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A. New Developments in the field of Divorce (since September 2002)

Overall, there have been no significant developments within divorce law in Austria since 2002. There are still multiple grounds of divorce,[1] including divorce on the ground of fault. Even though this approach is controversial,[2] fault is still decisive under section 49 Austrian Marriage Act *(Ehegesetz, EheG*).[3] There has been an amendment, however, regarding divorce by consent: since the 2013 Children and Names Amending Act (*Kindschafts- und Namensrechts-Änderungsgesetz, KindNamRÄG 2013*)[4] spouses who are filing a joint petition for divorce by consent are no longer allowed to reserve their arrangement regarding the contact with their children for later determination. Pursuant to section 55a (2) Austrian Marriage Act in its current version, the required written agreement on the consequences of the divorce shall include an arrangement concerning the personal contact of the spouses with their children.[5] Such an arrangement shall be reached in consultation with each child and shall be in his or her best interests (*Kindeswohl*). The parties must certify that they have sought advice from a suitable person or institution[6] on the specific needs of their minor children following the divorce. The original document containing this confirmation shall be submitted to the court by the divorce hearing at the latest, otherwise the request for divorce will be rejected.[7] The guardianship court (*Pflegschaftsgericht*), however, is not bound by the divorce agreement: it may take a different decision that overrides the relevant parts of the divorce accord.[8]

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1 *Roth/Reith*: When the Common Journey Comes to an End – Getting divorced in Austria, in *Uzunalli* (ed.), Festschrift für Prof. Dr. Hakan Pekcanitez, Dokuz Eylul University Law School Journal Volume 16, Special Issue 2014, p. 346.

2 *Fischer-Czermak*: Reformbedarf in Ehe- und Partnerschaftsrecht, JPR 1/2020, p. 15; *Deixler-Hübner*: Ehescheidung: Schlussstrich statt Schmutzwäsche, Die Presse (17.02.2020).

3 German Imperial Law Gazette *(deutsches Reichsgesetzblatt, dRGBl)* No. 807/1938, in the version dated 25.04.2017, Federal Law Gazette I *(Bundesgesetzblatt I, BGBl I)* No. 59/2017.

4 2013 Act Amending the Act on Children and Names, Federal Law Gazette I No. 2013/15.

5 *Roth*: Außerstreitverfahrensrecht, 6th Edition, 2019, p. 100 *et seq.*; *Nademleinsky*: Scheidung und Aufhebung der Ehe, in *Deixler-Hübner* (ed.) Handbuch Familienrecht, 2nd Edition, 2020, p. 870.

6 The federal ministry published a list of suitable persons or institutions who are qualified for this consultation. See (online) https://www.trennungundscheidung.at/elternberatung-vor-scheidung/berater/ (27.01.2021).

7 *Leb* in *Schneider/Verweijen:* AußStrG, section 95, marg. No. 2 *et seq.* (27.01.2021).

8 See section 190 (1) and (2) General Civil Code *(Allgemeines Bürgerliches Gesetzbuch, ABGB)* of 11.06.1811, Judicial Law Gazette *(Justizgesetzsammlung, JGS)* No. 946/1811, in the version dated 23.12.2020, Federal Law Gazette I No. 148/2020; *Roth*: Außerstreitverfahrensrecht, 6th Edition, 2019,

Since 2010 registered partnerships, and since 2019 same-sex marriages, are recognized under Austrian law. The Austrian Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz, EPG*) provides rules for the conclusion,[9] legal effects[10] and termination[11] of a registered partnership. Originally only same-sex couples were able to register their partnership. Conditioned by a decision of the Austrian Constitutional Court in December 2017,[12] this limitation of registered partnerships to same-sex couples has been abolished so that since 2019 both same-sex and different-sex couples may assume a registered partnership.[13] The decision of the Constitutional Court also enables same-sex couples to enter into a (civil) marriage.[14] Therefore, same-sex – like different-sex – partners can choose between entering a registered partnership or a marriage. When it comes to the termination of such unions, the equivalent to the divorce of a marriage is the dissolution of a registered partnership. Despite these terminological differences, the rules regarding the prerequisites, procedures and consequences of the dissolution are similar to divorce.[15] As to the grounds for dissolution, however, there is one important difference: in contrast to divorce on the ground of irretrievable breakdown and separation,[16] the registered partnership will be dissolved irrespective of any hardship or prospect of restoration, if the 'domestic community' (*häusliche Gemeinschaft*) has been dissolved for a period of three years.[17]

B. New Developments in the field of Maintenance between former spouses (since September 2002)

There have been no changes in regard to maintenance between former spouses. Due to the implementation of registered partnerships, however, the maintenance obligation of a former spouse does not only expire if the entitled former spouse enters into a new marriage, but also if he or she assumes a registered partnership.[18]

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p. 101; *Nademleinsky*: Scheidung und Aufhebung der Ehe, in *Deixler-Hübner* (ed.), Handbuch Familienrecht, 2nd Edition, 2020, p. 870.

