succession and family law. The shares according to the number of notarial instruments were not determined.

15 According to statistics published by the Federal Chamber of Lawyers [Bundesrechtsanwaltskammer], on January 1st 2011 there were 8,373 lawyers appointed that were specialised in family law and 1,205 lawyers that were specialised in the law of succession. Together they make up the largest share of all specialised lawyers; http://www.brak.de/w/files/04_fuer_journalisten/fa2011.pdf

16 Reiner Braun, Hat die Erbengeneration ausgespart? [Is there any Money left for the Generation of Heirs?] Nach der Rentenillusion droht eine Erbschaftsillusion [After the Illusion of Pensions, a new Illusion of Inheritances is looming], in Lettke (ed.), Erben und Vererben, Konstanz 2003

Furthermore, the number of cases is increasing in which there is a need for settling matters directly in the generation of heirs, e.g. in so-called atypical families and patchwork families[17], in the case of heirs in special personal situations and international dimensions. The standard repertoire of any civil law notary today already includes, next to the classical subjects for making provisions, so-called special wills in which there is a disabled or indebted person or a divorcee involved, arrangements in marriage law and the law of succession in which foreign law may be applicable, as well as lifetime measures of various ways of passing on assets, including arrangements or measures to reduce the compulsory share.

In the light of the broad levels of the population that consult the civil law notary with completely different social and economic aims, notarial research for all kinds of problems has compiled solution proposals and is constantly developing them further on the basis of the far-reaching contractual freedom of the German Civil Code [BGB] in family law and the law of succession.

The broad legal training of civil law notaries in Germany (about four to five years of university studies, subsequent two-years judicial training and at least three years further training as notary candidate), ensure that the notarial services meet the highest quality standards. Many fellow notaries participate actively in legal research and politics, both on a national and European scale. This way, the German Notariat does not only shape the daily work in family law and the law of succession, but time and again also takes influence on legal policies. It indicates weak points in law as well as structures in society that are changing, with a view to improve the law with reforms, optimise arrangements and adjust deficits by contractual settlements. It is unlikely that the demand for notarial participation in the political realm will decrease in the future.

III. Legal development in recent years

The main legal changes of the last years took place in the regulations governing the consequences and procedures of divorce, in the law of parent and child, and only to a small extent in the law of succession.

1. Changes through the reform of maintenance law

The maintenance reform of 2007[18] formulated the notion of post-marital individual responsibility in maintenance law as a duty to maintain oneself, and, more than previously, determined the payment of maintenance as an exception that only applies in the case of certain facts that justifyit.

[17] Conference lecture of Christopher Keim, Testamentsgestaltung bei der Patchworkfamilie [Drawing up Wills in Patchwork Families], in Herbert Grziwotz (ed.) Notarielle Gestaltung bei geänderten Familienstrukturen - demographischer Wandel, faktische Lebensgemeinschaften und Patchworkfamilien [Notarial contract shaping for changing family structures – demographic change, factual life partnerships and patchwork families], Würzburg 2012
[18] Schwab margin comment 371

Immediately after the reform, this initially lead to a situation in which single mothers, older or ill divorced persons had to fear for their maintenance claims in court. Presently the reform seems to be consolidating itself. However, the principle that the reform was based on was right: namely not to automatically provide the economically weaker spouse with a life-long support, and furthermore to even guarantee for an upkeep of the social status ("Once a doctor's wife, always a doctor's wife"). But in the aftermath the courts recognised that the need of the economically stronger spouse to be able to rearrange his or her life – also economically – must be reconciled with the disadvantages for the other spouse that are due to the marriage and continue to have an effect; consequently, the economically weaker spouse cannot always be expected to take up his or her life again at the point where matrimony was entered directly after divorce.

From the notary's perspective, this offers a broad range of opportunities to arrange post-divorce maintenance by means of contractual agreements by the spouses that are limited only by the standard of violation of moral principles or the uneven distribution of burden.

2. Changes in the law of pensions equalisation

To begin with, the reform of pension claims equalisation of 2009[19] confirmed the existing concept; this means that a spouse who renounces from working during the marriage and thus abstains from acquiring his or her own pension claims is entitled to establish pension claims from those of the other spouse, in order not to let him or her become dependent on social benefits for life or to put him or her at risk of poverty in old age.

However, the old system of converting all sorts of pension claims into remuneration points of the statutory pension insurance involved a severe shortcoming: as each pension right develops distinctly, the result was often not a fifty-fifty division of the rights accrued during the marriage, but in part a division that varied greatly. The change of the legislator therefore primarily aimed at avoiding such distortions by changing the system altogether. As of now, each claim acquired during the marriage is always divided by two; the consequence is that equalisation does not only take place from the better provided for spouse to the one with fewer claims, but that for each claim each spouse gives and receives, which also spreads the risks of distinctly developing claims evenly.

A further core issue of the reform was to strengthen the right of the spouses to arrange pension equalisation by notarial marriage contracts and settlements for divorce consequences. In these cases, a review by the courts takes place only in exceptions, such as in cases of immoral discrimination of one of the spouses.

[19] Schwab margin comment 464 et seq.

3. Reform of the law of parent and child

The essential achievement of the reform of the law of parent and child of 1997 consisted in implementing the constitutional mission of Article 6 (5) of the Basic Law (GG) and finally abolish the difference between children born inside and outside of marriage.

Moreover, the constitutional stipulations resulting from Article 2 of the Basic Law (GG) concerning the rights of the child and the father or ostensible father to knowledge of descent needed to be implemented, which in 2004 and 2008 led to further changes in the law of filiation proceedings, the contestation of legitimacy/paternity and the introduction of a possibility to determine paternity outside a contestation of legitimacy.

4. Act amending the Law of Succession

In the Act on the Reform of the Law of Succession of September 24th 2009, there were only minor changes in the law of the compulsory share which in the course became more clearly arranged and simpler. In particular, the danger was eliminated that a person entitled to a compulsory share, unaware of the true value of the estate, waived the inheritance too early and received nothing. Rather, he or she now has the option of always demanding the compulsory share instead of what has been bequeathed to him or her.

A great practical help is also the possibility of extending the renunciation of donations to the descendants of the renouncing person by a binding joint will or inheritance contract and of downgrading the claim for the augmentation of compulsory shares for relatives entitled to a compulsory share within ten years, to be counted from the date a gift was made. The legislator did not make a final decision on the abolishment or limitation of the compulsory share, although this had been discussed and weighed in an absolutely justifiable way in the run-up of the reform.[20]

5. Reform of procedures in matters of non-contentious jurisdiction, Introduction of the Act on Procedures in Family Matters and Matters of Non-Contentious Jurisdiction

The legal relationships regulated in the Fourth Volume of the German Civil Code [BGB], by their nature, are matters of civil law and thus either of contentious or non-contentious jurisdiction.

The special characteristics of conflicts in family law prompted the legislator to establish family courts within the local courts [Amtsgerichte] as early as in 1976. In the “Act on Procedures in Family Matters and Matters of Non-Contentious Jurisdiction” [FamFG] which has been in force since September 1st 2009, fundamentally new procedures for family matters were established.

[20] Cf. the contentious consultations of the 64th Annual Legal Conference of 2002 in Berlin [Deutscher Juristentag, an association of members of all legal occupational groups], http://www.djt.de/fileadmin/downloads/64/beschluesse.pdf

The particular family matters are listed in section 111 of the Act on Procedures in Family Matters and Matters of Non-Contentious Jurisdiction [FamFG] and do not only comprise procedures for divorce, but also include all regulations and consequences that are due within the context of a separation or divorce. As part of the changes, marriages, among other things, are not divorced any more by judgement [Urteil], but by decision [Beschluss].

Furthermore, the Act on Procedures in Family Matters and Matters of Non-Contentious Jurisdiction [FamFG] contains, among other provisions, procedural regulations for matters of parent and child and adoption matters and for probate cases.

The instances and appeals to the Higher Regional Courts [Oberlandesgericht] and the Federal Court of Justice [Bundesgerichtshof] were also newly settled.

B. Description of the current legal situation

I. Part: Description of the legal system

1. Marriage, registered civil partnership

There is no legal definition of the term “marriage” in German law, as set forth in the provisions of sections 1303 et seq. of the German Civil Code [BGB]. The structure of matrimony is considered a historical development, the roots of which can again be traced to Roman law and Christianity.

Marriage, according to German law, is solely the union between (one) man and (one) woman. Two same-sex partners may enter into a registered civil partnership according to the Act on Civil Partnership, legally conceived largely approximate to marriage. Polygamy or a civil partnership consisting of more than two partners is a criminal offence, but not living together outside of matrimony or a registered civil partnership.

Marriage as well as the registered partnership are entered into by concurrent declarations of intent of the partners to do so, thus they have a contractual character. In Germany, the principle of mandatory civil marriage applies, which can only be entered into before a civil registrar. Civil partnerships are also contracted before a civil registrar. Legislation of the respective Land, though, may additionally constitute the competence of further authorities. Therefore, in Bavaria, the civil law notaries are, along with the civil registry offices, also competent for the establishment of civil partnerships.

Alongside, religious marriage is permitted and customary. However, it does not have any legal effects whatsoever. The former regulation, which forbade priests to conclude a religious marriage before the civil marriage had been entered into, was cancelled, so that by now in Germany it is possible to conclude a religious marriage without being married before the law. Marriage and the civil partnership are concluded for life and therefore cannot be legally ended by the parties involved themselves outside of the procedures of divorce or dissolution of the civil partnership provided by the state.

In German law, there are no other legally regulated forms of sexual unions between two persons apart from marriage and the registered civil partnership. In particular, there is no marriage with lesser legal effects and a concubinage with legal consequences similar to those of marriage does not exist (any more)[21]. Family law provides no other possibilities of legal union. This means that the numerous relations of persons that are not married or have established a civil partnership and that are living in a joint household, are not subject to any sort of special legal regulations according to German law. Neither are they especially supported by the state, as this would contradict the constitutionally required protection of marriage, nor are they expressly discriminated against. At best they are considered "communities of shared households" [Bedarfsgemeinschaften] by the state in welfare law which reduces possible claims to state support. However, such factual domestic communities do not constitute any legal obligations among the persons involved. In particular, there is no mutual obligation to pay maintenance, no mutual right of succession or claim to a compulsory share and, above all, no obligation to establish or perpetuate a marital cohabitation or a relation as partners of a civil partnership.

The engagement as a pre-form of marriage, as regulated in sections 1297 et seq. of the German Civil Code, has lost any significance in legal practice. It does not entitle to make a claim to get married, let alone to enforce such a decision. The only function the engagement still has today is as a tradition in society (and in criminal procedural law). Engaged couples that break an engagement are mostly unconscious of the fact that they are annulling a legal relationship and therefore do not expect the fulfilment of the still existing legal claims.

By establishing equal rights for children whose parents are married and children whose parents are not married, a further significant social or moral obligation of the past to get married has ceased to exist. It can therefore be summarised that today, in the eyes of the population, marriage and the civil partnership as legally regulated forms of living together exist alternatively alongside unregulated forms. Often they only become aware of the difference if they separate or a partner dies and the legal effects fail to materialise that the state only provides for those forms that have been regulated.

[21] In the Middle Ages, it was possible for men to take a second wife or concubine ["Kebsehe"].

Marriage contracts and contracts of civil partnership are just as common in notarial practice as settlements for separation or divorce. In the course, the parties reach a settlement concerning the general and economic effects of the marriage/civil partnership such as living together, material contributions to the union, property and assets relations as well as settlements for separation or divorce. Legislation in this field allows for arrangements that deviate significantly from the statutory provisions. However, in spite of political attempts, the legislator did not determine an authorisation of a divorce or dissolution of the civil partnership as such in front of the civil law notary instead of the family court, should the parties agree accordingly.

Arrangements of unmarried partners for living together and a possible separation are relatively rarer.[22] The legal relationships of these domestic communities are subject to the legal provisions valid for everyone, so they can organise themselves especially within the regulations of the law of obligations. In notarial practice, it is not uncommon that the parties desire arrangements that are similar to a marriage contract and that, for the case of separation, simulate the statutory consequences of divorce.

