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Recent Developments in Family Procedures – Civil Law Perspective

by Prof. Dr. Dagmar Coester-Waltjen, University of Munich, Germany

I. General Descriptions

All recent developments in family procedures in Germany as well as in Austria and Switzerland may be characterized (1) as a move away from state control towards more party autonomy and more possibilities for self regulation, (2) as mitigating the adversarial situation, (3) and improving the position of the child.

II. First Development: Court Proceedings versus Self Regulation

For the legal termination of a marriage court proceedings are necessary under German[1], Austrian[2], and Swiss law[3]. It is generally believed that divorce cannot be left solely to the parties themselves (postcard-divorce) or to other officials (like for example registrars), but that court proceedings are necessary, first to ensure certainty of status, secondly to guarantee fair results and thirdly to establish a barrier against hasty, ill-considered divorces. Though there is some discussion whether court involvement is really necessary when both spouses want a divorce – especially if there are no minor children[4] – recent reforms retain the necessity of court proceedings. It is feared that otherwise true consent might be lacking and that the institution of marriage might be damaged. The latter argument – especially stressed in the German discussion[5] – also concerns the availability of divorce. In German law divorce by consent is not possible; a marriage may be divorced only after marital break down[6]; however, marital break down is presumed after separation[7] for a certain duration[8]. Courts do normally

[1] § 164 BGB (German Civil Code).

[2] § 46 EheG (Austrian Marriage Act).

[3] Art. 111 ZGB (Swiss Civil Code).

[4] In such cases divorce is very easy to obtain for example in Japan where a kind of postcard-divorce would be possible, whereas the Korean legislator asks for court involvement in order to ensure true consent.

[5] *Otto*, StAZ 1999, 162.

[6] § 165 (1) BGB.

not investigate with scrutiny whether in fact the parties have lived apart for a certain time and thus, in reality, divorces by consent take place.

Austrian law follows insofar different rules as besides certain grounds for divorce[9], the consent of the spouses that their marriage has irretrievable broken down constitutes a ground for divorce (§ 55 a EheG). Though the judge may not investigate into the matter, the court may stay the proceedings for six months, if a reconciliation seems possible[10]. In addition, mediation has gained considerable importance as shall be demonstrated under the next topic.

In Swiss law – as effective of January 1st, 2000 – the concurring declarations of the spouses that they want to divorce may result in a divorce decree, if certain prerequisites – namely agreement of the consequences of divorce and certain judicial hearings – have been fulfilled. Now, not marital misconduct or marital break-down, but the concurring will of the parties[11] is a reason for divorce. Thus, the new law though introducing some formalisation of the spouses' intention to divorce involves at least a part-privatization of divorce and a move away from state control. The procedural frame-work has been softened in addition, as shall be shown under the next topic.

Thus, whereas German law negates – at least theoretically – self regulation of the spouses concerning the divorce as such, Swiss and also Austrian law allow divorce by consent accompanied by some procedural safe-guards.

In contrast, the acceptance of self-regulation with regard to the consequences of divorce is far greater in German law than in the other two systems. Except for the splitting of pension rights[12], in German law the spouses may dispose of all consequences of divorce by agreement and there will be a kind of judicial control only with regard to child custody. In all other matters (property division, alimony, family home) the spouses have autonomy to regulate their affaires within the limits of public policy. There are some safeguards through special formal requirements[13]. The family law reform of 1998 has increased the possibilities of self-regulation even with regard to child custody: Whereas under the old law a judicial decision on child custody was obligatory when there were minor children, now the spouses may continue to have joint custody and the court will only intervene when at least one parent wants a change in the custody matters. In other cases, there is only the possibility of a "soft intervention": The

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[7] Living apart may take place under the same roof (§ 1567 I 2 BGB) but must be accompanied by the intention of at least one party to refuse a further marital relationship (§ 1567 I 1 BGB).

[8] One year if both spouses agree in the divorce and in the consequences of the divorce (§ 1565 I BGB, § 630 ZPO – German Code on Civil Procedure) or three years separation if there is no agreement – provided divorce does not cause any hardship to the non-agreeing spouse or the children (§§ 1565 II, 1568 BGB).