9 Section 4 to 6 Registered Partnership Act *(Eingetragene-Partnerschaft-Gesetz, EPG)* of 30.12.2009, Federal Law Gazette I No. 135/2009, in the version dated 07.12.2017, Federal Law Gazette I No. 161/2017.

10 Section 7 to 12 Registered Partnership Act.

11 Section 13 to 42 Registered Partnership Act.

12 Austrian Constitutional Court *(Verfassungsgerichtshof, VfGH)*, Judgement of 04.12.2017, G 258-259/2017.

13 Section 2 Austrian Registered Partnership Act.

14 Austrian Constitutional Court, Judgement of 04.12.2017, G 258-259/2017.

15 *Roth*: Zivilprozessrecht, 3rd Edition, 2020, p. 97; see section 13 to 19, section 43 (1) para. 2, 25, 27 Registered Partnership Act.

16 Section 55 Austrian Marriage Act.

17 *Dolinar/Roth*: Zivilprozessrecht, 16th Edition, 2019, p. 154 et *seq.*; see section 15 (3) Registered Partnership Act.

18 See section 75 Austrian Marriage Act.

The maintenance obligations of former registered partners are broadly comparable to those of former spouses[19] with one noteworthy exception: the Registered Partnership Act does not provide a rule similar to section 69 (2) Austrian Marriage Act, which grants the defendant maintenance in the same amount as during the existent marriage in case of a divorce on the ground of irretrievable breakdown with a ruling as to the sole or preponderant fault of the claimant.[20]

C. New Developments in the field of Parental Responsibilities (since December 2004)

The 2013 Children and Names Amending Act introduced profound amendments for the legal relations between parents and children, triggered by the decisions of the European Court of Human Rights which stated that the inability of a father, whose child is born out of wedlock, to obtain joint parental responsibilities without the mother's consent is a violation of article 14 in conjunction with article 8 ECHR.[21] Hence, many changes concerning parental responsibilities can be traced back to the approximate equalization between children born in wedlock and those born out of wedlock. The differentiation between those, however, still has not been fully eliminated in the Austrian legal system, as can be seen in section 177 (2) General Civil Code where the unmarried mother is at first solely entrusted with parental responsibilities.[22] Nevertheless, the 2013 Children and Names Amending Act simplifies agreements between the parents on parental responsibilities: unmarried parents and parents who are not living in a registered partnership may stipulate joint parental responsibilities at the civil registry office.[23] Those arrangements do not need court approval according to section 190 (2) General Civil Code. Agreements between the parents about sole parental responsibilities of the child, however, have to be accepted by the guardianship court.[24] If parents who are not married nor in a registered partnership are not able to reach such an agreement, neither at the civil

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19 See sections 66 *et seq.* Austrian Marriage Act and sections 20 *et seq.* Registered Partnership Act; *Leb*: Ehe, Verlöbnis und EPG mit den wesentlichen Unterschieden, in *Deixler-Hübner* (ed.), Handbuch Familienrecht, 2nd Edition, 2020, p. 68.

20 See section 20 in conjunction with sections 15 (3) and 18 (3) Registered Partnership Act in contrast to section 69 (2) in conjunction with sections 55 and 61 (3) Austrian Marriage Act.

21 *Roth/Stegner*: Die Entwicklung der Obsorgeregelung in Österreich, in *Verbeke/Scherpe/Declerck/Helms/Senaeve* (eds.), Confronting the Frontiers of Family and Succession Law. Liber Amicorum Walter Pintens, Volume II, 2012, p. 1191; ECtHR, *Zaunegger v. Germany*, No. 22208/04, 03.12.2009; ECtHR, *Sporer v. Austria*, No. 35637/03, 03.02.2011; Austrian Constitutional Court, Judgement of 28.06.2012, G114/11.

22 *Roth*: Außerstreitverfahrensrecht, 6th Edition, 2019, p. 127.