Only spouses used to enjoy tax benefits in accordance with income tax law and inheritance- and gift tax law. Civil partners were treated equally as spouses in inheritance- and gift tax law, but not in income tax law ("splitting the difference in spousal income", the so-called "advantage of splitting"), although this was subject of political debate and after clarification by the Federal Constitutional Court, a legislative solution had to be brought about. The respective act was passed by the Bundestag on June 28th 2013 and still requires the approval of the Bundesrat, which is deemed certain, though.

2. Descent, Adoption

As a matter of principle, the filiation of a child always resorts to its genetic relationship to the biological parents. However, a family relationship may be established by adoption.

a) Maternity

In section 1591, the German Civil Code (BGB) provides a definition for the term of maternity. Since this issue came under dispute with the new reproductive technologies, legislation saw the need for regulation in the Act concerning the Reform of the Law of Parent and Child 1997 [Kindschaftsrechtsreformgesetz]. Since then, only the mother that has given birth to the child is considered the mother before the law.

[22] However, such arrangements are strongly recommended, cf. the conference lecture of Martin Löhnig, Vermögensauseinandersetzung bei faktischen Lebensgemeinschaften [Property settlements for factual life partnerships], in Herbert Grziwotz (ed.) Notarielle Gestaltung bei geänderten Familienstrukturen - demographischer Wandel, faktische Lebensgemeinschaften und Patchworkfamilien [Notarial contract shaping for changing family structures – demographic change, factual life partnerships and patchwork families], Würzburg 2012

This also applies, for example, if she is not genetically the mother in the case of egg or embryo donations. A deviating statement of maternity for the benefit of the genetic mother is not provided for.

Contractual arrangements on maternity between the egg donor and the woman giving birth (so-called surrogate motherhood) are void, corresponding medically assisted methods of reproduction are illegal in Germany. If German nationals or persons with permanent residence in Germany seek medical aid of this kind, certificates of birth issued abroad that do not disclose the woman that gave birth, but the genetic mother as mother, are not recognised in Germany. A parent-child relationship in this case can only be established in an adoption procedure. This is controversial, but there is no change in sight.[23]

b) Paternity

The legal regulations for paternity in sections 1592 to 1600 d of the German Civil Code (BGB) are considerably more complicated:

If the parents are married at the time of birth, the husband is automatically considered father. If the child is born outside of wedlock, the man

- that has recognised or
- whose paternity has been determined by a court

is considered father.

In neither of the aforementioned cases does it matter whether the parents are living together at the time of birth or not.

In order to recognise paternity, the consent of the mother is necessary, it cannot be enforced. If the mother denies consent, the only possibility for a father who is willing to recognise paternity is to instigate proceedings of judicial acknowledgment.

Consent of the child is only necessary if the mother's custody of the child does not cover matters of filiation or if the child is of full age. The declaration of acknowledgment can only be issued in person and must not be subject to any conditions or limitations in time. However, in the case of legally incapable persons, the legal representative may act with the consent of the custodianship

[23] Legal practice, however, must already come to terms with cases such as these today, cf. the conference lecture of Nina Dethloff, Biologische, soziale und rechtliche Elternschaft - Herausforderungen durch neue Familienformen und Reproduktionsmedizin [Biological, social and legal parenthood – Challenges arising from new family types and reproductive medicine], in Herbert Grziwotz (Hrsg.) Notarielle Gestaltung bei geänderten Familienstrukturen - demographischer Wandel, faktische Lebensgemeinschaften und Patchworkfamilien [Notarial contract shaping for changing family structures – demographic change, factual life partnerships and patchwork families], Würzburg 2012

court. A person with a restricted legal capacity can only consent him- or herself, but needs the consent of the legal representative.

The acknowledgement can also take place before the birth of the child and apart from that is not subject to any deadline. The contentious issue is whether the acknowledgement demanded from physicians specialised in reproductive medicine before procreation can have legal effect. In this case, on indication of the problematic issue, notarial practice therefore resorts to creating an obligation to repeat the acknowledgement in the required form after birth of the child.

The husband or father of the illegitimate child that has acknowledged paternity may challenge the acknowledgement of paternity afterwards, but is considered the father until paternity is disproved. Once paternity has been legally determined, it is impossible that by subsequent challenging two men or none of several that come into question are considered as the father.

If the parents were not married at the time of birth of the child and marry later, this has no consequences for the child's status. The "legitimation" of the child provided for hitherto by subsequent marriage was abolished by the Act concerning the Reform of Parent and Child Law of 1997 [Kindschaftsrechtsreformgesetz], according to which there is no distinction to be made any longer between children born inside or outside of marriage. The only consequences that may arise pertain to custody if, along with the acknowledgement of paternity, no declaration to bring about joint custody was submitted. If the mother has initially exercised custody alone, joint custody is established automatically with the marriage of the parents.

Children that are born after the decision on divorce or annulment of the marriage has become final are not automatically attributed to the former husband. In this case, the determination of paternity is carried out like in cases of children born outside of marriage, i.e. independent of whether the parents lived together other not in the respective period of time. If a child is born after the death of the husband, it is assigned to him. Should the mother marry anew and the child is born into the new marriage, the law considers the new husband as father, even if this is biologically unlikely. In this case, the new husband may challenge the paternity.

The persons with a right to challenge paternity are, apart from the man that the child is attributed to, the mother, the child and, to a certain extent, the person that comes into question as biological father of the child, as well as certain administrative bodies. Other persons, such as relatives of the husband, have no right to challenge paternity. The right of challenge for public bodies was introduced after the challenge of paternity was abused. In the underlying cases men had acknowledged paternity that did not exist genetically only in order to provide the child or the mother a residence permit in Germany or the child German citizenship. Which authorities are competent is determined in the laws of the respective Land.

If the spouses are in the course of divorce proceedings and a child is born before the court decision of divorce becomes final, another man may acknowledge paternity before the birth of the child, if the legal conditions are met and if the still-husband consents.

If modern reproductive technologies are used, initially the aforementioned regulations for determining paternity are applied. Should the semen for fertilisation not originate from the husband or acknowledger, proceedings for the determination of paternity may be instigated with the goal of ascertaining the donor's genetic paternity. Although the law excludes the challenge of paternity for cases in which the man and the woman have agreed to *in vitro* fertilisation with sperm donation. But this is without prejudice to the child's authority to challenge. The law makes no provisions to authorise the sperm donor to challenge. On the other hand, the donor's anonymity is not protected by German law. He can always be determined as father, especially at the instigation of the child.[24] It is not possible to renounce from maintenance or inheritance claims to him in the name of the child. In this case, the only possible help is to arrange for indemnity agreements of the mother and the social father, mostly in the form of a contract for the benefit of third parties.

For same-sex couples the issue of parenthood intensifies: the registered partner of a mother cannot obtain the legal status of a parent and cannot acknowledge parenthood, let alone the factual life partner. A stepchild adoption is only possible for registered partners. The concerns about this legal situation must bear in mind not only the interests of the parents involved, but also the considerably worse situation of the children concerned, since in many cases they cannot be legally attributed to both parents like in the case of heterosexual parents, in spite of the social integration into their family.

The Federal Constitutional Court derived the right to receive knowledge of descent from the right to free development of the personality (Article 2 (1) of the Basic Law [GG]) and from the respect for human dignity (Article 1 (1) Basic Law [GG]).[25] Initially the Federal Constitutional Court [BVerfG] recognised this as a specifically personal right of the child and forbade all public institutions to deprive anyone concerned of attainable information.[26] In a later decision, the Federal Constitutional Court also granted this right to the man who wishes to find out whether a child is his natural child, without having to contest paternity at the same time.[27] In a decision adopted recently, this was confirmed towards a physician specialised in reproductive medicine who was obliged to disclose the identity of the sperm donor.[28]

[24] Dethloff reference as above pg. 21
[25] Schwab margin comment 588
[26] BVerfGE 79, 256
[27] BVerfGE 117, 202
[28] OLG Hamm, Entscheidung von 06.02.2013 [decision of the Higher Regional Court, Hamm (Oberlandesgericht) of February 6th 2013], (Az. [number]: I-14 U 7/12)

c) Adoption

The possibility in Roman as well as Germanic law of establishing a child-parent relationship by a legal act is regulated in German law under the designation “acceptance as child”. In the course, the acceptance does not take place by contract (contract system) as formerly, but now solely by decision of the family court (decree system) upon application of the person adopting. Since also the child itself, in the case of minors the parents and if necessary further family members such as the husband or the registered partner of the adopting person or of the person being adopted must consent, an adoption today remains impossible without the consensus of all the persons involved.

However, the court must examine the applied adoption and its legitimacy, but in addition also under the criteria of the best interests of the child and the concern of third parties. Systematically, the adoption of a minor is the basic case that is pursued with a view to providing a child the safety and legal security of a family. Therefore the law requires as a condition an existing or at least the establishment of a child-parent relationship. In the case of minors, the only possible adoption is the so-called full adoption, by which the legal effects are extended to the relatives of the adopting person, who legally become relatives by virtue of the adoption, while the legal family ties to the previous relatives cease to exist. If a person of full age is adopted, the legal effects of establishing family ties in principle do not extend to the relatives of the adopting person (so-called adoption with weak effects), if the conditions for a full adoption are not met (so-called adoption with strong effects). In this case, a full adoption requires a special application; it is especially possible in cases of stepchild adoption or in cases in which the adopted person has been taken into the household of the adopting person as a minor, but was not yet adopted at the time.

The adoption of persons of full age is only permitted if it is considered “morally justified”. In particular, jurisdiction will not consider the adoption of a person of full age morally justified if the persons involved are primarily pursuing economic interests, such as obtaining tax benefits for an inheritance. Married persons may only adopt as a couple, except if one of the partners is legally incapacitated or under 21 years of age. Partners in a registered civil partnership cannot jointly adopt an unrelated child, although one partner may now adopt the child of the other partner. One partner may now also adopt the adopted child of the partner (“successive adoption”). [29] The still existing ban on joint adoptions is politically highly controversial and should soon be clarified by the Federal Constitutional Court as one of the remaining fields in which marriage and registered partnership are not yet treated legally under the law. If a joint adoption of an unrelated child took place abroad, it is disputed whether it can be recognised in Germany. If the recognition was declared by the family court, it takes effect.[30]

[29] Entscheidung des BVerfG vom 12.02.2013 [decision of the Federal Constitutional Court (Az. [number]: 1 BvR 3247/09 und 1BvL 1/11)

[30] Kammergericht Berlin [Higher Regional Court Berlin], Entscheidung vom 11.12.2012 [decision of December 11th 2012], (Az.[number]: 1W 404/12)

Unmarried persons can only adopt a child alone. An unmarried couple cannot adopt jointly nor adopt the child of one of the partners as a common child. The adoption of the child of one of the partners by the other would, in this case, result in the legal termination of the hitherto existing family relationships and establish family ties with the adopting person, which is not intended, as a rule. Multiple adoptions are not permitted, so that a further adoption of the child is excluded as long as the adoptive relationship exists. The annulment of an adoption is a very rare exception and takes places on application only if it is proved that false statements were given during the proceedings of the adoption.

3. Divorce/Dissolution of the civil partnership

In spite of the teachings of the Churches on the indissolubility of the marital bond, divorce was regulated for the whole of Germany for the first time in the Act concerning Civil Status of 1875, after it had already been approved in the Protestant regions. This meant that also Catholics could divorce by civil law, whereas before they had only had the option of marital separation. With the coming into force of the German Civil Code [BGB] on January 1st 1900, a consistent law of divorce was introduced that limited the grounds for divorce to serious misconduct (principle of fault) and mental disease. From the Marriage Act introduced in 1938, with which the law of divorce had been removed from the Civil Code and "accumulated" with National Socialist elements, these elements were removed again in 1946. At the same time, the principle of matrimonial breakdown was introduced as a ground for divorce after living separately for three years. As of January 1st 1977, the law of divorce was restored to the Civil Code [BGB] with the First Act concerning Marriage Law and completely reorganised according to the principle of matrimonial breakdown.

