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NAZI CHANGES IN THE FIELD OF FAMILY AND INHERITANCE LAW

DESCRIPTION

THIS PAPER EXAMINES THE PRE-NAZI LAWS REGARDING MARRIAGE, DIVORCE, ADOPTION, INHERITANCE, ETC., AND THEN PRESENTS THE CHANGES MADE IN THESE LAWS UNDER THE NATIONAL SOCIALIST REGIME.

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NAZI CHANGES IN THE FIELD OF FAMILY
AND INHERITANCE LAW

I. THE LAW PRIOR TO 1933

A. Family Law (Book IV of the German Civil Code)

Marriage is a public institution, created and regulated by the state with regard to public policy. Only within narrow limits are the parties to a marriage allowed to change the framework of the law of domestic relations. Within these boundaries the German Family Law was individualistic and liberal before the Nazis usurped power in Germany.

In creating a family a person could follow his own interests and affections without danger of interference by the state. This fact will become apparent through a brief description of the more important sub-divisions of the Family Law as it was prior to 1933 according to the Civil Code (Bürgerliches Gesetzbuch, hereafter cited as B.G.B.).

1. Betrothal. Mutual promises of marriage constituted an agreement described by the expression Verlobnis (betrothal), which, in terms of the conditions of its validity and some of its consequences, was subject to the ordinary rules as to obligatory agreements. The remedies for breach of the agreement were, however, modified in the following manner:

An agreement to marry could not be specifically enforced; a claim for pecuniary compensation arose, as a general rule, on breach of the agreement by one of the parties.

The pecuniary compensation was generally limited to an amount indemnifying the aggrieved party for any disbursements made or undertaken in contemplation of the marriage, or for any loss incurred through any steps taken by such party in contemplation of the promised marriage affecting his property or occupation.

The claim for compensation did not arise if there was a reasonable ground for the breach of promise, such as the discovery of a legal impediment to the marriage, or of a circumstance which after the marriage would justify a decree of annulment or divorce.

Betrothal, therefore, created only a moral obligation to fulfil the promise of marriage except that its breach did give a cause of action for pecuniary damages. The state did not interfere in case of the withdrawal from the betrothal and did not even give its help to the enforcement of the promise.

2. Conclusion of Marriage. The German rules recognized civil marriage exclusively. The marriage was effected by the declaration of the parties to be married to each other made before the competent registration official (Standesbeamter) and in the presence of each other. The parties had to make these declarations in person, and they had to be unconditional and not subject to any stipulation as to time. The registration official had to be willing to receive the declarations. Two witnesses of full age had to be present (B.G.B. 1317, 1318).

No marriage certificate of any kind was necessary.

The marriage had to be preceded by a public notice (Aufgebot) to be effected in the prescribed manner and subject to previous presentation of certain prescribed documents (B.G.B. 1316). In the majority of cases a religious marriage ceremony followed the civil marriage, but the celebration of a religious marriage ceremony by any clergyman or minister who had not satisfied himself of the fact that the civil marriage had taken place was a criminal offence. The rules of the Civil Code as to marriage were not, however, intended to interfere with the duties imposed by any religious denomination on its members (B.G.B. 1588).

It is interesting to note that the refusal of one of the parties to allow a religious marriage ceremony to be performed was a "cogent ground" entitling the other party to refuse the performance of the agreement to marry; if the refusal to take part in a religious ceremony was not communicated to the other party before the celebration of the civil marriage it might entitle such other party to obtain a decree of annulment (B.G.B. 1334).

3. Validity of Marriage. The circumstances which affected the validity of a marriage according to the Civil Code were divided into three classes:

- a. Fatal defects in the marriage ceremony;
- b. Public severing impediments¹;
- c. Private severing impediments².

With respect to a, the following irregularities were deemed fatal defects in the case of any marriage celebrated in Germany:

(1) Disregard of the rule that the declaration of the parties must be made before a person deemed to be a competent official.

(2) Disregard of the rule requiring the parties to make their declarations in person and in the presence of each other.

(3) Disregard of the rule that the registration official must be willing to receive the declaration (B.G.B. 1324).

A fatal defect in the marriage ceremony brought about the absolute nullity of the marriage (B.G.B. 1324).

With respect to b, the following impediments caused the "relative nullity" of a marriage:

1. A "public severing impediment" (such as incest, insanity, etc.) makes the marriage void. The invalidity of the marriage is established by proceedings inaugurated by public authorities (e.g., the public prosecutor) if the facts come to their notice.
2. A "private severing impediment" (such as lack of consent of parents or guardians of minors, marriage of person too closely related, pre-marital fraud by one spouse on another on facts considered essential by law) makes the marriage voidable by a suit initiated by the affected spouse.

(1) The incapacity or temporary mental aberration of one of the parties at the time of the marriage (B.G.B. 1323, 1324);

(2) The subsistence at the time of the marriage of a previous valid marriage between one of the parties and another person (B.G.B. 1309, 1323, 1326);

(3) Certain specified kinds of relationship between the parties (B.G.B. 1310, 1323, 1327);

(4) The previous adultery of the parties, if the former marriage of one of them was dissolved on the ground of such adultery (B.G.B. 1312, 1323, 1328).

These so-called public severing impediments brought about a nullity which may be described as relative nullity. An absolutely void marriage was of no effect, while a voidable marriage had to be decreed as void by a judgment of the competent matrimonial court on a petition for annulment (B.G.B. 1329).