23 Section 177 (2) sentence 2 General Civil Code in conjunction with section 43 (1) para. 27 Registered Partnership Act.

24 Section 177 (3) General Civil Code; *Roth*: Außerstreitverfahrensrecht, 6th Edition, 2019, p. 128.

registry office nor at the court, the parent who is not entrusted with parental responsibilities can file an application for sole or joint parental responsibilities at the court under section 180 (1) para. 2 General Civil Code.

There have also been some amendments regarding the attribution of parental responsibilities after divorce or dissolution of the domestic community.[25] Married parents, getting divorced, as well as unmarried parents, dissolving their domestic community, have three options under section 179 General Civil Code. Firstly, the joint parental responsibilities that the parents had during the existent domestic community will continue, unless they reach another agreement.[26] Secondly, parents can stipulate that one parent alone is entrusted with parental responsibilities,[27] or thirdly, they can agree that the main caring parent has full parental responsibilities, whereas the other is limited to a certain extent of parental responsibilities.[28] The last two options must be stipulated in court and also where parents decide to continue equally shared joint parental responsibilities, the parents have to determine the child's main residence in court.

If the parents cannot reach such an agreement under section 179 General Civil Code regarding parental responsibilities or the household of the main care in reasonable time after the divorce or dissolution of their domestic community, the guardianship court shall take a decision ex officio on temporary parental responsibilities (*Phase der vorläufigen elterlichen Verantwortung*), subject to the best interests of the child. Also, the court may arrange temporary parental responsibilities on application, if a parent applies for sole parental responsibilities or for participation therein, against the will of the other parent.[29] Section 180 (2) General Civil Code defines temporary parental responsibilities as an arrangement in which the court assigns an already with parental responsibilities entrusted parent with the main care of the child in his or her household while the previous regime of parental responsibilities is maintained. In any case parental responsibilities will be determined by the court in accordance with the best interests of the child.[30]

This temporary phase shall last for six months (or more if needed) and the other parent will have a sufficient right to contact so that he or she has the opportunity to perceive

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25 Section 179 General Civil Code.
26 Section 179 (1) sentence 1 General Civil Code.
27 Section 179 (1) sentence 2 General Civil Code.
28 Section 179 (1) sentence 2 General Civil Code.
29 Section 180 (1) General Civil Code.
30 *Roth*: Außerstreitverfahrensrecht, 6th Edition, 2019, p. 129; *Huber*: Rechte und Pflichten zwischen Eltern und Kindern, in *Deixler-Hübner* (ed.), Handbuch Familienrecht, 2nd Edition, 2020, p. 316 *et seq*.

the care and education of the child.[31] After this time, the court will come to a final decision on the basis of the experiences of the temporary parental responsibilities, taking into account the payment of statutory maintenance and the best interests of the child.[32] Notwithstanding the above, an arrangement of temporary parental responsibilities is not a prerequisite for a final decision on parental responsibilities.[33] Once a final decision has been made, each parent is able to file an application for the revision of parental responsibilities as soon as circumstances have significantly changed.[34]

The 2013 Children and Names Amending Act presupposes that joint parental responsibilities should be the preferred choice as long as it complies with the best interests of the child. Hence, it is possible that the court determines joint parental responsibilities even against the will of one or both parents.[35] Only the best interests of the child, and not the will of the parents, are decisive when it comes to the attribution of parental responsibilities. The practice of joint parental responsibilities, however, requires a minimum of cooperation and communication between the parents which is more likely to be achieved if they are willing to make their joint parental responsibilities work.

Even if the court entrusts both parents with equally shared joint parental responsibilities, it is mandatory to determine with whom the child will mainly reside.[36] Nevertheless, in its 2015 judgement the Austrian Constitutional Court stated that the determination of the main residence of the child shall only be a 'nominal connection factor' for other legal consequences than care, such as registration law, whereas the care of the child in equal shares by both parents is practicable.[37] This decision leads to the 'double-residence-model' (*Doppelresidenzmodell*) which is frequently applied in case law and approved by legal literature, but not yet implemented into the Austrian legislation.[38]

The recognition of the double-residence-model, however, affects the right to determine the child's residence. If parents hold joint parental responsibilities and one parent is

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31 Explanatory notes to the Governmental Proposals *(Erläuterungen zur Regierungsvorlage),* 2004 of the addenda to the stenographic protocol of the national council *(Beilagen zu den stenographischen Protokollen des Nationalrats, BlgNR),* XXIV. legislation period *(Gesetzgebungsperiode, GP),* p. 27.