As a matter of principle, marriage and civil partnerships are concluded for life. However, German law has regulations for divorce and dissolution of the civil partnership, provided that the legal requirements are met. Divorce and dissolution of the civil partnership are carried out solely by a court's decision, upon formal request of one of the partners, section 1564 of the Civil Code [BGB]. The only reason for divorce is the breakdown of the marriage (principle of matrimonial breakdown), section 1565 of the Civil Code. A fault is legally irrelevant.

Only those circumstances are relevant that occurred after conclusion of the marriage or civil partnership. If the act of entering into marriage or civil partnership itself was defective, the marriage or civil partnership may be annulled. The difference for the partners consists in the consequences for their civil status: after annulment of the marriage or dissolution of the civil partnership the partners are not divorced, but single again. However, in practice the annulment of marriage and dissolution of the civil partnership is irrelevant, because divorce proceedings according to the principle of marital breakdown is by far the more practical solution and discrimination of the divorced is no longer an issue in modern society.

According to the principle of marital breakdown, the marriage can be divorced if the spouses have been living separately for one year and both partners file for divorce (consensual divorce). If the partners have been living separately for three years, the breakdown of the marriage is presumed. In this case, it is sufficient if one of the spouses files for divorce. The other spouse can then only delay the divorce if it would involve particular hardship in accordance with section 1565 (2) of the Civil Code.

Moral reasons or faults can only be taken into account if, by way of exception, the divorce is filed for prior to expiration of the one-year period and a continuation would be unacceptable for one of the spouses, or if, in spite of a three-year separation period, the divorce were a particular hardship for one of the spouses. A hardship in this sense can be a circumstance that lies in the person of the other partner, such as severe physical abuse or gross violation of maintenance obligations. The divorce freeze can also be applied if the marriage was entered only for convenience, e.g. to provide the foreign partner a residence permit.

In the judicial practice the consequence is that the divorce takes place faster if the abused or the maintenance creditor desires the divorce. If he or she blocks the divorce, this can lead to an activation of the barring clause.

A further delay of the divorce is only possible in accordance with the hardship clause of section 1568 Civil Code, if either a child's interest or exceptional circumstances at the expense of a respondent are at stake, who is unwilling to consent to the divorce, so that a perpetuation of the marriage seems necessary by way of exception, even if the interests of the petitioner are considered. This only comes into question in the case of serious illnesses or exceptional accomplishments of the spouse unwilling to divorce for the other's interests.

The divorce proceedings are conducted as a "family matter" by the family court. The course of procedures is regulated in the Act on Procedures in Family Matters and Matters of Non-Contentious Jurisdiction [FamFG]. The proceedings are not brought to trial by filing a (civil) lawsuit, but by petition for divorce as a procedure of non-contentious jurisdiction. The parties are called petitioner and respondent. Representation by a lawyer is mandatory. If the respondent is not being assisted by a lawyer, he or she may not be able to file requests at court. But in the course of a consensual divorce, this does not play a part for the result of proceedings. Therefore it is handled this way regularly by the parties in order to save costs.

Since by far most petitions for divorce are based on marital breakdown and living separately, this is the term that unfolds the decisive significance for practice. According to section 1567 (1) of the Civil Code, the spouses are living separately if there is no common household and if at least one of the spouses does not wish to establish it because he or she rejects the marital cohabitation.

Consequently it is not enough to have different addresses in order to live separately, there must be an intention on the part of at least one of the spouses not to share a common household with the other, namely because marital cohabitation is not desired. Therefore, it is often difficult to explain to legal laymen that legally it is possible to live together in different homes, but at the same time live separately within one home, depending on the subjective attitude and practical behaviour to maintain or end marital cohabitation.

Since the family court must investigate the facts relevant for decision ex officio, and facts that are not put forward by the parties can only be considered if they are likely to maintain the marriage or if the petitioner does not object to their consideration, it is often necessary for the parties to clarify which aspects of the cohabitation question are significant and must therefore be reported.

4. Successions (the right of the heir, the surviving spouse/civil partner, the children)

a) Double meaning of the term “law of succession”

- Objectively it means all statutory standards that regulate the consequences in private and proprietary rights following the death of a person.
- Subjectively it refers to the legal power of the heir in private law after the death of the decedent.

The law of succession in the objective sense can be found mainly in the sections 1922 et seq. of the Civil Code (BGB).

In Germany, the subjective law of succession follows the principles of universal succession and “automatic devolution” [“Vonselbsterwerb”], i.e. the inheritance is transmitted to the heir as universal successor, without the necessity of a declaration of acceptance. In contrast the legatee has no subjective right to inherit, but only a claim against the heirs to obtain the assets bequeathed. The subjective right to inherit comes into being with the death of the decedent. Beforehand neither the prospect of inheriting as a relative by virtue of intestate succession nor the existence of a testamentary disposition create a legally secure position. Not even the binding effect of a joint will or a contract of inheritance can guarantee the designated heir that the testator will still have assets on inheritance, even if the law makes so-called disadvantaging dispositions more difficult in these cases.

With regard to very few assets, German law provides for special/individual succession as exceptions from the principle of universal succession:

- In those federal Länder in which the so-called Farms and Forestry Code [Höfeordnung] applies as partial federal law, it is possible to pass the farm estate on to only one heir, the so-called "Anerbe" (section 4 Farms and Forestry Code [HöfeO]), in the interest of maintaining efficient farms, securing general food supply and preserving farms and private agricultural businesses. However, the remaining estate objects are passed on in accordance with the general provisions of the Civil Code.

- Shares of a decedent in a business partnership are also not included in an estate. If it is a partnership under the Civil Code [BGB-Gesellschaft or GBR], the partnership is dissolved with the death of one of the partners, unless otherwise stipulated in the partnership agreement. In this case, only the deceased's share in the liquidation value is included in the estate. In the case of a trading partnership [Offene Handelsgesellschaft – OHG (general partnership), Kommanditgesellschaft – KG (limited partnership)], the partnership generally continues to exist – again subject to the provisions of the partnership agreement – and the remaining partners carry on business. However, the deceased partner's claim (in case of withdrawal) against the partnership is included in the estate.

  Therefore, so-called succession clauses in partnership agreements are common that exclude the dissolution or continuation of the partnership among the remaining partners provided for by law upon death of one of the partners. If the shares in the partnership are stipulated hereditary by way of a so-called simple succession clause, problems arise between the law of succession and partnership law, should a community of heirs enter into a partnership as a community of joint owners. Different provisions in the field of succession law, whereby the heirs' liability is limited only to the estate and other statutory limitations of liability for the coheirs (administration of the estate, insolvency of the estate) contradict the principle of unlimited personal liability of the individual partners (in company law). For this reason, the principle of universal succession is substituted by an individual succession of each coheir. If not all coheirs can succeed to the status of partner (so-called qualified succession clause), the successor designated in the partnership agreement acquires the partnership shares directly.

- Life insurances and other payments due to contracts for the benefit of third parties also constitute a case of special succession, but on the basis of the regulations within the law of obligations, about legal transactions inter vivos. However, the life insurance sum is legally not part of the estate.

b) Capacity to inherit

Natural persons and legal entities with legal capacities are eligible to inherit. It is not necessary for them to be competent to contract. However, the heir must be alive at the time of the decedent's death. Should the decedent and the person designated as heir both have an accident at the same time and should it be impossible to ascertain the exact order in which they died, they are

considered as if they had died at the same time, therefore no succession occurs between them. Animals are not eligible to inherit.

The child that has already been conceived at the moment of the decedent's death (nasciturus) may inherit, provided that it is born alive after the death of the decedent, so that its legal capacity can set in. This does not apply if the child is conceived with the sperm of a man who has already died, which is illegal in Germany. In cases such as these, the succession occurs in the order that would otherwise have been applicable.

c) The heir designated by will

Testamentary freedom, which is constitutionally protected, allows the testator to make provisions about his or her entire estate by testamentary disposition that completely exclude intestate succession. Under German law, there is no statutory provision for the closest relatives to participate directly in the estate, so that these may be excluded from succession completely by the testator which results in a compulsory share and which is a mere claim to payment. Nevertheless most wills are drawn up for the benefit of the closest relatives. However, often the spouses initially appoint each other as sole successors, at first without considering the children, and they are not included in the succession until the death of the longer living spouse.

If a business is passed on, on the other hand, the successor of the company is often a descendant of the family as sole heir, while the spouse and the other descendants are bequeathed otherwise. Statutory succession only plays a role if compulsory shares need to be paid, because the compulsory share as a claim to payment is calculated from the net estate value, amounting to half of the statutory share of the respective person entitled to a compulsory share.

d) Intestate succession

Intestate succession is regulated in sections 1924 et seq. of the German Civil Code. Accordingly, the law of succession fundamentally means, due to its historical roots, the right of relatives to inherit and sets up different classes of relatives, depending on the degree of relationship. Heirs of a lower class exclude the heirs of a higher class from succession.

Heirs of the first class are the descendants of the deceased. Their inheritance is governed by the so-called principle of representation, meaning that living children exclude living grandchildren from succession. Children inherit in equal shares. Remote descendants inherit according to the so-called principle of representation per stirpes, if a closer descendant does not inherit. If children of a pre-deceased child inherit instead of that child, the subsequently "free" share of the estate is in turn partitioned in equal shares among these grandchildren of the deceased.

Heirs of the second class are the parents of the deceased and their descendants, as a result the parents inherit first and in equal shares. Then, brothers and sisters and their descendants take the place of a pre-deceased parent, in accordance with the principles already laid forth for the first class of heirs. If the decedent was the only descendant of his or her parents, the longer living parent becomes the sole heir.

Heirs of the third class are the grandparents of the deceased and their descendants. Accordingly – also in this case – the grandparents inherit first and in equal shares, excluding their offsprings. Alongside, the succession principles of the second class apply – in this case based on each pair of grandparents, respectively. The other pair of grandparents or its descendants take the place of a pre-deceased pair of grandparents without descendants.

Should a person belong to several of the aforementioned relationships, he or she inherits each share of the estate separately.

The fourth class of heirs is still mentioned expressly: the great-grandparents of the deceased and his or her descendants take the right of succession, whereby – unlike in the case of the lower classes – the living great-grandparents inherit in equal shares per person, irrespective of whether they belong to the same line or different lines. As a consequence, descendants in this case only inherit if there are no more great-grandparents. If there are no more great-grandparents left, it must be determined, which of the whole of all descendants has the nearest relationship. Should several persons be related to the same degree, they inherit in equal shares.

For the remoter succession classes, the Civil Code refers to the principles of the fourth (succession) class, however such cases should occur extremely rarely.

According to section 1931 of the Civil Code, it is not possible to determine the succession claims of the surviving spouse of the deceased before clarification of the succession claims of the related persons:

- If there are no relatives of the first or second class, the surviving spouse inherits alone.
- If relatives of the first or second class or grandparents are entitled to succession, a community of heirs is established, of which the spouse is a member and in which his or her succession share depends on the degree of relationship of the inheriting relatives to the deceased as well as on the matrimonial property regime applicable to the marriage of the deceased with the spouse.
- The succession share of the spouse next to relatives of the first succession class is a quarter, next to relatives of the second class or grandparents half of the estate.

This share is a quarter higher if the spouse and the deceased were living under the default matrimonial property regime (community of accrued gains), so that in this case, which is practically the most frequent, the spouse receives half of the estate next to children and three quarters of the estate next to parents-in-law or brothers- or sisters-in-law, respective the nephews and nieces of the deceased.

If the spouses were living under the less frequent matrimonial property regime of separation of goods, the Civil Code [BGB] rules that the spouse inherit no less than each of the children, so that he or she also receives half of the estate next to one child, a third next to two and a quarter next to more than three children. There is no further increase of the spouse's share in the succession.

If the deceased and his or her spouse had agreed on the matrimonial regime of community of property, the statutory succession share of the spouse next to children is always (only) one quarter; however, these spouses, nearly without exception, link the marriage contract to an inheritance contract, so that intestate succession occurs extremely rarely in the case of matrimonial community of property.

The spouse is also entitled to the so-called "preferential benefit" (personal chattels: household goods and wedding presents) ["Voraus des überlebenden Ehegatten", section 1932 Civil Code], irrespective of the matrimonial property regime. However, the preferential benefit can only be invoked vis-à-vis descendants to the extent that the spouse needs these articles to adequately maintain a household. Insofar the spouse has the position of a legatee vis-à-vis the co-heirs.