With respect to c, the following so-called private severing impediments caused the voidability of a marriage:

(1) The absence of the authorization of the statutory agent of one of the parties where such party is of restricted capacity at the time of the marriage (B.G.B. 1304, 1330, 1331);

(2) The ignorance of one of the parties as to the nature of the ceremony or as to the effect of the declaration made before the registration official (B.G.B. 1330, 1332);

(3) The mistake of one of the parties as to the essential personal qualities of the other party (B.G.B 1330, 1333);

(4) The fact that one of the parties was induced to marry the other under the influence of misrepresentation as to essential circumstances made by or with the knowledge of the other party, or of unlawful threats on the part of the other party or any other person (B.G.B. 1330, 1334, 1335);

(5) The fact that one of the parties to the instant marriage is discovered to have living a spouse who was judicially declared to be dead and was believed to be dead at the time of the marriage.

These private severing impediments caused a marriage to be voidable at the option of the spouse who had the right of avoidance.

These sections of the German Civil Code indicate that the law did not interfere with the private interests of the parties to a marriage except for their own protection as, for instance, in the case of fraud or duress or in the case of the violation of generally approved principles of ethics and morals.

4. Divorce and Judicial Separation. The possibility of obtaining a divorce did not become universal in Germany before 1876. In many parts of Germany and in Austria the only relief which a petitioner belonging to the Roman Catholic Church was able to obtain in respect of any matrimonial offense was

"perpetual separation." The latter concept was made statutory under the new name of "dissolution of the conjugal community" (Aufhebung der ehelichen Gemeinschaft) after the introduction of the German Civil Code in 1900.

The grounds which entitled a petitioner to obtain a divorce or judicial separation were subdivided into "absolute" and "relative" grounds. Where the facts constituting an absolute ground were established the petitioner was entitled as of right to the order prayed for; in the case of a relative ground it was left to judicial discretion whether, under the special circumstances of the case, the relief ought to be granted.

The absolute grounds were:

- a. Adultery, bigamy, and sodomy (B.G.B. 1565);
- b. Attempts against the petitioner's life (B.G.B. 1566);
- c. Wilful desertion (B.G.B. 1567).

The relative grounds were:

- a. Any facts by which the marital relation, owing to any grave breach of marital duty or dishonorable or immoral conduct on the respondent's part, was disturbed to such an extent that the petitioner could not be expected to continue the marriage (B.G.B. 1568). It should be noticed here that only the immoral conduct or grave violation of the matrimonial duties of a party to the marriage justified a divorce; the former German law did not recognize any violation which was against the interest of the German people in general as a

reason for divorce according to section 1568 B.G.B.

b. Insanity was a relative ground when it had continued for more than three years during the marriage and was of a type so severe that the intellectual community between the spouses had ceased and there was no hope of its reestablishment (B.G.B. 1569)..

A divorce decree had the effect of dissolving the marriage as from the date on which it ceased to be appealable (B.G.B. 1564).

After the divorce new duties sprang up between the parties in respect to the right of the innocent party to alimony and in respect to the custody of infant children.

As mentioned before, a spouse who was entitled to a petition for a divorce could claim judicial separation in lieu of divorce. The decree obtained on any such petition had to declare the separation to be due to the fault of one or both of the parties in the same manner as on a petition for a divorce. (see II, B, 6) While the parties were living apart under a decree for judicial separation, either of them was at any time entitled to obtain a divorce decree (B.G.B. 1575, 1576).

5. Legal Status of Children Born of Void Marriages. Any child of a voidable marriage, which otherwise satisfied the requirements of legitimacy, was deemed legitimate, unless the relative nullity of the marriage was known to both spouses at the time of such marriage.

But the child was illegitimate if the marriage was void owing to some defect in form, and the marriage had not been recorded in the marriage register (B.G.B. 1699).

A child deemed illegitimate on the ground that its parents' marriage was declared void on any ground other than a fatal defect in the marriage ceremony was entitled to maintenance from its father in the same manner as a legitimate child (B.G.B. 1703).

If the father knew at the time of the marriage that the marriage was void, he did not have the rights arising from paternity. The parental power belonged to the mother (B.G.B. 1701).

If the mother knew at the time of the marriage that the marriage was void, she had only a limited parental power (B.G.B. 1702).

6. Adoption. The act of adoption enabled the adoptor to place the child of another into the same position as if it were his own. According to the former German law the view prevailed that a person could accept a child of whatever race and descent if he complied with certain requirements of the law which tried to protect the child to be adopted. Here again the law was the guardian of private interests only and not the protector of the interests of the German people as a whole.

The adoption was effected by a contract between the adoptor or the joint adoptors and the adopted child which, however, required the confirmation of the competent Court.

The confirmation could not be refused if the statutory requirements were complied with (B.G.B. 1741, 1749, 1754).

According to the statute a person having natural legitimate issue could not adopt a child, but the fact that another child had been previously adopted was no impediment to a second adoption. The adoptor had to be at least fifty years old and at least eighteen years older than the adopted child (B.G.B. 1741, 1743, 1744).