[9] Like serious matrimonial defences; adultery, serious unreasonable behaviour especially physical violence or severe psychological damage are regarded as grounds for divorce, but only if they seriously infect the marital relationship, *Hopf*, "Eherechtsänderungsgesetz 1999 im Überblick", in: *Ferrari/Hopf*, "Eherechtsreform in Österreich", Wien 2000, p. 12 seq. (§ 49 EheG); and mental illness or infectious diseases which infect the relationship (§§ 50–52 EheG).

[10] § 223 AußStr.G (Austrian law on non-litigeous procedure).

[11] This is, however, thought of as an indication of the marital break-down – *Schwenzer/Fankhauser*, Scheidungsrecht, Basel 2000, Art. 111 n 2.

[12] Deviations from the statutory system are possible by agreement in a certain form (see next footnote) up to one year before divorce proceedings are started. In the year preceeding the divorce proceedings the parties may not dispose of these issues, § 1408 II BGB. During divorce proceedings a party agreement is possible but subject to a certain form and judicial control, § 1587 o II BGB.

[13] If the spouses want to change the marital property regime before or during marriage or in connection with divorce proceedings the agreement has to be made before a specialised lawyer (notary public) who has to give information of the legal consequences (§ 1410 BGB), all other dispositions do not require a certain form.

court has to ask the spouses about the way they look at the future organization of the custody issues and has to inform them of the existing possibilities for consultation. However, – even if the answers of the parents are not very satisfying – family autonomy will hinder any further court intervention unless the welfare of the child seems seriously endangered[14].

The situation is very similar in Austrian law where parties may dispose of most matters concerning the consequences of divorce[15]. There is, however, a great difference with regard to child custody: The court is not bound by an agreement transferring sole custody to one parent but has to decide accordingly only if such arrangement serves the best interest of the child (§ 177 AGBG). Joint custody may only be granted if the divorced parents live together[16]. A new law – as far as I know just enacted – introduces joint custody of divorced parents (Art. 177 a ABGB). But this will only be possible if one year after the divorce decree has lapsed. The court may grant such order only, if joint custody does not obviously seem detrimental for the child[17].

In Swiss law, on the other hand, all interspousal agreements on the consequences of divorce – made either before or during the divorce proceedings and even before marriage – are subject to judicial control and will be held valid only, if the court is satisfied, first that there is no lack of consent, secondly that all matters are dealt with and thirdly that the agreement does neither violate legal rules, nor public policy, nor the standards of fairness, Art. 140 BGB. With regard to the well-being of the children the court' s intervention will be inquisitorial (Art. 133 ZGB)[18]. This approach is quite similar to French law with which, however, I shall not deal here.

A possibility of self-regulation also exists in custody issues between unwed parents. Here again German law stresses the autonomy of the family and enables joint custody, if both parents declare a respective intention. Judicial control takes place only when changes of such arrangements are sought (§§ 1671, 1672 BGB) or when the well-being of the child is seriously endangered (§ 1666 BGB).

In Swiss law, on the other hand, joint custody of unwed parents is available only if a state agency (Vormundschaftsbehörde) approves a respective agreement between the parents after investigating about the best interests of the child (Art. 298 a I ZGB)[19].

According to Austrian law the same has to be done by the courts to which the unwed parents have to apply (§ 167 ABGB).

III. Second Development: Adversary Proceedings versus Round-Table Talks

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[14] *Staudinger/Coester*, BGB, 13th ed., 2000, § 1671 n 263.

[15] For a divorce by consent an agreement of the parties concerning all consequences is required, § 55 a II EheG.

[16] §§ 167, 177 ABGB (Austrian Civil Code); OGH EvBl. 1992, 185.

[17] *Gründler*, ÖJZ 2000, 3332.

[18] *Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Personenrecht, Eheschließung, Scheidung, Kindesrecht, Verwandtenunterstützung, Heimstätten, Vormundschaft und Ehevermittlung) vom 15.11.1996, BBl. 1996, 1, 123.*

[19] *Hegnauer*, "Die ZGB-Revision 1998/2000, Personenstand, Eheschließung, Scheidung, Kindesrecht"; Supplement zu *Tuor/Schnyder/Schmid*, "Das Schweizerische Zivilgesetzbuch", 11th ed., 2000, p. 110.