The rights of the spouse cease to exist if he or she was formally married to the deceased at the time of death, but the requirements for divorce were fulfilled and the deceased had filed a divorce petition or consented to a divorce. However, after divorce proceedings have begun, a spouse does not necessarily lose all of his or her succession claims, but may assert a claim to maintenance against the heirs pursuant to sections 1569 to 1586b of the Civil Code, if he or she had been entitled to such claims against the deceased in case of a divorce; nevertheless, this claim is limited by the sum of the fictitious compulsory share.

The rights to a share in the succession and a compulsory share in the estate of a registered civil partner of the decedent has been modelled upon the right of succession and compulsory share of the spouse, according to section 10 of the Civil Partnerships Act [LPartG], also with respect to the property regime and its consequences for a possible rise of the share in the estate. A partner that was neither married nor in a registered civil partnership with a deceased has no rights of succession or compulsory share, not even if he or she has joint descendants with the deceased, or if they were living together as husband and wife or as life-long partners.

II. Part: Presentation of the following key issues

1. Evolution of the marital/the registered partner relationship and of family relations

a) Constitutional foundations

Article 6 of Germany's Basic Law already hints at the conflicting tensions between the marital relationship and the registered civil partnership and other partnerships for life with or without children, as well as the rift existing in state intervention policies between promotion and interference:

(1) Marriage and the family shall enjoy the special protection of the state.

(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

(3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.

(4) Every mother shall be entitled to the protection and care of the community.

(5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

b) Special protection of marriage and the family

To begin with, the controversial discussion is concerned with the question what exactly the "special" protection of marriage pursuant to Article 6 (1) can consist of (today and positively), whether – as a consequence – forms of living together that are on equal terms with marriage are admissible in the legal system or if equal treatment would automatically mean the abandonment or reduction of this special protection.

In advance, it must also be stated that the law of marriage and divorce has by no means been static after the Civil Code and also the Basic Law came into force, cf. the outline of legal developments at the beginning of this report. However, these changes dealt exclusively with the relationship between a man and a woman or the equal treatment of the latter, as well as with questions of equal participation in the economic outcome of the marriage.

But since the state must protect the needs and rights of children in accordance with the sub-articles 2 and 3, irrespective of the form of family in which they are raised, and the protection of all mothers called for in sub-article 4 does not specify whether these are married or not, the tendency in this field is equal treatment of parent-child or mother-child-families, not taking into account whether the parents are or were married or not. Since, on the other hand, it can hardly be justified to fundamentally place single fathers at a disadvantage to single mothers, given their

rights and their economic responsibilities, much importance will also be attached to equal treatment here, considering also that the principle of equality [“Gleichheitsgebot”] pursuant to Article 3 of the Basic Law [GG] enjoys constitutional status. Any unequal treatment on the state’s part requires a legitimation that the factual circumstances are not comparable, which is difficult to justify in the presence of children – especially after the abolishment of the discrimination of children born within and outside of marriage – in the face of the clear constitutional obligation of Article 6 (2) and (3). As a result, a discrimination of any type of family with children is ruled out. The only distinctions that consequently remain refer to the different life concepts of unmarried adults without children and the legal relations of parents outside of a marriage – not considering the claims of children.

aa) Developments with respect to marriage

Along with the development of the law of marriage and divorce, presented in the historical part, the following considerations have a special practical relevance:

The community of accrued gains as statutory property regime has, in principle, proved successful as such and did not need any significant corrections. It combines the principle of separate property without establishing joint property with a claim to payment that equalizes the different increases in value of both properties during the time the marriage lasts only in the case of a divorce. On the one hand, this enables the spouses to manage their assets freely each during the existing marriage and gives the economically weaker spouse a share in the economic success of the marriage in case it fails.

The equalisation of pension claims has also proved successful in principle; its goal is to distribute the pension claims accrued during the marriage equally on both spouses. This is necessary in a society in which periods out of work in the professional career remain normal for women due to the education and care of children as well as care and nursing of family members; without the equalisation of pension claims this would lead to poverty in old age. The recent corrections that the legislator undertook in the system have led to a significant improvement of a fair allocation of claims. Likewise, the extension of contractual freedom has proved advantageous in practice. But since the equalization of old age provisions would not lead to sufficient economic security except if both spouses worked, political efforts are made to remind the spouses of their personal responsibility and keep the phases out of work short by introducing measures to reconcile family life and the world of work; some of these, however, are the subject of highly controversial debate (state support for parents who have their child/ren taken care of in a nursery at an early stage vs. monetary benefits for parents that care for their children themselves [“Betreuungsgeld”]).

Since the Maintenance Reform of 2007, which introduced the principle of post-marital personal responsibility, a spouse only receives post-divorce maintenance if he or she is not capable of

providing for his or her own maintenance and only according to the statutory reasons laid forth (care of young children, old age, illness, unemployment, education or further training for obtaining adequate employment). The family judge dealing with the maintenance claims examines in each case whether these statutory conditions are met. The reform also stressed the possibility of a stronger limitation of the sum of maintenance claims and the period of time they are granted. As a consequence, the spouse that did not work or only worked to a small extent during the marriage is forced to take up his or her professional career earlier after the divorce than before, as a principle without a guarantee of status. The reform therefore clearly determined that marriage is not conceived as an institution of maintenance.

Should the spouses not consider this model of divorce consequences – geared towards marriages with one earner and a housewife – apt for their situation, they can make deviating arrangements in all areas by marriage contracts. In the case of pension equalisation and post-divorce maintenance of the spouse, though, the claims belong to the core area of divorce consequences and may therefore only be altered insofar as this does not entail a one-sided and consequently immoral distribution of the burden on the part of the economically weaker spouse. The law of matrimonial property regimes, in contrast, does not belong to the core area and therefore allows for an almost unlimited contractual freedom, with the possibility of modifying the statutory property regime or agreeing on a different property regime of their choice in the statutory or in a modified form. The spouses may thus alternatively agree on either complete separation of property without any mutual share in the other's property or on community of property, which however – in its basic form – always includes the entire property, also pre-marital assets as well as gifts or inheritances acquired during the marriage. In practice, the community of property is hardly ever chosen any longer, the separation of property mainly within the framework of divorce and separation settlements.

The main focus of notarial marriage contracts is on the modified community of accrued gains that is agreed upon in the most diverse forms: exclusion of certain parts of the property upon calculation of the gain (especially if companies and real estate property is involved), determination of a deviating fixed day for beginning the calculation of the initial assets, if common property accrued before the marriage, arrangements with respect to the amount of the initial assets and many more. Compared to the number of notarially authenticated testamentary dispositions, the number of marriage contracts is relatively low, however, which means that the statutory regulations are considered either adequate by a majority or at least not worthy of change. Furthermore, an important aspect of matrimonial property regimes is that a significant part of the population in Germany is living in a foreign legal system – often without knowing it and without a marriage contract. This is often noticed when property is acquired, in the case of a divorce and when a spouse dies, as the succession claims of the spouse depend on the property regime if German law is applicable.

This concerns the legal relationships either of foreigners living in Germany, Germans that married a foreigner abroad or Germans that used to have another citizenship.[31] For the legal effects of the matrimonial property regime, German Private International Law refers invariably to the conflict of law rules that govern the general effects of marriage at the time it was entered into. This, in turn, depends on a common nationality, alternatively on the laws of the state in which both have their residence. German law is only applicable if the law of the state that is invoked by German conflicts-of-law, refers back to the German law of residence. For notarial practice, the clarification of the matrimonial property regime plays the most important part in these cases, since the respective conditions of acquisition must be entered into the land register if real estate property is acquired.

bb) The registered civil partnership

At the focus of current political debate is the registered civil partnership for same-sex couples that demand a complete alignment of the regulations concerning the registered civil partnership, invoking Article 6 (1) and the principle of equality of Article 3 of the Basic Law [GG], also in the law of adoption and fiscal law, and a broader interpretation of the term "marriage". An argument brought forth against this is that the special protection of marriage may make a discrimination of other partnerships necessary, which would be in line with Article 3 Basic Law (GG), since this only requires equal treatment for equal factual circumstances. Biological, moral, religious and historical reasons are referred to to claim the term of marriage – hitherto not legally positively defined – as a life-long partnership between a man and a woman.

The mere introduction of the registered civil partnerships was highly controversial politically in the light of the mentioned arguments. In the end, the registered partnerships were modelled identically upon marriage, with slight differences, but were given a different name and the regulations placed – consciously outside of the Civil Code – in a separate act, namely the Civil Partnerships Act of February 16th 2001. Initially it was in the hands of the legislation of the *"Länder"* [Federal States] to determine the competent authorities for entering into a civil partnership. For this reason, in Bavaria the civil law notaries were initially competent exclusively for establishing civil

[31] The Act on the Matrimonial Property Regime for Displaced Persons and Refugees of August 4th 1969; Federal Law Gazette: Bundesgesetzblatt – BGBl. I 1067, integrates all those persons into the matrimonial property regime of the Civil Code that entered the Federal Republic of Germany by December 31st 1992 and have been recognised as Germans. So-called ethnic German "late refugees" ["Spätaussiedler"] that entered after that date must acquire German citizenship by naturalisation. It is disputed whether the aforementioned act applies to them analogously or whether they must be treated as foreigners with respect to the matrimonial property regime, cf. Peter Wandel, Kuckuckseier nicht nur zur Osterzeit - Zum Güterrecht der Spätaussiedler ["Gifts of dubious value – On the Property Regimes of the late Refugees"] BWNotZ [Journal for the Notariat in Baden-Württemberg] – 1994, 85 et seq., OLG Hamm [Higher Regional Court of Hamm] on the changeability of the (matrimonial) property regime status of the" late refugees", MittBayNot [Journal for the Notariat in Bavaria] 2010, 223 [including notes by Süß]. [Translator's explanatory note: Towards the end of WWII and afterwards, many German nationals and ethnic Germans were forced to migrate from various European states and territories to areas which would become post-war Germany.]

partnerships, the civil partnership register as civil status register was kept with the Landesnotarkammer [Chamber of Civil Law Notaries of Bavaria].

However, in the aftermath, step by step, legislation had to bring the civil partnership in line with marriage more and more, due to court decisions and political pressure. Civil partnerships can now be entered into in front of a civil registrar in all Germany (in Bavaria alternatively still in front of the civil law notary), the respective civil status register is now kept exclusively by the civil registry office. The characteristics of the civil partnership now fully coincide with marriage. Equal treatment with married persons was established in the law of pensions, the law of inheritance and income tax and recently in the case of the adoption of stepchildren and in successive adoption. Legal equality has not yet been established in the remaining cases of adoption.

Whenever the Federal Constitutional Court [BVerfG] established changes with its decisions, the principle of equal treatment pursuant to Article 3 of the Basic Law [GG] was always decisive, it did not want to derive an "obligation to discriminate" from Article 6 Basic Law [GG]. Should the current government coalition or a new government as of autumn 2013 not be able to agree on further steps in equal treatment in the law of adoption, the Federal Constitutional Court [BVerfG] is expected to make this move. It is unclear whether or not the terminological distinction between marriage and civil partnership will prove to last.

In Germany, the legal evaluation of civil partnerships registered according to foreign law is carried out in accordance with the registration authority (*lex libri*), as stated in Article 17b of the Introductory Act to the Civil Code [EGBGB]. However, a foreign civil partnership may at best unfold the effects pursuant to the German Civil Partnerships Act [LPartG], according to a so-called cap limit [Kappungsgrenze] that has been the subject of legal criticism and may possibly even contravene European law. By now, the recognition of same-sex marriages in Germany is assessed in accordance with a view also held by the higher courts, with reference to Article 17b of the Introductory Act to the Civil Code [EGBGB] and to the above mentioned argument of the differences between marriage and civil partnership, since the legislator is thought to have consciously excluded equal treatment according to Article 6 of the Basic Law [GG] by the use of differentiating terminology. This opinion has the advantage that, according to Article 17b Introductory Act to the Civil Code [EGBGB], a foreign same-sex marriage can be at least recognised as a registered civil partnership, irrespective of the nationality of the parties involved. Other views suggest equal treatment in analogy to Article 13 of the Introductory Act to the Civil Code [EGBGB], according to the law of the partners' country of origin.[32] There is no practical experience for cases of separation, divorce or successions. Therefore, in order to prevent legal uncertainty, it is highly

[32] Detailed account by Buschbaum, Kollisionsrecht der Partnerschaften außerhalb der traditionellen Ehe [Conflict-of-laws for partnerships outside of traditional marriage], 2010, RNotZ [Journal for the Notariat in the Rhineland] 73 et seq. und 149 et seq., who recommends a qualification as (a) registered civil partnership.

recommendable for foreign same-sex spouses or partners to make use of the opportunities of contractual arrangements in German law and, if necessary, register their partnership anew and integrate into the German legal system if they have their residence here.