A child adopted by a single adoptor acquired the adoptor's name and the status of a legitimate child of such adoptor; a child adopted by a husband and wife jointly acquired the husband's name and the status of a legitimate child of both spouses. No ties of kinship were created between the adopted child and the kin of the adoptor, and no tie of affinity was created between an adoptor and the adopted child's spouse (B.G.B. 1757, 1758, 1762, 1763).

An adoptor did not by virtue of the adoption become entitled to any right of inheritance in respect to the child's property (B.G.B. 1759).

B. Law of Inheritance (Book V of the German Civil Code)

The title to the estate of a deceased person can be derived under either a statutory rule or a disposition made by the deceased. This fact was frequently expressed by the statement that the right of the persons taking the estate was acquired.

under the intestacy or under the will of the deceased; but it should be emphasized that the statutory right of succession represents the normal one while any right derived under a disposition of the deceased was looked upon as a modification of the statutory right. Therefore the rule is that the statutory heir succeeds, except insofar as he is displaced by any disposition of the deceased intended to become operative on his death.

The next of kin and the surviving spouse (if any) were the statutory heirs of the deceased, and as such, took the whole estate, or such part thereof as was not disposed of by testamentary disposition or contract of inheritance.

The rules determining the order in which the kindred were entitled were based on the following principles:

The kindred were divided into classes, each known as a Parentel; the first class consisted of the issue of the deceased, the second of his parents and their issue, the third of his grand-parents and their respective issue, each subsequent class consisting of the ancestors next in remoteness and their respective issue. The members of the first class were called Verwandte erster Ordnung and so forth (B.G.B. 1924-1929).

The share to which any statutory heir was entitled in the absence of any testamentary or contractual provision was called his "statutory portion" (gesetzlicher Erbteil); the estate, as

a whole, was called the "inheritance" (Erbschaft). The inheritance vested in the heirs immediately on the death of the deceased.

According to the Germanic law the right to take the estate belonged to the natural heirs, and it was only gradually and through the influence of the clergy that a person was allowed to take a certain portion away from the heir. But modern German law entirely discarded the right of any person to be appointed as heir of another person; under its provisions the right of the testamentary heirs to take possession of the estate cannot be defeated on the ground that the persons entitled to compulsory portions are not included among them; a person entitled to a compulsory portion was entitled to receive the value of that portion from the heirs; but he had no direct right over the estate. His claim was a money claim against the testator's heirs which accrued on the date of the testator's death (B.G.B. 2317).

The following classes of persons were, on principle, entitled to compulsory portions (pfllichtteilsberechtigt);

1. The testator's issue, and in default of issue, each of his parents;
2. His spouse.

The compulsory portion was equal to one-half of the statutory portion (B.G.B. 2303).

Except for the rights of the persons who were entitled to compulsory portions a testator could dispose freely of his estate.

Every instrument containing a testamentary disposition (letztwillige Verfügung) was called a will. No such disposition was valid unless the prescribed formalities as to the execution of the will had been observed (B.G.B. 1937, 1941):

A testator could, according to the Civil Code, make his testament either by a holograph will or by a publicly declared will. A will had in all cases to be executed by the testator in person (B.G.B. 2064).

1. Holograph wills. A holograph will (eigenhändiges Testament) was a document containing a direction of any kind intended to be operative on the writer's death, written and signed by the testator, and indicating its date and the name of the place at which it was written. It was not necessary that the document should be described as a testamentary instrument, or should be strictly confined to testamentary directions. A testamentary disposition contained in an ordinary letter would be deemed a holograph will (B.G.B. 2231).

2. Publicly declared wills. A will executed in a public form had to be declared before a judge or a notary public in one of the two following ways:

a. The contents of the will might be declared before the judge or the notary;

b. A ^{statement in} writing might be handed to the judge or notary with an oral declaration to the effect that such writing contained the declarant's will; the declaration had to be made in either case by the testator in person and the execution had to be attested by two additional witnesses, or by the Registrar of the Court, or another notary as a single additional witness.

The formalities had to be complied with very strictly in order to make the will valid (B.G.B. 2233 - 2245).

Easier formalities were allowed in any of the following cases:

a. Where a testator believed his death to be approaching so fast that he would not have time to make a declaration before a judge or notary (B.G.B. 2249);

b. Where the testator's place of residence was, by reason of an epidemic or any other exceptional circumstances, isolated from the outer world to such an extent that a declaration before a judge or notary was rendered impossible or exceptionally difficult (B.G.B. 2250);

c. Where the testator being a member of the armed forces in time of war or under a state of siege was impeded by one of certain specified hindrances from making a will in one of the ordinary forms;

d. In any case in which a testator was on board any German ship other than a warship while such ship was not in any German port (B.G.B. 2250, 2251, 2252).

The capacity to revoke a testamentary disposition was governed by the same rules as the capacity to make such a disposition, subject, however, to the qualification that a person under guardianship on the ground of mental debility, extravagance, or dipsomania, might notwithstanding such disability, revoke a testamentary disposition made before he was placed under guardianship (B.G.B. 2253).

Under the Civil Code a covenant to make or to abstain for making any specified testamentary disposition was entirely inoperative.

On the other hand, an agreement inter vivos by which one of the parties, by direct disposition, conferred a right of inheritance or a legacy on the other party, if complying with the requirements set forth in the Civil Code, was binding on the estate as valid testamentary disposition. Such an agreement was called a contract of inheritance (Erbvertrag). It might contain dispositions by each of the parties in favor of the other, and in the absence of any contrary indication such dispositions were deemed mutually interdependent (B.G.B. 2298).