The climate in family law proceedings has changed considerably in most of the civil law countries. Germany has established special family law departments within the courts of general jurisdiction. Though only lawyers may sit on the bench, these judges will have special training and will be concerned with family matters only for which they have exclusive jurisdiction. Different proceedings concerning the same family (for example: maintenance, custody, divorce) will be joint to concentrate all disputes with the same judge. The procedure is partly inquisitorial and many rules for non-litigious proceedings apply. In-court and out-of-court-conciliation is encouraged.

As far as mediation is concerned family courts make use of this tool very differently. Some judges have undergone special training in mediation and try to get the fighting spouses to solve their problems peacefully; others urge the litigants to consult a mediator and there is also a group of judges who doubt the efficiency of mediation at least in most contested divorces[20]. The law requires only that the court hears the spouses in person (§ 613 I ZPO) and should stay the proceedings if an amicable resolution can be worked on out of court (§ 614 I ZPO) or if reconciliation of the spouses can be expected (§ 614 II ZPO). However, despite a certain reluctance towards mediation, all judges try to mitigate the general climate; they hear the parties in chambers; those hearings are held privately and the adversarial nature is softened. Most judges will try hard on getting the parties to an agreement. Where the court has been asked to intervene for the protection of the child the proceedings are inquisitorial altogether and the court is free to use all means of proof and to order all kinds of measures to improve the situation of the child.

In Austria also special branches for family law matters have been installed in the county courts (Bezirksgerichte)[21]. Though the general rules of civil procedure are applicable in divorce cases and the court will not enquire into the issues on its own initiative, mediation has been embodied in the divorce law by recent reform[22]. The new law does not deal with all aspects of mediation, but concerns only certain matters like the obligation of the judge to test whether mediation might be appropriate for the parties and – if so – inform them about the possibilities of mediation and adjourn the proceedings if both parties agree[23]. During mediation the statute of limitation does not run (§ 99 EheG). The mediator must not reveal any of the facts which come to his/her knowledge during mediation. This is sanctioned by a privilege (§ 320 Z 4 ZPO) and by criminal law (§ 99 II EheG/§ 301 I StGB). This new law has been introduced after a pilote project of mediation in some court districts had been very successful, and it seems that the recent reform is just a start.

In Swiss law, the situation is different insofar as – at the time – the competency for procedural rules still lies with the Cantons, for substantive divorce law with the Federal Parliament. Nevertheless, the new federal divorce law contains some procedural rules, including the duty of the courts to investigate into the issues concerning the children (Art. 145 II ZGB) and the fairness of financial agreements (Art. 123 I ZGB). In addition, the new law enables a "soft procedure", when the parties agree on divorce and its consequences or when they are in disagreement only with regard to the consequences of the divorce but not to the divorce as

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[20] For the arguments against mediation see: *Bergschneider*, FamRZ 2000, 77.

[21] § 49 a JN; *Fasching*, "Österreichisches Zivilprozeßrecht", n 250.

[22] Eherechts-Änderungsgesetz 1999, öBGBl. I 1999/125; see also *Deixler-Hübner*, Wien 1999.

[23] § 460 Z. 7 a ZPO; against the will of one party-adjournment is not allowed: OGH, EvBl. 1998, 3.

such. In both cases the proceedings are not contradictory in nature, though in the latter case rules for contested proceedings (streitige Gerichtsbarkeit) may partly apply. The parties shall be heard in court, and they should get a time of reflection (Art. 111 ZGB); when they have not reached an agreement on the consequences, the judge should recommend a solution (Art. 112 ZGB). This constitutes a major step towards alternative dispute resolution[24]. There have been several proposals, how the cantonal procedural rules could integrate these new ideas, for example, by introducing the possibility to "choose a certain judge" or to entrust these conciliation proceedings to a different judge who will not render the decision when no solution can be reached (like the procedural judge in the new English procedure and the juge commissoire in French civil procedure) or to enable the judge to decide according to equity without full examination of the controversial issues[25]. However, there seems to be little reaction to those proposals up to now.