In German law there is no specific conflict-of-law provision for registered heterosexual partnerships that do not correspond to marriage. Article 17b of the Introductory Act to the Civil Code [EGBGB] is not applicable in their case. For them, the general statutory provisions are applicable. They are considered neither as a marriage nor as a civil partnership.

cc) Partnerships outside of marriage

Hitherto, the legislator has not considered it necessary to regulate other forms of partnership that deviate from marriage and the civil partnership, given that there is no specific form of partnership outside of marriage, in the absence of any legal definition or tradition.

In society, there is a wide variety of unmarried couples whose partnership is not only conceived for a long period of time, and not only as a true alternative to marriage, e.g. with partners that do not wish to take the remaining risk of a void marriage contract providing for a total exclusion of divorce consequences, or with persons that do not want to lose their entitlements to pensions or maintenance by entering into marriage. Rather, the partnership with unmarried partners has established itself, on one hand, as a “partnership for a life-phase” with a consciously weaker bond, as well as a pre-stage to marriage, like a marriage on a trial basis.

In many cases, partners that establish a relationship without marrying do not do so with a legally founded demarcation to marriage, but with the simple, not further reflected desire to live together. From there, the relationship does not move on, in the absence of social, legal or economic constraints of today’s society to marry, also given that marriage offers only limited security in view of a liberal law of divorce.

Consequently there is no need to act, since all couples with common plans in life and the will to make a legally binding commitment have many offers to choose from which can be adapted, to a far-reaching extent, to a wide range of situations in life.[33] In view of the possible exclusion of the statutory provision on divorce consequences, which may be agreed on up to the limitations of immorality, also spouses and civil partners are very flexible in shaping the arrangements of their (legal) commitments.

In legal disputes about the settlement of partnerships with unmarried partners, jurisdiction therefore has established the view that the application of the law of divorce consequences is ruled out

[33] Löhnig reference as above

simply because the partners could have married, had they wished to have the legal effects of a marriage. If somebody does not marry in order to prevent the effect of a legally binding commitment, he or she must not be subjected to regulations that he or she did not wish, given that even unmarried couples or partners without a registered partnership are free to arrange their legal relations with contracts. In the past, this sometimes led to court decisions that were hard to understand for the parties involved, e.g. if the property of one partner gained considerably through the achievement of the other partner, but compensation after a separation was not granted. By now, the courts find adequate solutions, even without resorting to concepts of divorce law, but by applying the general provisions on unjust enrichment [sections 812-822 Civil Code] or on the adaptation and ending of contracts [sections 313-314 Civil Code], so that a former partner does not lose everything in the event of a conflict about property, without "economically marrying" the parties.

However, a legal protection of the economically weaker partner that is comparable to matrimonial property law cannot be derived from this. Furthermore, maintenance claims – except for the modestly conceived claims of an unmarried mother according to sections 1651a et seq. of the Civil Code – and succession claims can only be arranged by way of contractual settlements or testamentary dispositions, which are then treated by tax law as legal relations among strangers, so they enjoy no benefits whatsoever.

The conflict-of-law rules in family law are not applicable to foreign civil partnerships that are not registered. Their property relations may possibly be evaluated according to the respective law applicable to obligations, possibly also the law applicable to unjust enrichment or to torts.[34]

dd) One-parent-child families and patchwork families

The classical case of the one-parent-child family assumes that – if both parents are alive – the minor children have their residence with the mother. Maintenance for the children according to the idea of this generalised case is performed by the mother in the form of performances in kind and of services, by the father in the form of payments. In certain constellations the mother also receives maintenance. In practice this model is still the prevailing one, for divorced couples as well as for parents that were never married. Although it should be noted that more and more cases occur in which the father takes over child care or a so-called model of alternation is applied, according to which every parent contributes with payments and maintenance in kind. Also so-called patchwork families with children from different relationships of their parents are more and more common.

[34] Palandt/Thorn Art. 17 b EGBGB [Einführungsgesetz zum Bürgerlichen Gesetzbuch – Introductory Act to the Civil Code], margin comment 12

Alongside the social developments, fathers have come up with the idea that for the services they have rendered – in fact in accordance with Article 6 sub-article 2 – should come along with a right of contact and a share in parental care.

In the statutory provisions this can be traced in the changes of rules about parental care and child custody.

The traditional assumption is based on the notion that it is the man's duty to procure the economic means and the woman's to use these for the child. It was taken for granted that the personal aspects of the parent-child relationship are of less importance for the man, so that child custody had to be granted to the mother, as a rule in the case of a divorce and always if the parents were not married. This way, the children were thought to be protected best from conflicts of child custody between their parents that were not living together.

At first, parental care, formerly called "parental power", was conceived in section 1626 of the Civil Code as "duty and right to care for the minor child". The law expressly stipulates that the best interests of the child "generally require regular contact with both parents".

For divorced parents, common custody then became a general rule as a result of the reform of the law of parent and child of 1997, custody of only one parent was introduced as an exception that requires a respective petition of one of the parents and consent of the other parent, and it must be in line with the best interests of the child.

If parents that are not married at the time of birth, they may now assume parental custody by issuing a declaration of parental custody. By subsequent marriage parental custody is established automatically. In other cases, parental custody is assigned to the mother alone.

In all cases of common parental custody the parents are called upon to "exercise the parental custody on their own responsibility and in mutual agreement for the best interests of the child". The law then formulates: "In the case of differences of opinion, they must attempt to agree.…" .

As a consequence in legal practice, petitions for granting custody to only one parent are approved of rarely, especially not just for the reason of differences of opinion.

The possibilities of fathers to contribute to parental care have thus improved significantly. In particular, it is no longer legally provided that the mother can exclude the father altogether simply by rejecting his desire to participate. However, the possibilities of fathers willing to educate are still limited by two factors:

- The mother can obstruct the father's participation illegally by impeding his right to contact and by relegating him to legal action to enforce his claims (and duties).

- If the father is obliged to pay maintenance, his working obligations will leave him less opportunities for intensively caring for the child personally, so that is it often difficult to maintain a close relationship, even if this is desired.

Factually, common parental custody and a satisfactory level of contact with both parents after a separation requires the parents to be very disciplined and to cooperate closely, so that unmarried parents stand in quite a close legal relationship via their common children, even if they have entered a new marriage or partnership. The Act Enhancing the Rights of the Natural, not Legal Father of July 4th 2013 (Federal Law Gazette I, 2176 et seq.) has now granted men that are natural fathers, but are legally not considered as such, the right to contact with the child and the right to obtain information about the child, if they take serious interest in the child and if this serves the child's best interest. Thus, the possibility was created to establish biological and social family relationships in cases in which the parties involved – for whatever reasons – refrain from action to contest paternity and from issuing a declaration of descent, both with legal consequences, but in which the natural father nevertheless wishes to establish contact with the child as a legal non-father. However, in reality this right can also be obstructed considerably and will therefore be difficult to enforce.

2. Transfer of assets

a) Presentation of formal requirements for the act of property transfer

The transfer of assets, especially property, also enjoys the protection of the Basic Law [GG]. The respective constitutional right is Article 14:

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

(2) Property entails obligations. Its use shall also serve the public benefit.

(3) Expropriation shall only be permissible for the public benefit. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

The wording "content and limits" already hints clearly at conflicting potential that this entails. In this case, the state has far-reaching possibilities of intervening and restricting, which again and again becomes obvious in the context of taxation of gifts and inheritances. Time and again, the right to a compulsory share as a limitation of testamentary freedom has also been derived from Article 14 of the Basic Law.

aa) Transfer of property inter vivos

In Germany, the engagement of a living person to transfer property to another is subject to the law of obligations, for which the principle of contractual freedom applies. During the life (of the testator or decedent), close relatives are not entitled to any transfer of property that corresponds to the compulsory share, with the exception of maintenance claims. There are no limitations to acquire, for example for foreigners in the case of real estate property. Any person having legal capacity [“Rechtsfähigkeit”] may receive gifts.

Generally, the donor’s obligation to transfer property can be invoked only if the underlying contract was notarially authenticated according to section 518 of the Civil Code, except if the donated asset is handed over directly (so-called “Handschenkung”). In the case of real property and the according titles, notarial authentication is always necessary due to section 311b (1) of the Civil Code.

The donation contract may provide for a one-sided obligation only, but it can also provide for a donation subject to conditions, or a so-called mixed donation, in case the performance of the donee is lesser than that of the donation. If a plot of land is involved, the complete contents of the contract must be authenticated, even parts that do not refer to the plot of land.

There are interconnections to the law of succession, owing to the duty to count gifts towards the compulsory share [section 2315 Civil Code], if the provision was agreed upon, and also owing to the general obligations concerning the adjustment within the circle of eligible descendants, as long as these inherit equal shares later.

According to the “principle of abstraction”, the contract itself does not establish the transfer of ownership of the property. Rather, this is an agreement of ownership transfer typically associated with a contract in property law. The agreement according to property law has no formal requirements, except if the object is real estate property or a right in real property or shares in a company with limited liability [Gesellschaft mit beschränkter Haftung – GmbH]. According to section 925 of the Civil Code, the so-called “agreement as to the conveyance of land” must be declared in presence of both parties and “before a competent agency”. Irrespective of other possible competent agencies, the civil law notary is competent to receive such declarations. The transfer of shares held in a company of limited liability [GmbH] requires notarial authentication.

The agreement as to transfer of property itself does not bring about the legal act of property transfer either, except for the transfer of rights. For doing so, a further legal element is necessary. For movable property the law requires the property to be handed over or another form of procuring possession. In the case of immovable property, the entry into the land register is a necessary legal

predisposition, in which the agreement as to the conveyance of land must be proven to the land registry. The land registry does not simply accept the instrument and discloses its content. Rather, it discloses the legal relationships with respect to the registered plot of land directly, so that, as a consequence, it becomes obvious without further investigation who is the owner of a plot of land or holds titles as to the plot of land. In the case of transfer of company shares of a company of limited liability [GmbH], the agreement does establish the legal transfer of property, however the authenticating civil law notary must hand in a new list of shareholders to the Commercial Register [Handelsregister] that discloses who is now shareholder by virtue of his instrument.

bb) Transfer of property mortis causa

Additionally to the above mentioned transfer mortis causa of heirs by way of universal succession, the acquisition of property is possible by legacy. While the estate passes on to the heir immediately in the moment of death, and the heir can only get rid of it by disclaimer of the inheritance, the legacy establishes a claim between the heir and the legatee to fulfilment of the legacy. If the legatee does not assert his claim, the subject-matter of the legacy remains with the heir. The claim of the legacy is subject to a 3-year limitation period. In any case, an explicit disclaimer is not necessary in order to prevent its devolution. A special, additional contract is not necessary, except if the heir and the legatee agree on deviating arrangements. Fulfilment itself occurs in accordance with the rules of the agreement in the law of property, so that in the case of real property a notarial instrument must be drawn up and subsequently the entry into the land registry carried out as an act establishing the rights. In German law, there are no legacies with immediate *in rem* effects [*legatum per vindicationem*].

b) Examples in which a notarial instrument is required for becoming the owner or to bring about the conveyance in a real property register

In German law, notarial authentication is always required

- for contracts in which one party binds itself to acquire or transfer the ownership of a plot of land, section 311b (1) of the Civil Code
- for contracts that have as subject matter the obligation of transferring the present property or a part of it of a person, section 311 b (3) of the Civil Code, irrespective of whether real property is part of the property
- for so-called inheritance contracts among future statutory heirs or contracts stipulating the compulsory share of one of them, section 311 b (5) of the Civil Code [BGB], irrespective of whether real property is part of the future inheritance
- for gifts to the extent described above
- for the transfer of shares in a company of limited liability [GmbH]

The case of the rule on the agreement as to the conveyance of land is not a formal requirement, but a competing competence of different office holders.