A contract of inheritance was made by a declaration before a judge or notary public, both parties being present at the same time. In other respects the formalities are the same as those in the case of a publicly declared testamentary disposition (B.G.B. 2274 - 2277).

II. THE LAW SINCE 1933

A. The Major Innovations in the Law

1. In respect to Family Law, the following laws were passed by the National Socialist regime:

a. Statute against Abuses with regard to Marriage and Adoption (Gesetz gegen Misbräuche bei der Eheschliessung und der Annahme an Kindes Statt, Reichsgesetzblatt vom 23 November 1933).

b. Statute for the Prevention of Hereditary Diseases (Gesetz zur Verhütung erbkranken Nachwuchses, Reichsgesetzblatt vom 14 Juli 1933, p. 529).

c. Statute for the Protection of the German Blood and the German Honor, and the amendments thereto (Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre, Reichsgesetzblatt vom 15 September 1935, p. 1146, und Ausführungsbestimmungen).

d. Statute for the Preservation of the Health of the German People (Gesetz zum Schutze der Erbgesundheit des deutschen Volkes, Ehegesundheitsgesetz vom 18 Oktober 1935, Reichsgesetzblatt p. 1246).

e. Statute Affecting certain Changes in the Provisions of the Family Law and modifying the Legal Status of Stateless Persons (Gesetz über die Aenderung und Ergänzung familienrechtlicher Vorschriften und über die Rechtsstellung der Staatenlosen, Reichsgesetzblatt vom 12 April 1938, p. 380).

f. Statute for the Unification of the Law of Marriage and Divorce in Austria and the German Reich, and the amendments thereto (Gesetz zur Vereinheitlichung des Rechts der Eheschliessung und der Ehescheidung im Lande Oesterreich und im übrigen Reichsgebiet, Reichsgesetzblatt vom 6 Juli 1938, p. 807 und Durchführungsverordnungen).

In amending and redefining the law in accordance with their own concepts, the Nazis repealed the following sections of the German Civil Code, Book IV: Sections 1303 - 1352; Sections 1564 - 1587; Section 1608, Paragraph 2; Sections 1635 - 1637; Sections 1699 - 1704; Section 1756; Section 1771, Paragraph 2.

2. In respect to Inheritance Law, the National Socialists passed the following statutes:

a. Statute concerning the Inheritance of Farms (Reichserbhofgesetz vom 29 November 1933, Reichsgesetzblatt Seite 685).

b. Statute Imposing Certain Limitations on the Right of Inheritance because of Conduct against the Interest of the German People (Gesetz über erbrechtliche Beschränkungen wegen gemeinschaftwidrigen Verhaltens vom 15 November 1937, Reichsgesetzblatt, p. 1161.)

c. Statute Affecting the Creation and Revocation of Testamentary Dispositions and Contracts of Inheritance (Gesetz über die Errichtung und Aufhebung von Testamenten und Erbverträgen vom 31 Juli 1938, Reichsgesetzblatt, p. 973).

The Nazis also repealed the following sections of the German Civil Code, Book V, dealing with inheritance: Section 2064; Sections 2229 - 2267; Sections 2272 - 2277; Section 2300.

B. The Present Law and its Deviations from the Principles of the Earlier Family Law

1. Betrothal. The Statute for the Preservation of the Health of the German People and the Statute for the Unification of the Law of Marriage and Divorce in Austria and the German Reich (hereinafter called Marriage Law--M.L.) created several new public severing impediments as to marriages which will be discussed below. Therefore new reasons which would justify a decree of annulment or a divorce could be set up and could defeat the claim for pecuniary compensation of the aggrieved party.

2. Validity of marriage. Section 4 of the Marriage Law in declaring a marriage between a German citizen of German or racially related blood and a person of non-German and not racially related (artfremd) blood not permissible set up a new public severing impediment. This development is one of the most important changes in the German law introduced by the National Socialist government, for this conception of the protection of the German blood became one of the main features of the new German state. The Law for the Protection of the German Blood and the German Honor and the amendments thereto explain at length which persons are considered to have German

blood and which persons belong to a different class of blood. Section 1 of the above-mentioned law especially forbids a marriage between Jews and citizens of German or racially related blood. Such a marriage is void even if it is concluded in a foreign country.

Section 5 of the Marriage Law sets up another public severing impediment, whereby a marriage is void if the conclusion of such a marriage would endanger the health of the German people. The circumstances which are regarded detrimental to the public health are defined in section 1 of the Statute for the Preservation of the Health of the German People. Section 1 states that a marriage is not permissible:

a. when a betrothed person has a contagious disease which might affect the health of the other betrothed or of the issue of both;

b. When a betrothed person is afflicted with a mental disease or with a type of insanity which would render such a marriage undesirable from the point of view of the interest of the German people;

c. When one betrothed suffers from one of the following diseases which are described in section 1 of the Statute for the Prevention of Hereditary Diseases: congenital imbecility (angeborener Schwachsinn); schizophrenia (Schizophrenie); manic depressive psychosis (zirkulaerem manisch-depressivem Irresein); hereditary epilepsy (erbliche Fallsucht);

Huntington's chorea (erblicher Veitstanz /Huntingtonsche Chorea/); congenital amaurosis (erbliche Blindheit); congenital deafness (erbliche Taubheit); congenital malformation (schwere erbliche körperliche Missbildung).