32 Section 180 (2) General Civil Code.

33 Austrian Supreme Court *(Oberster Gerichtshof, OGH)*, Judgement of 19.07.2016, 10 Ob 53/16s.

34 Section 180 (3) General Civil Code.

35 *Deixler-Hübner* in *Kletečka/Schauer*, ABGB-ON, version 1.06, section 180, marg. No. 28 (27.01.2021).

36 Section 180 (2) sentence 3 General Civil Code.

37 Austrian Constitutional Court, Judgement of 9.10.2015, G 152/2015.

38 The Austrian Government Program refers to this issue with the aim of clearer rules concerning the "double-residence-model". See 2020 to 2024 Austrian Government Program, p. 24 (online) www.bundeskanzleramt.gv.at/bundeskanzleramt/die-bundesregierung/regierungsdokumente.html (27.01.2021).

the so-called domicile-parent (the parent the child mainly resides with), then this parent is allowed to decide about the child's residence, even without the permission of the other parent, according to section 162 (2) General Civil Code. The only restriction is that the right of care and education of the one parent, with whom the child does not mainly reside, should not be impaired.[39] In contrast to this rule, when parents choose the double-residence-model where a domicile-parent only exists for formal reasons as above mentioned, it is not possible for this parent to decide about the child's residence without the permission of the other parent. Therefore, decisions in the case of double-residence must be made by mutual agreement of the joint holders of parental responsibilities or by an approval of the court according to section 162 (3) General Civil Code.[40]

Since the 2013 Children and Names Amending Act, parents who do not reside with the child can be forced to exercise personal contact under section 110 (2) sentence 3 Non-contentious Proceedings Act as long as this complies with the best interests of the child.[41] However, a parent cannot enforce his or her right to contact against the will of a minor older than 14 years of age.[42] Apart from that, parents not only have the right, but also the obligation to maintain personal contact with their children. This is inequitably connected with the child's right of contact under sections 186 and 187 General Civil Code. Therefore, personal contacts shall be settled by mutual agreement between child and parents. When such an agreement does not work out, the court shall develop rules of contact which comply with the best interests of the child.[43] Hence, the sociologists and social workers of the family court assistance (*Familiengerichtshilfe*) can be charged with exercising tasks of a so-called visit mediator (*Besuchsmittler*) who ensures that the contact between a parent and his or her child is performed in the child's best interests.[44]

In general, the family court assistance has been introduced by the 2013 Children and Names Amending Act to support the competent court in collecting the necessary information on the basis of which the court shall make its decision in proceedings concerning parental responsibilities and the right to contact.[45] Moreover, the staff of the family court assistance helps the court to reach an amicable settlement between the parties and ensures the information is shared with the parties in these specific

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39 *Fischer-Czermak* in *Kletečka/Schauer*, ABGB-ON, version 1.05, section 162, marg. No. 6 (27.01.2021).

40 *Fischer-Czermak* in *Kletečka/Schauer*, ABGB-ON, version 1.05, section 162, marg. No. 6/1 (27.01.2021).

41 *Roth*: Außerstreitverfahrensrecht, 6th Edition, 2019, p. 146.

42 Section 108 Non-contentious Proceedings Act *(Außerstreitgesetz, AußStrG)* of 12.12.2003, Federal Law Gazette I No. 111/2003, in the version dated 22.05.2019, Federal Law Gazette I No. 38/2019.

43 Section 187 (1) sentence 2 General Civil Code.

44 Section 106b Non-Contentious Proceedings Act.

45 *Roth*: Außerstreitverfahrensrecht, 6th Edition, 2019, p. 144; Section 106a (1) Non-contentious Proceedings Act.

proceedings. It is entitled to personally communicate with the child and to interrogate persons who are close to the minor. Persons who currently take care of the child have to condone these contacts.[46] Security authorities, the public prosecutor's offices, the courts as well as institutions which educate or take care of the minor are obliged to provide necessary information and allow inspection by the family court assistance. The family court assistance reports to the court on the secured information.[47]

Most of the improvements by the 2013 Children and Names Amending Act have been born by the commitment to the primacy of the best interests of the child in family law matters, which is now anchored in section 137 General Civil Code, right at the beginning of the third chapter on the law of parents and child. The following section lists a number of specific aspects that illustrate the concept of the best interests of the child and thereby intends to help both parents and judges in their decision-making.[48]