3. Instruments of regulation

a) Regulation by obligations and prohibitions

The legislator controls legal relations in family law and the law of succession primarily by laws that stipulate the rights and duties of the persons involved, especially prescribing the contents and limits. The regulations implement the constitutional rights of the Articles 6 and 14 of the Basic Law [GG] in such a way that the parties involved may arrange for their legal relationships within the context of the also protected general freedom of action, as stated by Article 2 of the Basic Law [GG].

This may be done directly by way of obligational regulations and *in rem* provisions of the Civil Code, cf. the foregoing statements on the description of the legal situation as well as the above listed examples of legal transactions that require notarial authentication, among which particularly section 311 b is interesting in that it does not only stipulate the necessity of notarial authentication for especially important or critical legal transactions in the subsections 1, 3, and 5, but also as in subsections 2 and 4, it expressly declares void contracts by which future property is to be transferred or charged or contracts relating to the estate of a third party who is still living (except for the inheritance contracts pursuant to subsection 5).

b) Regulation by state support

However, the state influences the behaviour of people in family law and the law of succession at least in the same way by financial incentives and offers in monetary benefits.

aa) The support can be granted indirectly, e.g. by tax laws

The decision in favour of or against a marriage is probably also taken in view of the so-called matrimonial splitting [“Ehegattensplitting”], the current legal provisions for the taxation of married couples, by which the incomes of spouses that earn differently are equally distributed among both partners for the sake of taxation; thus, the disadvantages of tax progression, i.e. the rising tax rate that comes with a rising income, is levelled stronger the greater the difference of income between the spouses is. There is criticism of the matrimonial splitting as couples without children benefit from it as well as single-earner families, Still others call for its general preservation, but are in favour of arranging it as a “family splitting” in the future, depending on the number of children, thus granting it only to families with children, which could produce more benefits than the child tax allowance described below.

Another important aspect concerning tax issues is the taxation of gifts and inheritances, both equally treated by fiscal law. All donations of the same donor to the same donee within 10 years are added, even if succession follows a donation. Every notary has experiences with requests for authentication that are only intended to avoid taxes, however the concerns of the parties are often unjustified: taxation for close relatives as a rule does not present a problem since these enjoy benefits through high allowances and low tax rates. The more remote the degree of relationship, the lower the allowances are, and the higher the tax rates, though. While the change of tax class III to tax class I by entering into marriage is usually not a problem, the parties involved must prove the moral justification in the case of an adult adoption, which is negated by the courts in the event the adoption is carried out merely for fiscal benefits.

The persons concerned are categorised into the following tax classes, according to section 15 (1) of the Inheritance Tax Act [ErbStG]:

Tax class I:
1. the spouse and registered civil partner,
2. the children and stepchildren,
3. the descendants of the children and stepchildren mentioned in No. 2,
4. the parents and grandparents in the case of transfers mortis causa;

Tax class II
1. the parents and grandparents, if they do not belong to tax class I,
2. the brothers and sisters,
3. the descendants in first degree of brothers and sisters,
4. the stepparents,
5. the children-in-law
6. the parents-in-law,
7. the divorced spouse and the civil partner of an annulled civil partnership

Tax class III
all further persons acquiring shares and the testamentary dispositions, donations and legacies with a specified purpose.

Classified according to tax classes, pursuant to section 16 (1) of the Inheritance Tax Act [ErbStG], the following tax allowances are applied:

(1) Exempt from taxation in cases of full tax liability (section 2, subsection 1, no. 1 and subsection 3) is the transfer of

1. the sum of up to 500,000 Euros for the spouse and civil partner;
2. the sum of up to 400,000 Euros for children as defined by tax class I no. 2. and the children of deceased children within tax class I no. 2;
3. the sum of up to 200,000 Euros for children of children as defined by tax class I no. 2;
4. the sum of up to 100,000 Euros for other persons within tax class I;

5. the sum of up to 20,000 Euros for persons within tax class II;
6. (deleted)
7. the sum of up to 20,000 Euros for other persons within tax class III.

(2) In cases of limited tax liability, in lieu of the allowance according to subsection 1 (section 2 subsection 1 no. 3), a tax allowance of 2,000 Euros is granted.

So-called resident taxpayers have full tax liability and thus enjoy tax benefits, i.e. in principle all persons who have their residence or habitual residence within Germany, Germans that do not move abroad for more than 5 years, Germans in public service [Öffentlicher Dienst] with their place of office abroad, as well as domestic associations and corporations.

For persons of limited tax liability, i.e. persons that are not resident taxpayers such as Germans that live abroad for a long period of time without being in public service, or foreigners that live abroad with assets in Germany, the situation looks a lot more unfavourable with an allowance of only 2,000 €, irrespective of the family relationship. After determining the tax class and the personal tax allowance, according to section 19 of the Inheritance Tax Act [ErbStG], the tax rate needs to be determined, which depends on the value of the transfer, to which transfers existing abroad are added:

Inheritance taxes are levied according to the following rates:

value of the transfer subject to tax liability (section 10) up to the sum of … Euros	Tax rate of the classes		
	I	II	III
75,000	7	15	30
300,000	11	20	30
600,000	15	25	30
6,000,000	19	30	30
13,000,000	23	35	50
26,000,000	27	40	50
over 26,000,000	30	43	50

(2) If a fraction of assets is withdrawn from resident taxation due to a convention for the avoidance of double taxation according to section 2 subsection 1 no. 3, taxes are levied according to the rate that would be applied for the whole transfer.

(3) The difference in sum between the taxes that arise from application of subsection 1 and the taxes that would arise if the transfer had not exceeded the last relevant limit is only levied

if it can be covered by
(a) half of the exceeding amount above the limit for a tax rate of up to 30 per cent,
(b) three quarters of the exceeding amount above the limit for a tax rate of over 30 per cent.

Thus, for larger properties and in cross-border cases, the persons involved need to make plans for their assets early, in the course of which the civil law notary should be included from the start, apart from other consulting professionals, considering his or her competence as adviser and authenticator.

bb) Direct support also plays an important part in practice

Direct state intervention especially takes place in the field of the so-called aid payments ["Transferleistungen"] and other monetary benefits. Examples of such aid payments that are transferred as payments directly to the beneficiaries without any service in return are the child benefits ["Kindergeld"] and the parental benefits ["Elterngeld"] and the local bonus according to the pay regulations for civil servants which depends on the number of children and the civil status.

The claim to child benefits ["Kindergeld"] begins with the moment of birth and generally ends at the age of 18 years. For every child that begins training or university studies after the age of 18, child benefits can be applied for up to the age of 25. In Germany, in the year 2013, 184 Euros are paid for the first and second child each, 190 for the third and 215 Euros for every further child. According to the decisions of the Federal Constitutional Court [BVerfG], the subsistence minimum of the child must remain tax free. For this reason, child tax allowances ["Kinderfreibeträge"] were introduced. The child allowance in the year 2013 is 7,008 Euros. The subsistence minimum exempt from taxation is supposed to be achieved mainly with the child benefits. In the context of the annual adjustment of wage tax, a so-called "most favourable tax inspection" ["Günstigerprüfung"] takes place, in the course of which the tax office carries out a calculation of comparison by first determining the tax debt without considering the child allowance. In a second step, it determines the sum of taxes that would have to be paid less if the child allowances were considered. Then, the result is compared to the child benefits that were paid. If the child benefits for 2013 exceed the consideration of the child allowances of 7,008 Euros per child of taxes to be saved, the payment of child benefits was more favourable for the person liable to taxation than the consideration of child allowances. Balancing does not take place. Or, expressed otherwise, the person liable to taxation need not pay back child benefits only because the calculated tax benefit was less than the amount of the child benefit paid for in 2013. If, however, the tax benefit possible by considering the child allowance is higher than the child benefits paid for 2013, the person liable to taxation is paid the balance between the tax benefit and the child benefits paid.

The parental benefits ["Elterngeld"] are granted for a maximum of 14 months to the parent who interrupts his or her career, with a rate of 67% of the income obtained hitherto, with a limitation of a maximum sum of 1,800 Euros a month. Parents without income receive a fixed sum of 300 Euros a month. Foreigners without a legally approved residence, on the other hand, do not receive any parental benefits.

This provision is intended to prevent an incentive for immigration. Grandparents have no claim, either.

For the sake of better reconciliation of the family and the professional career, the possibility of taking leave from work was also introduced, for child education and for nursing family members. The Federal Act on Parental Benefits and Parental Leave [Bundeselterngeld- und Elternzeitgesetz] grants mothers and fathers a legal claim to parental leave up to the third year of age of the child.[35] Both parents are considered separately here, so both parents may completely or partly take leave together. Preconditions for the legal claim are that the parents educate and care for the child themselves in a common household and, furthermore, the habitual residence of the parents must be within the Federal Republic of Germany and work of more than 30 hours per week is not permitted. At the end of parental leave, the employment is automatically continued under the same conditions valid before the parental leave. However, there is no claim under German law to the position that was held before. Whether this is in line with European law is subject to controversy.

As further support, the Federal Government passed the "Act on Benefits for Home Care of Children Under 3" ["Betreuungsgeld"] in November 2012. It is intended to offer a compensation for families that care for their children under three years of age themselves, instead of sending them to a state-supported nursery ["Kindertagesstätte"]. The subsidy "Betreuungsgeld" in Germany should be seen against the backdrop of the fact that the state has thus not succeeded in offering sufficient places in nursery care for children under three years of age, and therefore has fallen behind the standard it has set for itself. However, the subsidy is highly controversial. On the one hand, the intensification of state supported child care costs more than the "Betreuungsgeld" itself. But politically it is highly controversial in what ways women are kept from their working position or children from early child education, both to their disadvantage, possibly thereby suffering greater disadvantages than without the payment of the subsidy. In a legislative proposal passed on March 22nd 2013, the *Länder* [Federal States] wish to annul the Act on the "Betreuungsgeld" and instead invest the designated money in infrastructure for an appropriate offer in high quality places for early childhood nursery.

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[35] Similarly, civil servants are entitled to parental leave according to the civil service regulations. As independent holders of a public office, the civil law notaries are not subject to these regulations, but they may take a family leave in accordance with section 48 b of the Federal Notaries' Code [BNotO]. The wording of the provision is as follows:
"(1) A person who as civil law notary de facto provides care for
1. at least one minor child or
2. another relative in need of care as certified by a public health officer, may temporarily resign from office upon approval of the supervisory authority.
(2) The duration of laying down office pursuant to subsection 1 may not exceed twelve years, also in conjunction with the resignation from office pursuant to section 48c."

An important support is also the possibility of co-insuring the spouse and children without additional charges in the statutory health insurance, if the conditions for doing so are met, especially that the income does not exceed certain limits.

c) Efficiency

The efficiency of regulations is certainly best in the area of obligations and prohibitions, since here, the state can use his possibilities of intervention to either enforce or prohibit a specific action or declare specific legal action for valid or void.

The law of inheritance and gift taxation is probably a very efficient instrument to regulate the transfer of property. Since it allows the parties involved to save considerable amounts, provided the arrangements are planned favourably, long-term plans for large properties are often combined with measures taken at the same time (marriages with the respective marriage- and inheritance contracts, adoptions, renunciation of inheritance and of the compulsory share, provisions within the regulations of company law).

In the area of benefit transfers, which is dominated by family politics, and in the case of indirect support, the effects are more difficult to measure. Thus, in spite of state support, the number of marriages is declining, the number of children born outside of marriage is rising, the birth rate is one of the lowest within the European Union or worldwide.

C. Consequences of the situation ascertained

Part I: Expectations and political perspectives in Germany

1. of the public authorities

In the field of marriage and family law, the planned legal changes were introduced as described above in this and last legislative period. In the run-up of the Bundestag elections planned for September 22nd of 2013, numerous discussions on measures in the field of family politics are expected, although the development of these will depend on the outcome of the elections. This concerns especially the continuation of the “Betreuungsgeld” and the call for equal treatment of civil partnerships in the law of adoption.