These are the two most important sections (4 and 5) in the new Marriage Law and give expression to the National Socialist ideology, which interferes with the private rights and the freedom of the citizens if the interest of the state or, as it is usually called, the community of the German people is involved.

A violation of section 4 of the Marriage Law is punishable according to section 5 of the Statute for the Protection of the German Blood and the German Honor. So is the violation of section 5 of the Marriage Law according to section 4 of the Statute for the Preservation of the Health of the German People.

Sections 6 and 7 of the Marriage Law correspond to section 1310 B.G.B. They provide that a marriage cannot be concluded between relatives by blood in the direct line, nor between brothers and sisters of full blood or halfblood, nor between relatives by marriage in the direct line. Section 1310 B.G.B., second paragraph, further stated that a marriage could not be concluded between two persons, one of whom had had sexual intercourse with parents, grandparents, or descendants of the other. This paragraph is omitted in the Marriage Law which, on the other hand, regards illegitimate descendants exactly like legitimate ones.

Section 8 M.L. corresponds to 1309 B.G.B., stating that neither spouse may remarry before the first marriage has been dissolved; but paragraph 1, sentence 2, and paragraph 2 have been omitted.¹ This particular omission is not important, but section 8 M.L. was amended on 27 July 1938 by providing that the second marriage may be valid if the parties believe in good faith that the first marriage was invalid.

Section 9 M.L. corresponds to 1312 B.G.B. and deals with the impediment of adultery. Exemption from this provision could be granted according to B.G.B., but it shall now be denied only if cogent reasons make the conclusion of a new marriage unfeasible.

Sections 10 to 14 of the M.L. are a new codification of similar provisions of the Civil Code. The formalities concerning a marriage are nearly the same as in the Civil Code and are covered by sections 15 to 19 of the M. L.

1. They read: "If a married couple wish to repeat the marriage ceremony a previous declaration of annulment is not necessary (1309 B.G.B., paragraph 1, sentence 2). If an action for annulment or for restitution is brought against a judicial decree whereby the first marriage was dissolved or declared void, the parties cannot conclude a second marriage before the determination of the suit, unless the action has not been instituted until after the expiration of the prescribed period of five years" (1309 B.G.B., paragraph 2).

3. Marriage Certificates. An important change was made by section 2 of the Statute for the Preservation of the Health of the German People, which requires every betrothed person to possess a marriage certificate (Ehetauglichkeitszeugnis) stating that no impediment exists according to this law. Sections 20 to 26 summarize the circumstances which make a marriage void. One new impediment was added to the Civil Code on 21 September 1933 and is now codified in section 23 M.L.: a marriage is void when the wife's only reason for the conclusion of the marriage was to acquire the family name of the husband or to acquire his nationality without the intention of both spouses to live together in conjugal community. The meaning of this section is clear, because such a marriage is considered unethical. Nevertheless it is a deviation from the former liberal policy and represents an interference of the state with the private rights of the citizens. Section 23 is applicable to all marriages concluded after 8 November 1918.

The private severing impediments mentioned before are codified in sections 35 to 39 and have not been changed. However, they are interpreted differently. For example, the refusal to take part in a religious ceremony without previous communication to the other spouse would not be considered any longer as a reason for annulment because of mistake as to essential personal qualities of the other party. (See above I, A, 2, 3).

4. Legal status of children born of void marriages. The legal status of children born of void marriages is dealt with in sections 29 to 39 M.L. and corresponds to sections 1699 to 1704 B.G.B. A child born of a void marriage, who if the marriage were valid would have been legitimate, is deemed to be legitimate insofar as both spouses did not know at the time of the marriage that the marriage was void.

This rule does not apply if the marriage was void owing to the violation of sections 4, 5, and 23 M.L. In the latter case the children are deemed to be illegitimate.

According to 1699 B.G.B. children born of a marriage which was void because of some defect in form were illegitimate. This has been changed by the new law.

The legal relations between the parents and a child who is deemed to be illegitimate as provided for in section 30, paragraph 1, M.L., are determined according to the provisions which apply to a child born of a dissolved marriage in the case where both spouses have been declared to be guilty parties (Section 30, paragraph 2, M.L.).

5. Divorce and judicial separation. The sections concerning divorce have been substantially changed and are now codified in sections 47 to 83, M.L. The respective provisions of the Civil Code have been repealed.

Section 1565 B.G.B. provided that either spouse might petition for divorce if (a) the other spouse had been guilty

of adultery, or (b) of any act punishable under sections 171 or 175 of the Criminal Code. But it is characteristic of the National Socialist regime that section 1565b has been dropped, because section 175 of the Criminal Code punished sodomy. It is generally known that many leading Nazi leaders and members of the party were guilty of this crime. Section 171 of the Criminal Code deals with the crime of bigamy.

Section 48 M.L. is a new provision, according to which either spouse may petition for divorce if the other spouse wilfully refuses to permit conception or brings about an illegal abortion.

Section 49 M.L. replaces section 1568 B.G.B. which has been mentioned before (I, A, 4). The wording of the new section is more liberal and facilitates a divorce on the ground of any grave breach of marital duty or of dishonest or immoral conduct. While section 1568 declared gross ill-treatment as such a grave breach of duty, the new section does not mention it at all. Although section 49 M.L. literally facilitates a divorce, its value depends on its interpretation. The German Courts after 1933 have interpreted it according to National Socialist ideas.