It is fundamental that the will of the child shall always be considered concerning care and education matters.[49] Thus, minors over 14 years of age are able to participate autonomously in proceedings about issues of personal contact, care and education.[50] For children under 14 years, and if necessary and with their approval also for minors under 16 years, a special 'child support' (*Kinderbeistand*) is provided during those proceedings.[51]

The aforementioned legal provisions are applied to married parents as well as to parents who live in a registered partnership, so that both institutions are equated in regard to parental responsibilities. Also, a homosexual partner can be a foster parent of the biological child of his or her partner.[52] Furthermore, in its decision of December 2014, the Austrian Constitutional Court followed the opinion of the European Court of Human Rights that homosexuality shall not be an impediment to adoption[53] and thus repealed those provisions that barred same-sex-couples from adoption.[54]

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46 Section 106a (2) Non-contentious Proceedings Act.
47 Section 106a (4) Non-contentious Proceedings Act.
48 *Deixler-Hübner* in *Kletečka/Schauer*, ABGB-ON, version 1.07, section 138, marg. No. 3 *et seq.* (20.04.2021).
49 Section 160 (3) General Civil Code.
50 Section 104 (1) Non-Contentious Proceedings Act.
51 Section 104a Non-Contentious Proceedings Act.
52 Austrian Supreme Court, Judgement of 28.06.2012, 8 Ob 62/12v.
53 ECtHR, *E.B. v. France*, No. 43546/02, 22.01.2008, iFamZ 2008/64 = EF-Z 2008/30; *Rudolf*: Adoption, in *Deixler-Hübner* (ed.), Handbuch Familienrecht, 2nd Edition, 2020, p. 349.
54 Austrian Constitutional Court, Judgement of 11.12.2014, G 119/2014; see section 43 (1) para. 27 Registered Partnership Act.

The 2019 Protection against Violence Act (*Gewaltschutzgesetz 2019*)[55] has introduced a new injunction against stalking which the 'child and youth welfare agency' (*Kinder- und Jugendhilfeträger*) may file in order to prevent the child from threats and harm.[56]

The 2013 Children and Names Amending Act provides a solution for faster court decisions when parents or holders of parental responsibilities and children are separated due to interferences by the child and youth welfare agency under section 211 (1) General Civil Code in case of imminent danger.[57] Such an intervention by the child and youth welfare agency can be a serious interference to the right to private and family life under article 8 ECHR. Hence, section 107a Non-Contentious Proceedings Act enables holders of parental responsibilities and the child to file an application to the court within four weeks after the intervention took place. Without delay, preferably within another four weeks, the court shall determine whether the measures of the child and youth welfare agency are permissible or not.

D. New Developments in the field of Property relations between spouses (since August 2008)

There have been some changes concerning the property relations between spouses, especially by the 2009 Family Law Amending Act (*Familienrechts-Änderungsgesetz 2009, FamRÄG 2009*).[58] Special provisions with regard to contractual matrimonial property law such as the marriage portion (*Heiratsgut*), the bride price (*Widerlage*), the morning gift (*Morgengabe*), the marriage portion legacies (*Heiratsgut-Vermächtnisse*), the widow's allowance (*Witwengehalt*), and the legal usufruct (*Advitalitätsrecht*) have been abolished.

The property provisions under chapter 28 General Civil Code are also applied to registered partners according to section 1217 (2) General Civil Code. Moreover, the Registered Partnership Act determines in sections 24 *et seq*. the distribution of the consumable assets and savings of former registered partners. The provisions widely comply with those of former spouses according to the Austrian Marriage Act,[59] with

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55 Federal Law Gazette I No. 105/2019.

56 Sections 382b and 382e Enforcement Code; for more detailed information, see *Roth*: Exekutions- und Insolvenzrecht, 11th Edition, 2019, p. 146; explanatory notes to the Ministerial Draft *(Erläuterungen zum Ministerialentwurf)* 158, XXVI. legislation period, p. 4.

57 *Roth*: Außerstreitverfahrensrecht, 6th Edition, 2019, p. 134 *et seq.*; *Huber*: Rechte und Pflichten zwischen Eltern und Kindern, in *Deixler-Hübner* (ed.), Handbuch Familienrecht, 2nd Edition, 2020, p. 331.