Again and again, criticism of the current situation in the law of inheritance taxation is voiced, which states that the – intended – equal treatment of different kinds of property was not reached and that it even became possible to transfer privileged business assets completely tax-free if the company continues to operate. On the other hand, the current regulation is criticized for the fact

that persons in tax class II are taxed more comparably to tax class III than to tax class I, even though these are relatives of 2nd or 3rd degree that descend from the same grandparents, and that couples without children often pass on inherited property to other descendants of the same grandparents, which is then heavily taxed by the state.

2. of the notaries' profession

The profession of civil law notaries was able to contribute to the reform of the law of succession, as well as to the various changes in family law by making proposals and submitting its opinion, which can now be recognised in the regulations.

Since an abolishment of the law of the compulsory share was unrealistic, especially in view of the decisions of the Federal Court of Justice [BVerfG] concerning the guarantee of the right to inherit, the reform at least brought a relief by straight proportional downgrading of the claim for the augmentation of compulsory shares ["Pflichtteilsergänzungsanspruch"] for gifts within a period of the last 10 years. Further changes in this field are not expected in the near future. Moreover, the possibility is welcomed in notarial practice to issue declarations of renunciation of donations in a will effective vis-à-vis the descendants of the renouncing person if binding testamentary dispositions and inheritance contracts exist.

The changes in family law are welcomed by notarial practice, since they have strengthened the possibilities of contractual freedom. In the field of pensions equalisation and post-divorce maintenance of the spouse, however, there is always legal insecurity because the courts established a principle of core areas within these fields (i.e. that may not be touched); as a result, agreements on far-reaching exclusions always run the risk of being void; from the perspective of contract shaping – and in the opinion of the parties involved – this is unfortunate.

3. of the parties involved in legal transaction themselves

In Germany, every legislative process involves a hearing of the circles affected, mostly in a written procedure.[36] In practice, most Ministries and legislative organs dispose of lists of the associations and federations, to whom legislative proposals are sent to state their position if they are concerned. Moreover, public hearings take place to which experts are invited and which every-

[36] This has been demanded early on, e.g. by Heinrich Josef Schröder, Gesetzgebung und Verbände. Ein Beitrag zur Institutionalisierung an der Gesetzgebung [Legislation and Federations/Associations. A Contribution to the Institutionalization of Federations/Associations in the legislative Process], Berlin 1976. Today, the registration of the federations/associations with the Bundestag and the Federal Government is the result of Annex 2 to the Rules of Procedure, the participation of the advocacy groups in the government draft bills results from Article 47, 48 of the Joint Rules of Procedure of the Federal Ministries, cf. http://www.bundestag.de/bundestag/aufgaben/-rechtsgrundlagen/go_btg/anlage2.html
http://www.bmi.bund.de/SharedDocs/Downloads/DE/Veroeffentlichungen/ggo.pdf?__blob=publicationFile

body can attend.[37] Thus, it is possible for everybody to exert influence on the process of legislation, not only via political parties, but also by way of the numerous advocacy groups.

II. Part: Impact on the sociological situation of the country under consideration of the developments observed

Sociology has developed an interest for family law as well as for the law of succession in recent years. In family law, for example, questions of the following kind arise: How can the segmentation and pluralisation of parenthood and childhood be described empirically and analysed? How are parenthood and childhood regulated legally? And how is the sociological concept of segmentation of parenthood relevant for questions in legal research and for legislation?[38] There are also approaches for the sociology of inheriting and leaving somebody something by will.[39]

The following general statistics for the development in Germany are available:[40]

In the year 2011, 377,816 marriages were entered into in Germany, 662,685 children were born and 852, 328 persons deceased. The absolute number of births is thus at an all-time low ever since statistical recordings, even lower than in 1933 and 1945. The birth rate is 1.36 children per woman. At the same time, the life expectancy continues to rise and rise. For example, boys born in 2009 have a life expectancy of about 83.1 to 86.4 years (depending on the supposition taken as a basis). For girls the according numbers are even 88.3 to 90.7 years. Consequently, the aging of society is unstoppable.

In 1949, at the time the Basic Law [GG] entered into force, 10.2 marriages a year for every 1,000 inhabitants were entered into and 16.3 children were born. Of 1,000 children born alive, the parents of 99.5 were not married, which is about one tenth. In 2011, for every 1,000 inhabitants 4.6 marriages were entered into and for every 1.000 inhabitants 8.1 children born. Of every 1,000 children born alive – about one third – the parents were not married.

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[37] Information about this is available for everyone on the internet, e.g. for the Bundestag see http://www.bundestag.de/bundestag/ausschuesse17/a06/index.jsp

[38] Dieter Schwab and Laszlo A. Vaskovics (Hrsg.), Pluralisierung von Elternschaft und Kindschaft: Familienrecht, -soziologie und -psychologie im Dialog [Pluralisation of Parenthood and Childhood: A Dialogue between Family Law and the Sociology and Psychology of the Family] Verlag Barbara Budrich 2011

[39] Conference Proceedings by Frank Lettke (ed.) Erben und Vererben - Gestaltung und Regulation von Generationenbeziehungen [Inheriting and Bequeathing – Organisation and Regulation of Intergenerational Ties] is based on a meeting at the University of Constance in the year 2003, where this topic has already been the subject of sociological research for quite some time.

[40] These figures are taken from the website of the Federal Stastical Office [Statistisches Bundesamt]. The presentation which is differentiated even further substantively/as to contents covers the period between 1946 to 2011] https://www.destatis.de/DE/Publikationen/WirtschaftStatistik/Bevoelkerung/GeburtenSterbefaelleEhe2011_122012.pdf?__blob=publicationFile

Women as well as men enter into their first marriage increasingly later. For example, the average age of marriage among singles has again risen in Germany in the year 2011. For single men, it was 33.3 years (2010: 33.2 years), and for single women 30.5 years (2010: 30.3. years). Just since the year 2000, the average age of entering into marriage for single men as well as for single women has risen by 2.1 years altogether.

In the year 2011, one fifth of the couples entering into marriage (75,344) already had children descending from both partners. This meant 762 cases more than in 2010 and more than 50 per cent more than in 1991. It is not possible to exactly determine the number of initially unmarried parents that do marry after the birth of their child. However, if both factual circumstances are considered together, the conclusion is obvious that a growing number of partners that are initially not married and have children together do eventually marry.

In the 2010 microcensus, 63,000 couples altogether stated that they were living together as a same-sex partnership, among them about 23,000 as registered civil partnerships. Thus, 37% of the same-sex couples were registered according to the Civil Partnerships Act. In 2006, this only applied to 19 % of the roughly 62,000 same-sex couples.[41]
The Federal Statistical Office [Statistisches Bundesamt] also published the following press release recently (extract):[42]

“

...

- On one hand, in 2011 the majority of minor children was still being raised by married parents (75 %), but already 17 % were living with a single parent and 8 % with parents in partnerships outside of marriage.
- All in all, in 2011 there were roughly 1.4 million families less than in 1996. In over 70 % of private households, there were no children at all in 2011.
- The number of registered civil partnerships compared to the absolute number of same-sex partnerships has doubled from 2006 to 2011. (from 19 % to 40 %) …”

From these and from further surveys,[43] the Federal Statistical Office [Statistisches Bundesamt] deducts the following trends:

- Between 1996 and 2011, the number of married couples declined by 8 %, while the number of (other forms of) partnerships increased by 52 %, the number of singles by 24 %, and the number of single parents by 20 %.

[41] https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/zdw/2011/PD11_025_p002.html
[42] https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2012/10/PD12_351_p001.html
[43] https://www.destatis.de/DE/Publikationen/WirtschaftStatistik/Bevoelkerung/HaushalteUndLebensformen_112012.pdf?__blob=publicationFile

The following statistics are available on the number of adoptions of children and youths:[44]

Sex ——— **Age from … to under … years** ——— **nationality**	**total**	**Relationship to the adopting parents**			**from column 1, nationality of the adopting parents**		
		related	**stepfather/ stepmother**	**not related**	**German**	**not German**	**German/ not German**
male	**2 046**	**49**	**1 077**	**920**	**1 830**	**56**	**160**
under 3	721	12	120	589	680	12	29
3 - 9	620	16	340	264	563	16	41
9 - 15	495	13	441	41	429	16	50
15 - 18	210	8	176	26	158	12	40
among these							
Germans	1 545	20	916	609	1 474	22	49
foreigners	501	29	161	311	356	34	111
female	**2 014**	**55**	**1 189**	**770**	**1 791**	**51**	**172**
under 3	621	7	126	488	582	8	31
3 - 9	577	17	332	228	513	17	47
9 - 15	546	19	497	30	482	14	50
15 - 18	270	12	234	24	214	12	44
among these							
Germans	1 581	26	999	556	1 509	20	52
foreigners	433	29	190	214	282	31	120
total	**4 060**	**104**	**2 266**	**1 690**	**3 621**	**107**	**332**
under 3	1 342	19	246	1 077	1 262	20	60
3 - 9	1 197	33	672	492	1 076	33	88
9 - 15	1 041	32	938	71	911	30	100
15 - 18	480	20	410	50	372	24	84
among these							
Germans	3 126	46	1 915	1 165	2 983	42	101
foreigners	934	58	351	525	638	65	231

[44]https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Soziales/Sozialleistungen/KinderJugendhilfe/Tabellen/Adoptionen2011.html

There is no data available on the adoptions of persons of full age. However, most adoptions are probably full adoptions with strong effects, since this is the only possible form for minors and generally also desired by persons of full age in the case of stepchild adoptions. Adoptions of persons of full age that are neither related nor stepchildren are probably very rare in practice.

Since the total of foreigners of 8.8 % of the population no longer has any validity – in view of numerous ethnic German immigrants ["Spätaussiedler"] and naturalised citizens that are Germans – it has become common to statistically collect the percentage of the population with an immigrant background. In 2011, this percentage was 19.5 %. Through the European Succession Regulation, the application of foreign law will decrease significantly for residents in Germany, as it entails a change from the principle of nationality to the principle of residence at the time of death of the decedent. However, with respect to the field of matrimonial property regimes this still means that for about a fifth of the population it cannot necessarily be taken for granted that the statutory property regime of the community of accrued gains is applicable.

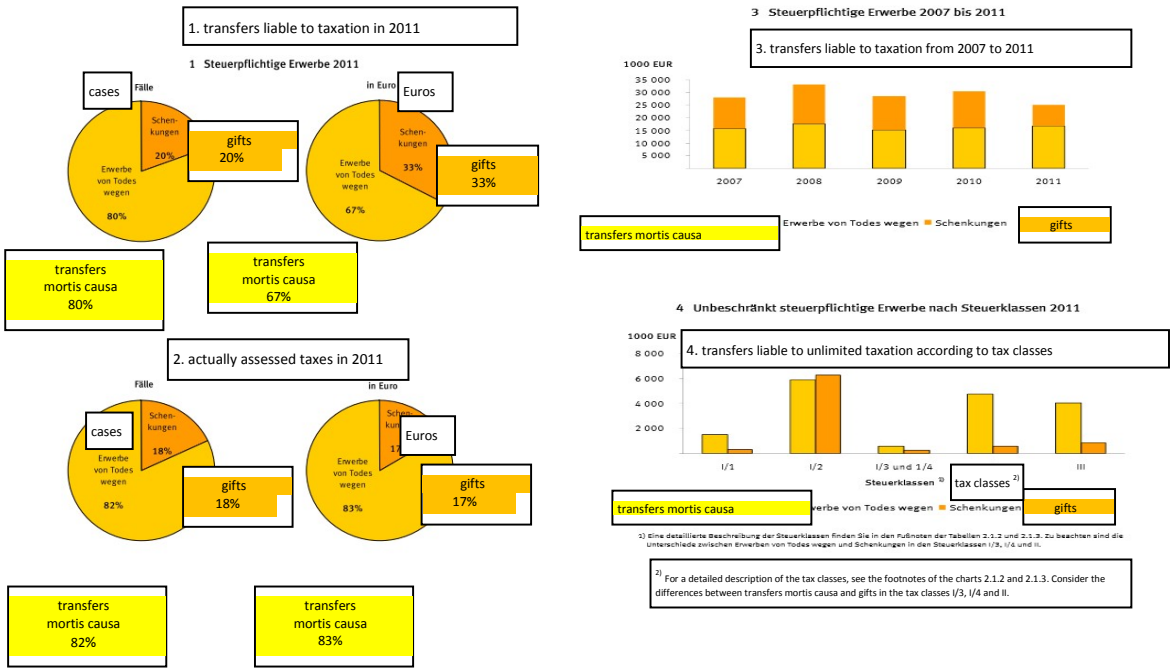
Data of the German Federal Bank [Deutsche Bundesbank] and the Federal Statistical Office was analysed to deduce about the sum of inheritances that in the year 2011, inheritances amounting to a value of roughly 233 billion Euros accrued throughout Germany. This amount corresponds to a little more than 5 % of the total financial assets of all private households in Germany and to 3 % of the balance sheet total of German banks.[45]

According to a survey conducted in the environment of the Handelsblatt [daily German economic and financial newspaper], 25.8 % of the persons questioned stated that they had had a will or inheritance contract drawn up.[46] Otherwise statutory succession is applicable.