Section 51 M.L., formerly section 1569 B.G.B., grants divorce in case either spouse is insane. But section 50 makes an important addition by providing that either spouse may petition for divorce if the other spouse is mentally sick

(not necessarily insane) to a degree that conjugal relations have been disturbed and the petitioner cannot be expected to continue the marriage. The conduct of the mentally ill spouse does not have to be of a kind that violates his marital duties.

Section 52 gives either spouse the right to petition for divorce if the other spouse is suffering from a contagious or loathsome disease which cannot be cured within a foreseeable time. No similar provision existed in the Civil Code.

Section 53 M.L. is again a typical product of the Nazi philosophy. Either spouse may petition for divorce, if the other spouse became prematurely sterile after the marriage was concluded. But the sterile spouse cannot ask for a divorce. Neither spouse can ask for a divorce, however, if they have a healthy child born in wedlock or an adopted healthy one.

According to section 1567 B.G.B. either spouse might petition for divorce if the other spouse had wilfully deserted him (or her). Wilful desertion was deemed to exist only (a) if either spouse after having been ordered by a non-appealable decree to reconstitute the conjugal community, had intentionally disobeyed such decree for a year against the will of the other spouse; or (b) if either spouse has been absent intentionally from the conjugal home for a year against the will of the other spouse, and the conditions for a public citation have occurred as against him (or her) for the period of one year.

According to 55 M.L. it now suffices if the conjugal community has been dissolved for three years and there is no chance for its reestablishment.

6 Right of innocent party to alimony. The German Civil Code (1574 B.G.B.) and the Marriage Law (section 60) have similar provisions as to the liability of the guilty party. If a marriage is dissolved on any ground other than the respondent's insanity, the divorce decree must declare the dissolution of the marriage to be due to the respondent's fault; where, in any such case, a cross-petition on the respondent's part is equally successful or where facts are proved, which show that the respondent would have been successful if he had filed a cross-petition, the decree must be on the respondent's application also declare the petitioner to be guilty. If condonation or the passage of time would have been the only reason preventing the respondent's success, a decree in his favor must nevertheless be granted if right and justice demand it. (The last sentence is new).

If only one of the spouses is declared to be the guilty party, he incurs certain liabilities and becomes subject to certain disabilities which will be briefly explained below.

Sections 66 to 69 M.L., replacing sections 1578 and 1579 B.G.B., establish the right of the innocent party to alimony. According to section 66 M.L. a husband declared to be the

exclusively or predominantly guilty party shall furnish maintenance to his divorced wife suitable to his station in life, provided that she cannot furnish such maintenance out of the income of her property and the earnings of her labor.

A wife declared to be the exclusively guilty party shall furnish maintenance to her divorced husband suitable to his station of life, insofar as he is not in a position to maintain himself.

Insofar as the spouse declared to be the predominantly or exclusively guilty party is not in a position, having regard to his (or her) other obligations, to furnish maintenance to the other spouse without endangering his (or her) own maintenance suitable to his (or her) station in life, he (or she) has to pay so much as is just under all the circumstances considering the financial position of both spouses (Section 67 M.L.).

According to the Civil Code the guilty spouse was entitled to retain two-thirds of his income or, when this was insufficient for the necessities of life, such part of the income available for providing maintenance as was necessary for such purpose (Section 1579 B.G.B.).

If the guilty husband is not capable of furnishing maintenance without endangering his own maintenance, he is entirely discharged from his financial duties to his divorced wife, if she can provide for such maintenance out

of the capital of her property (Section 67, paragraph 2, M.L.).

7. Custody and maintenance of infant children. The former 1635 and 1636 B.G.B. are now codified in sections 81 and 82 M.L. The Civil Code provided that if a marriage had been dissolved on any of the grounds specified in section 1565 to 1568, and as long as the divorced spouses are still alive, the custody of the children was awarded to the innocent party.

Where both spouses had been declared to be guilty, the mother had the custody of sons under six years and of daughters of any age, while the father had the custody of sons over six years of age. This rule has been completely changed. The Guardianship Court now decides which spouse receives custody of the infant child, and shall base its decision solely upon what it considers is in the best interest of the child. But the Guardianship Court shall transfer the custody of the child to the predominantly or exclusively guilty spouse only in case when special reasons justify it.

The spouse who does not have the custody of the child's person as provided for in section 81 M.L., retains the right to have access to the child. The Guardianship Court may decree such access in greater detail (82 M.L.).

8. The right of separation. Both spouses are bound to live together in conjugal community, which includes not only physical cohabitation but also a joint participation in all affairs of life. In all cases in which one of the spouses

Fails to perform any general duty owing by one spouse to another he may sue for the restitution of the conjugal community. A demand for the restitution of the conjugal community may be resisted so far as under the circumstances it constitutes an abuse of the right or insofar as the spouse to whom the demand is addressed is entitled to claim a divorce (B.G.B. 1363).

Section 83 M.L. entitles the spouse to separation, though he (or she) has lost the right for a divorce, because of condonation or by lapse of time. The Civil Code did not grant a right for separation in such a case.

The possibility of obtaining a judicial separation as was provided for in sections 1575 and 1576 B.G.B. does not exist any longer. The respective sections of the Civil Code have been repealed. They had been created for persons of the Catholic faith whose religious convictions did not permit them to obtain a divorce.