IV. Third Development: Improving the Position of the Child

Let us now move to the third issue: Improving the position of the child. Of the numerous efforts in this respect two should be outlined in the following: First the representation of the child (1) and secondly efficient procedure for enforcing child maintenance (2).

1. "Closed (family) shop" versus representation of the child

Though the child is neither a party in custody-disputes between the parents nor when parental responsibility is suspended for the protection of the child, its interests are the most important issues of those proceedings. To ensure that these interests will be looked after adequately the new German law provides that in these kind of proceedings the child has to be represented by a third person (§ 50 FGG). The Federal Constitutional Court obliges the courts to nominate such neutral, child focussed representative in all cases where the situation leaves doubts whether the (fighting) parents will be able to give due respect to their responsibility towards the child[26].

This applies in divorce cases, when custody issues are in dispute, as well as in cases of abuse and maltreatment of children; depending on the circumstances, it might even apply when both parents have abducted the child. The law gives some examples where such representation is necessary. In such cases – as mentioned above – the court has practically hardly any discretion, but is obliged to appoint a representative[27]. In other cases, the court has some discretion, but it always has to consider whether the conflicting interests of the parents require independent representation[28]. On the other side of the scales the danger of increasing the conflict and of violating the integrity of the family should be taken into account. The courts react very slowly and reluctantly on these possibilities and the Federal Constitutional Court had to advise them several times. The reaction in legal literature is divided; most authors welcome this kind of representation, but there are also critical reactions: Some stress the

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[24] *Reusser*, "Die Scheidungsgründe und die Ehetrennung", in: *Hausheer*, "Vom alten zum neuen Scheidungsrecht", Bern 1999, n 1.27.

[25] *Meier/Schneller*, "Scheidungsverfahren nach revidiertem Recht", Bern 2000, p. 32 seq.

[26] BVerfG 72, 122, 135; 75, 201, 217; JZ 1999, 459, 460.

[27] BVerfG, DEuFamR 1999, 55, 57.

[28] *Staudinger/Coester*, BGB, § 1671 n 291.

danger for family autonomy if a third person can act in these intra-family matters; others think that the law does not go far enough, because the representative is bound by the best interest of the child and is not a representative of the child wishes and will[29]. The latter authors ask for an independent lawyer who represents the child in different matters and who might have a special additional qualification for this function.

The representative under the German law at the time is not necessarily a lawyer. Preferably social workers, child psychiatrists and persons from similar background shall be appointed by the court[30]. A lawyer will be appointed only when the solution requires a special legal knowledge[31]. The representative has to care about the interests of the child notwithstanding the fact that the court has to hear the child in person were appropriate (§ 50 b FGG) as well as the youth welfare office in certain matters (§§ 49, 49 a FGG).

The renumeration of the representative is paid by the state, which, however, will recover the costs from that party or parties who will bear the costs of the proceedings altogether. The child' s estate will be burdened by this costs only in very exceptional circumstances[32].

Influenced by the development in Germany as well as in France and with regard to the long tradition of child representation in the Anglo-American world[33], the new Swiss law also obliges the court to appoint a representative of the child in divorce proceedings, if there is sufficient cause or on application of the child (Art. 146 ZGB)[34]. Parental disagreement about the distribution of custody will normally constitute sufficient cause. The law gives some examples for situations which constitute sufficient cause and a court has to appoint a representative, when a child of reasonable age asks for it. The representative (Beistand) need not be a lawyer, but should have some experience in welfare matters (Art. 147 I ZGB). The child might influence the appointment of the representative. It is not completely clear whether the representative will be bound by the best interest of the child or by the wishes of the child. It seems that the latter attitude gains more support[35].

The costs of representation will not burden the child. It seems widely agreed that the parents as parties to the lawsuit have to cover these costs[36]. The Swiss legislator thereby wanted to fulfil the Swiss obligations under article 12 UN-Convention on the Rights of the Child.

Austrian law is more reluctant in this respect. Though the youth welfare office will take part in the hearings concerning matters of child protection and divorce, the child itself has no right to be heard in divorce proceedings. Though it should be heard in matters concerning its education (Art. 178 b ABGB), the courts do not apply this rule in custody matters in connection with divorce[37]. As the use welfare office seems to act very efficiently, it is thought

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[29] *Steindorff-Classen*, Das subjektive Recht des Kindes auf seinen Anwalt, Neuwied 1996, p. 269.