[45] http://www.die-bank.de/banking/deutschland-ein-volk-von-erben

[46] http://de.statista.com/statistik/daten/studie/2313/umfrage/testament-oder-erbvertrag-vorhanden/

From the data on inheritance taxes, the following information and charts are available:[47]



The taxable transfers mortis causa contained in the statistics on inheritances and gifts of 2011[48] amounted to 16.9 billion Euros, the gifts to 8.3 billion Euros. The total of taxes assessed in the course were 4.2 billion, of which 3.5 billion were inheritance taxes and 0.7 billion gift taxes. The domestic sum of net estates (total sum of assets of estates minus the liabilities) that was determined in the context of the tax assessment for 2011 amounted to 25.3 billion Euros. The spread between the net estates and the sum of all transfers mortis causa is due first to the allowances, and second to the fact that the inheritance taxes were not assessed for the first time in 2011 for all transfers mortis causa that were part of an estate.

Real property as well as further property, which especially consists of bank deposits and securities, amounted to 30 % or 57 % of the value of all assets constituting the estates (i.e. without gifts). The proportion of business assets was 12 %. The share of agricultural and forestry property was only 0.8 %. The majority (54 %) of tax assessments for transfers mortis causa was based on a transfer mortis causa of up to 50,000 Euros, however the actually assessed taxes for this purpose

[47] https://www.destatis.de/DE/Publikationen/Thematisch/FinanzenSteuern/Steuern/ErbschaftSchenkungsteuer/ErbschaftSchenkungsteuer5736101107004.pdf?__blob=publicationFile
[48] https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/OeffentlicheFinanzenSteuern/Steuern/ErbschaftSchenkungsteuer/Aktuell.html

only contributed to the overall sum by 7 %. On the other hand, 0.2 % of the cases yielded 18 % of the assessed taxes (transfers mortis causa liable to taxation over 5 million Euros). The same applies to the gifts: a little over 51 % of the transfers did not exceed the amount of 50,000 Euros. These contributed to the overall sum of assessed taxes by 5 %. Only 0.8 % of the gifts were transfers liable to taxation of over 5 million Euros, but contributed by 21 % to the overall sum of assessed gift tax. If these results are considered in the context of the lengthy regulations on allowances, the tax rates as well as the principles of fiscal valuation, and the resulting fact that for the majority of transfers mortis causa no taxes were assessed at all, it becomes clear what the political will behind the inheritance and gift tax is: the transfer of property up to a normal amount within the family is not taxed. For transfers that exceed the allowances only by a small margin, only low taxes are levied. High taxes, however, are collected from large transfers of property, which is why these contribute most to the inheritance and gift tax revenues.

D. Conclusions/proposals

I. Priority of families/partnerships with children regardless of marriage

New models of the family, alongside the classical family consisting of a married couple with common children, are a fact of society. Article 6 of the Basic Law [GG] today must be understood primarily as a mandate of the state to promote the well-being of all family models with children. To consider the protection of marriage as a task to a legal or economic betterment as compared to the civil partnership, is not justifiable in view of the statements of the Federal Constitutional Court pursuant to Article 3 with respect to equal treatment. Politicians and legislation must therefore urgently take on the task to privilege concepts of life with children to those without children.

II. Adaptation of the law of descent to biological and social facts

It is illogical and does not keep people from carrying out methods of reproduction that are prohibited in Germany, if the connecting factor of the descent from the father depends completely on genetic parenthood, while genetic motherhood is irrelevant if a fertilised egg is implanted into another woman which then gives birth to the child. In Germany, this leads to the strange result that a genetic mother can only establish legal parenthood for children that descend from her via adoption. On the other hand, given heterologous insemination, permitted and often practised in Germany, it is impossible to exclude action to contest the paternity/legitimacy [Ehelichkeitsanfechtung] of a child that subsequently leads to all legal consequences with respect to the sperm donator. The comparison with the law of adoption shows that it is absolutely possible to make the constitutionally protected claim to knowledge of the genetic descent compatible with the stability of social family relations.

III. Better protection of the surviving spouse or civil partner from the children's claims relating to inheritance and to the compulsory share

Since 1945, the overwhelming majority in the current generation of decedents has built up the assets that are to be passed on together with the spouse. If these assets completely or partly consist of owner-occupied real property, the longer living spouse is deprived of his or her livelihood because of the unconditional claim to distribution of an estate (among co-heirs) – if necessary by compulsory partition in a public auction – or with reference to the maturity and enforcement of claims to the compulsory share. Relief would be possible by restricting the distribution of estates for communities of heirs with the longer living spouse at least for a given period of time and by suspending the claims to compulsory share. In a society with such excellent educational opportunities and a dense welfare net, the function of maintenance and participation ascribed to the compulsory share should not be used as an argument against the legitimate interest of the longer living spouse.

It is widely unknown among the general public that also privately drawn up joint wills of spouses are binding for the longer living spouse who has accepted the inheritance from the first deceased spouse, unless the change has not been expressly reserved. In this case, the longer living spouse may not change the will if a conflict over the inheritance of the first deceased spouse arose. Moreover, he or she may have restricted disposal over his or her property, as the heirs that have been bindingly bequeathed may have a claim to surrender of the property after his or her death. Here, the legislator should find a remedy.

IV. Tax privileges in inheritance and gift taxation for taxpayers belonging to tax class II

Tax class II comprises very close relatives, namely relatives of the first to third degree as well as relatives-in-law, also former spouses or civil partners. Their personal tax allowance is 20,000 Euros, which is identical to that of non-relatives of tax class III, and for higher amounts their tax rate is considerably higher than that of tax class I. This makes it substantially more difficult to pass on assets for persons without children, e.g. to brothers and sisters, nephews and nieces. A careful approximation to the taxation of tax class I would correspond more to the principle of the relatives' right to inherit, pursuant to the Civil Code.

E. Synthesis

I. The most prominent characteristics of the system presented

In German law, men and women enjoy **equal rights**, especially with respect to marriage. The principle of mandatory civil marriage applies.

In the statutory matrimonial property regime of the **community of accrued gains**, both spouses participate equally in the gains accrued during the marriage. **Pensions equalisation** enables both spouses to participate equally in the pension claims established by both spouses during the marriage. In the field of post-divorce maintenance of the spouse, the principle of **individual responsibility** applies. Regulations on maintenance claims are provided as an exception. For all of the aforementioned cases, **contractual freedom** applies. Same-sex couples may enter into a **registered civil partnership** that is largely modelled upon marriage. There are no other partnerships in German law that unfold legal effects apart from marriage or civil partnership – whether registered or not; introducing them is probably not in line with Article 6 of the Basic Law [GG].

There is no legal difference between children born within and outside of marriage. As a rule, the spouses and divorced persons have **common parental custody of the child**. Unmarried fathers may establish custody by issuing a so-called declaration of custody. Descent is generally determined according to the **genetic relationship** to the biological parents. A relationship between parents and child may also be established by **adoption**: by way of adoption the adopted person acquires the legal position as child of both of the spouses or as child of the adopting single person. In the case of the adoption of minors and persons of full age with “strong effects”, the family relationships to former relatives cease to exist. Adoption takes place by court decision.

Divorce takes place by court decision on petition, if the marriage has failed. The failure is judged according to the **disruption principle**. The law of succession follows the principle of **universal succession** and “**automatic transfer**”, without any necessity to expressly accept the inheritance. **Testamentary freedom** also allows the testator to disinherit close relatives. Only the descendants, spouses or civil partners are entitled to a compulsory share, and the parents if there are no descendants. The **compulsory share** is a **claim** to payment of half of the value of the fictitious statutory share in the estate. The testators may draw up their will with their own hand or in notarial form, as a single will or joint will with the spouse or with any third person by inheritance contract. Joint wills and inheritance contracts may unfold binding effects. The law of succession is primarily based on the **relationship according to classes**. According to this, the spouse or civil partner inherits more the remoter the succession class of the relatives. It is also possible to pass on assets inter vivos by **gift**. Inheritances and gifts are equally taxed. However, the personal tax allowances are granted anew every ten years.

II. The most important issues of the report

As a normal case, the present law of marriage, divorce and divorce consequences assumes a **model of marriage** with **one main earner** whose professional career is not interrupted and one spouse that is mainly committed to the needs of the family and therefore suffers **disadvantages due to the marriage**. This should apply to the majority of families with children and therefore meets the requirements of real life. Alongside with marriage, the **registered civil partnership** for same-sex couples has established itself. It is expected to legally enjoy full **equal treatment** soon.

If spouses and civil partners have deviating concepts (from the aforementioned ones) for their marriage or partnership, they may make far-reaching **contractual arrangements** for their legal relations and thus settle the economic binding ties among them to meet their own individual needs. Due to the existing authentication requirements, in this case the civil law notary assumes an important part in consulting the parties involved and in the appropriate wording.

There is no need for the introduction of further registered partnerships (apart from marriage or the registered civil partnership), in view of the **far-reaching opportunities** contractual freedom offers **for marriage or civil partnership contracts**, and also in view of the possibility of getting divorced relatively easily. Couples that are unmarried or have not entered into a registered civil partnership may settle their legal relations by **contracts** for which, as a rule, the civil law notary is also competent. The legal system must also respect the desire to live together **without being legally bound**.

The large number of unmarried couples or partners with children, of single parents and so-called patchwork families in which adults live together with children from several relationships makes it necessary to base assumptions on a **broad definition of the term "family"**. The present law of parent and child takes account of this by no longer linking the responsibility for the well-being of the children generally to marriage, but by providing regulations on **common parental custody** that is granted to both parents as an obligation that continues to have effect. Even for civil law notaries, the present law of succession has its limits for drawing up **testamentary dispositions for patchwork couples**, since the equal treatment of children is often not possible in the desired way, owing to the claims to compulsory share of the biological children. **Testamentary dispositions geared towards the needs of divorced and never married single parents** are common in notarial practice by now.

The state supports the different family models indirectly with **legal benefits** (like in fiscal law and through the possibility for parents to take leave from work) and directly with **transfer payments** such as child benefits, parental benefits and a subsidy granted for home care of children under three that do not attend a pre-nursing institution ["Betreuungsgeld"].

Property and the law of succession currently play an important part in society in view of the vast assets and the generation of heirs that is to inherit. Passing on **small amounts of property** within the close family is **tax-free** (politically intended). However, passing on **larger amounts of property** requires anticipatory planning and cannot be accomplished with inheritance arrangements or a single gift alone; instead, the current situation in fiscal law makes a **combination of (recurrent) gifts and an appropriate testamentary disposition** necessary. Gifts must be notarially authenticated, as must inheritance contracts. Authentication of wills, though, is also common in practice, as it provides legal certainty and cost benefits for the administration procedures of the estate.

The **law of the compulsory share** proves to be a **factor of interference** for the transfer of assets inter vivos and for successions. It may lead to the failure of personal financial plans. Therefore, the recommendation of measures to reduce the compulsory share is an important part of notarial practice.