9. Adoption. The provisions of the Civil Code in respect to adoption (1741 - 1772 B.G.B.) are for the most part unchanged except for the following instances. According to section 1750 B.G.B., the contract of adoption had to be entered into by both parties simultaneously in the presence of the court or a notary. Section 1754 B.G.B. declared that the adoption became effective on confirmation. The contracting parties were bound even before confirmation. The confirmation

could be refused only if ~~some~~ **legal requirement** of the adoption had not been complied with. Section 1754 B.G.B. has been modified by Statute of 23 November 1933 (Reichsgesetzblatt p. 979) by providing that the court is now entitled to refuse the confirmation also if (a) there is reasonable doubt that the adoption will establish a genuine family relationship, or (b) if important considerations from the point of view of the family of the adopted child or the public interest make the contemplated adoption undesirable.

These new provisions make it possible for the court to prevent an adoption more or less arbitrarily.

Section 5 of the statute of 23 November 1933 provides for the dissolution of adoption contracts concluded between 9 November 1918 and 23 November 1933 in cases where a genuine family relationship between adoptor and the adopted child had not been established. The parties to the contract may not demand such a dissolution; only the government has such a right. This statute was enacted for political reasons with the purpose of dissolving adoption contracts where the parties belong to different races or are of different religious faith.

The above-mentioned statute has been amended by section 5 of the statute of 12 April 1938 (effecting certain changes in the provisions of the family law and modifying the legal status of stateless persons). Now either of the parties to

the adoption contract may demand a dissolution, if, for important reasons, the personality of the adoptor or the child justify the discontinuance of the relationship.

10. Declaration of legitimation. An illegitimate child could, upon the application of the father, be declared legitimate by order of the public authority (1723 B.G.B.). It did not effect the validity of the declaration of legitimation, if the applicant was not the father of the child. Nor did it matter if it had been erroneously assumed in the declaration that the mother of the child or the wife of the father was in no position to make a declaration or that her place of residence was completely unknown (1735 B.G.B.). By the statute of 12 April 1938 a new section 1735a has been added to the Civil Code modifying and amending section 1735 B.G.B. It provided that the decree of legitimation may be declared invalid if it can be proved that the petitioner is not the father of the child.

11. Daughter's right to a dowry. The father is bound to furnish to a daughter on her marriage a reasonable dowry for the establishment of a home, insofar as he is in a position to do so, having regard to his other obligations (1620 B.G.B.). The father could refuse to furnish the dowry if the daughter married without the necessary parental approval. This practice has been changed by incorporating section 3 M.L. into the Civil Code. According to section 1621 B.G.B. a

minor or a person who is incapable of disposing or is limited in disposing capacity may not marry without the consent of her guardian. If therefore a daughter marries without the consent of her parents required under this section, the father can refuse the dowry. However, if she is of age, she may now marry without the consent of her parents and retain the claim for the dowry.

C. The Present Law and its Deviations from the Principles of the earlier Inheritance Law

1. Succession and Devolution. The right of the accrual of the inheritance has been changed in several respects. The Statute Imposing Certain Limitations on the Right of Inheritance because of Conduct against the Interest of the German People excludes certain persons by operation of law from the right of inheritance. A person who has lost his citizenship by order of the government cannot inherit from a German citizen. According to statute of 14 July 1933 every person could be denationalized who was considered an enemy of the German people. Practically everybody who was politically undesirable was in danger of losing his citizenship, and, indeed, the German Government published almost weekly a list of names of people who had been deprived of their citizenship. In 1939 a statute declared all Jews to be stateless; consequently no Jew could any longer inherit from a German citizen.

As mentioned before when a descendant of a testator was excluded from succession by testamentary disposition, he could demand his compulsory portion (which is equal to one half of the statutory portion) from the heir (2303 B.G.B.). According to section 2333 B.G.B. a testator could deprive a descendant of his compulsory portion (a) if the descendant made an attempt against the life of the testator, or of his spouse, or of any of his descendants; (b) if the descendant had been guilty of wilful corporal ill-treatment of the testator or his spouse; (c) if the descendant had been guilty of any crime, or any serious wilful offence against the testator or his spouse; (d) if the descendant maliciously committed a breach of his statutory duty to furnish maintenance to the testator; or (e) if the descendant led a dishonorable or immoral life contrary to the testator's wishes.

Section 2333 B.G.B. has been amended by adding section 2 of the Statute Imposing Certain Limitations of the Right of Inheritance because of Conduct against the Interest of the German People: A testator may now deprive a descendant of his compulsory portion if he should have married after 16 September 1935 a person who is considered Jewish according to the Statute for the Protection of the German Blood and the German Honor.

The purpose of the law on Farm Inheritance is to maintain the old German tradition with respect to farms and farmers. Farmers are considered as the fountain ("blood - fountain") from which the life of the German people flows. As such, farmers shall be protected and their farms be freed from indebtedness and not be subject to partition. A further economic and political purpose of this statute is to distribute the farmland of the German Reich into small and middle sized farms as equally as possible, this step being considered the best guaranty for the health of the nation and the people.