[30] *Johannsen/Henrich/Brudermüller*, "Eherecht", 4th ed., 1998, § 50 FGG n 12.

[31] *Johannsen/Henrich/Brudermüller*, n 12.

[32] § 50 V, § 67 FGG in connection with § 1835 I 1 BGB.

[33] See *Salgo*, Der Anwalt des Kindes, Frankfurt 1996; *Steindorff-Classen*, ibid.

[34] See *Schwenzer/Schweighauser*, Art. 146 n 5.

[35] *Schwenzer/Schweighauser*, Art. 147 n 14 seq.

[36] Berner Kommentar/*Hegnauer*, Art. 276 n 40; a different solution is suggested by *Reusser*, who views these costs as part of the child' s maintenance.

[37] *Verschraegen*, "Die einverständliche Scheidung", Berlin 1991, p. 477.

that the law – as it stands – does not violate article 12 of the UN-Convention on the Right of the Child[38].

Now I come to my last topic (2)

V. Exact Computation versus Efficient and Flexible Estimation in Child Maintenance

Under this last topic I would like to concentrate solely on German law, because the German legislator has developed an interesting[39] mechanism for efficient and flexible maintenance orders.

Orders for child maintenance have to be made available without delay, their adaptation to new needs has to be easy and the enforcement procedure has to be efficient. The exact computation of the financial needs of a child and the financial ability of the obliged parent involves lengthy inquiries. Changes in circumstances, growing needs of a growing child and the inflation rate require a continuos adaption and new inquiries.

German law opens up a fast-track-procedure for maintenance orders if the child claims only maintenance up to a certain sum. There is a statutory instrument which fixes the minimum sum for maintenance for children (Regelbetrag) with the age-ranges. If the child or the parent with whom the child lives asks only up to 150% of that respective sum, the fast track procedure will apply. The procedure is non-evidentary, summary in nature and expeditious.

If the respective parent wants to object he or she has to reveal all information about all kinds of income, otherwise the order will be issued and can be adapted automatically to the inflation rate every two years and, where applied for, to the new age-range of the child. Disputes about the exact amount of maintenance are not cut off completely, but do not hinder the issuance and the enforcement of that order. They may be dealt with in an alteration proceeding installed after the fast track procedure. The simple procedure has proved to work efficiently and to guarantee individual justice at the same time.

VI. General Reflections

Let me close my short remarks with some general reflections. Surely, the legislators in these civil law countries I have been talking about have realized that family matters should be treated differently from other litigation. The adversarial system seems inadequate for these proceedings. If the procedure is not adversary, it will be interventional. The more inquisitorial approach for these proceedings, however, does imply more state intervention, which is desirable only to a certain extent in these matters. Thus, alternative dispute resolution seems to be one way out of the dilemma, as it is neither inquisitorial nor adversary. An other escape from state intervention is provided by strenghtening the possibilities of self-regulation. The autonomy of the parties may result in a consensual resolution of the conflict and the courts then may merely act to ensure true consent and certainty of status.

Where, however, the issues are highly controversial, those approaches may not work successfully and in these situations it becomes apparent that in the adversarial process those

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[38] *Verschraegen*, "Die Kinderrechte-Konvention", Wien 1996, p. 84 seq.

[39] Despite several defects in the legislative technique.

persons – though not being parties in the procedural sense but affected considerably by the proceedings and the results, namely the children – should have their own representatives to ensure that their interest and wishes will be taken into account.

Thus, all topics we have been dealing with, seem to be inextricably intertwined and all developments have the same purpose: To smoothen the litigations in cases of family break-down.

Many of you might have had the impression that the developments in the civil law countries I have been talking about have taken place in your jurisdiction already some while ago. It is true that the ideas in other jurisdictions have influenced the discussion in the civil law countries considerably and the ways chosen might now fertilize the discussion in the other direction again. This is the purpose of comparative law and of such conferences as this. I have to thank for the opportunity to speak to you and for your attention.