The Statute Concerning the Inheritance of Farms (Erbhofgesetz) did not change any of the provisions of the Civil Code. However, it excludes from the estate of the testator certain farms which are called "Erbhof" and have a size of not more than 125 Hektar (309 acres). For these farms (Erbhöfe) a separate right of succession is provided for in the above-mentioned Statute (Section 19 of the Erbhof Law). The following classes of persons, called "Anerben," are entitled to inherit, and in the following order: (a) The sons of the testator or their issue per stirpes; (b) The father of the testator; (c) The brothers of the testator or their issue per stirpes; (d) The daughters of the testator or their male issue per stirpes; (e) The sisters of the testator or their male issue per stirpes. (Section 20 Erbhof Law).

Only a German citizen can be a farmer according to this law (section 12 Erbhof Law); he has to be of German or racially related blood (Section 13). The testator cannot dispose of the Erbhof by last will or contract of inheritance. The Erbhof cannot be alienated and execution against it is not permissible (Sections 37 and 38).

2. The Making and Revocation of a Will. The provisions of the Civil Code in respect to this subject have been repealed (sections 2229 and 2267 B.G.B.) by the Statute Affecting the Creation and Revocation of Testamentary Dispositions and Contracts of Inheritance (hereinafter called Testamentary Law--T.L.)

The new codifications of this part of the Civil Code was a modernization of the old law and a relaxation of the strict rules in respect to the formalities required heretofore. There are comparatively few changes but they are important and will be explained below.

According to section 2229 B.G.B. a person who was interdicted on account of feeble-mindedness, prodigality, or habitual drunkenness, could not make a will. Section 2 of the Testamentary Law grants such a person the right to make a will unless he lacks the understanding and the judgment necessary to comprehend his declarations.

a. Holographic Wills. The most important change applies to holographic wills. While section 2231 of the Civil Code

required the testator to write and sign the declaration with his own hand, stating the place and the date at which it was made, it is not necessary for the testator, according to 21 T.L., to indicate the time and the place of the making of the declaration. If the testator does not sign with his full name but in a manner which leaves no doubt about his identity, that is now sufficient; the Civil Code required the testator to sign with his full name.

In respect to publicly declared wills section 2233 B.G.B. required that in superintending the making of a will, the judge had to be attended by a registrar or by two witnesses; the notary had to be attended by another notary or by two witnesses. Section 6 T.L. puts it in the discretion of the judge or notary whether witnesses have to take part, except where the testator is deaf, blind, dumb, or not capable of talking. In the latter instance only, the attendance of witnesses is obligatory now.

The following persons cannot take part as witnesses in superintending the making of a will: (1) a minor; (2) a person declared to have been deprived of civil rights for the time which the deprivation had been ordered; (3) a person who under the provisions of the Criminal Code is incapable of being called as a witness under oath; (4) a person who is in the service of the judge or notary as a domestic servant or employee (2237 B.G.B.; 11 T.L.). Section 11 T.L. added the following to the list: (5) a person who is insane, imbecile, deaf, blind,

or dumb, or incapable of writing; (6) a person who does not know the German language.

b. Public Wills. In making a public will the testator either makes an oral declaration of his last will to the judge or notary or delivers to him a written statement accompanied by an oral declaration that the written statement contains his last will. The written statement may be delivered open or sealed. It may be written by the testator himself or by any other person (2238 B.G.B.; 11 T.L.). Section 11 T.L., in contradiction to section 2238 B.G.B., requires that the judge or notary has to take notice of the contents of the last will if it is contained in a written instrument.

In case the judge or notary believes that the contents of the written statement or of the oral declaration are not good in any respect he may advise the testator accordingly; should the judge or notary believe that the contemplated testament is invalid he has to inform the testator (Section 15 T.L.). A similar provision did not exist in the B.G.B.

The Civil Code permitted a relaxation of formalities in special cases. These provisions are now codified in sections 23, 24, 25, 26, and 27 T.L. without significant changes.

c. Joint Wills. According to the Civil Code a joint will (gemeinschaftliches Testament) was permissible as between spouses only (2265 B.G.B.). It was sufficient for making a joint will if one of the spouses made a will in the manner

formally prescribed in section 2231, paragraph 2, B.G.B.; the other spouse had to make a declaration that the will should be deemed also to be his (or her) will. The declaration had to be written and signed in his (or her) own hand, stating the place where and date at which it was made. Section 28 T.L. has relaxed the formalities of the joint will. The manner prescribed in section 21 T.L. for a holographic will of a testator is sufficient now; the other spouse has only to sign this testatment without adding a declaration and may, in his discretion, state the place where and date at which it is made.

A will made before a judge or notary was deemed to have been revoked if the document taken into official custody had been returned to the testator (2256 B.G.B.). A joint will could according to 2272 B.G.B. be withdrawn from official custody only by both spouses. 2272 B.G.B. has been repealed but section 34, paragraph 4, T.L. replaces it.

Section 2273 B.G.B. further provided that in the opening of a joint will the dispositions of the surviving spouse could not, insofar as they could be separated from the others, be read out, nor should they be brought to the knowledge of the interested party in any other manner. This section has been repealed also; the Testamentary Law has no similar provision.

The sections concerning the contract of inheritance (2274 to 2277 B.G.B.) have been newly codified in section 29 to 31 T.L. without any change of importance.

The provisions in respect to the revocation of a will are shortened and newly codified in sections 32 to 36 T.L. They conform generally with the provisions of the Civil Code.