58 Federal Law Gazette I No. 75/2009.

59 Sections 81 *et seq*. Austrian Marriage Act.

one exception: in case of the dissolution of a registered partnership, the court shall not transfer the lease of a shared apartment to one of the former partners.[60]

When it comes to the spouses right to inherit, it needs to be noted that if spouses get divorced during the lifetime of the decedent, the former spouse or registered partner does not have any statutory right of inheritance (*gesetzliches Erbrecht*) nor any claim to the preferential legacy (*gesetzliches Vorausvermächtnis)*.[61] The previous legal framework only excluded spouses from their statutory right of inheritance or the preferential legacy if they had been divorced on the ground of fault. Following this, the same would have happened if the decedent had been able to sue for divorce on ground of fault at the time of his/her death. Nowadays, however, the statutory right of inheritance remains until the divorce/dissolution of the marriage/registered partnership. If the spouses have agreed on an arrangement regarding matrimonial consumable assets and savings during divorce or resolution proceedings, this arrangement will be valid even in the event of a spouse's death during the proceedings.[62] Therefore, such a legitimate agreement will replace the statutory right of inheritance and the preferential legacy of the remaining spouse.[63]

There have been new developments regarding the so-called agreements in advance (*Vorausvereinbarungen*). Spouses reach these agreements at the beginning of or during the marriage/registered partnership and they concern the rules of distribution of property in the case of the divorce/dissolution. Since the Family Law Amending Act took effect in 2010, these agreements can be made about the common consumable assets, common savings, and the common home. Agreements about the common consumable assets must be in written form and confirmed by signature,[64] whereas contractual arrangements about common savings and the common home have the form requirement of a notarial deed in order to be valid.[65]

Concerning the matrimonial home, the Austrian Marriage Act creates an 'opt-in-' and an 'opt-out-model'. Hence, spouses can agree that a matrimonial home, which one spouse brought into marriage and which normally remains sole property of this spouse,[66] will be subject to an allocation procedure. Alternatively, they can agree, according to section 87 (1) Austrian Marriage Act, that the transmission of property or

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60 See Section 87 (2) Austrian Marriage Act in contrast to section 30 Registered Partnership Act.
61 Section 746 (1) General Civil Code.
62 Section 746 (2) General Civil Code.
63 Explanatory notes to the Governmental Proposals, 688 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 21.
64 *Roth*: Außerstreitverfahrensrecht, 6th Edition, 2019, p. 92; *Deixler-Hübner*: Aufteilung des Ehevermögens, in *Deixler-Hübner* (ed.), Handbuch Familienrecht, 2nd Edition, 2020, p. 950.
65 Section 97 (1) Austrian Marriage Act.
66 Section 82 (1) para. 1 Austrian Marriage Act.

other rights in rem concerning the matrimonial home will be excluded.[67] Having said this, agreements in advance about the matrimonial home can either be in regard to property law and rights in rem or in regard to usage rights. Only the latter, for example agreements about rental law, will be subject of the 'judicial control' (*richterliche Nachkontrolle*) according to section 97 (3) Austrian Marriage Act.

In general, when it comes to the judicial control of agreements of spouses, which were reached in advance, one has to consider the content of those. Hence, as mentioned above, only agreements in advance concerning property law of the matrimonial home cannot be amended by the court of allocation (*Aufteilungsgericht*),[68] those are considered as peremptory binding.[69]

Every other valid agreement can be reviewed and modified under certain circumstances. Therefore, agreements in advance about the matrimonial consumable assets and the matrimonial savings can be changed if, in overall view at the time of the allocation decision, the agreement would disadvantage one spouse inequitably.[70] Equally, the court of allocation can amend agreements about usage rights of the matrimonial home, if one spouse or a common child is not able to cover the necessities of life or the living conditions would change drastically through the agreement in advance.[71]

However, if the court amends an agreement in advance according to section 97 (4) Austrian Marriage Act, it shall consider the matrimonial living conditions, the duration of the marriage/registered partnership, if the spouses/partners had legal advice while reaching the agreement, and in which form the agreement was made.

E. New Developments in the field of De Facto Partnerships (since February 2015)

The 2015 Inheritance Law Amending Act (*Erbrechts-Änderungsgesetz, ErbRÄG 2015*) first introduced inheritance rights of partners living in an informal relationship.[72] Under section 748 (1) General Civil Code, in force since 2017, however, informal partners have only been granted a 'subsidiary statutory inheritance right' (*subsidiäres gesetzliches Erbrecht*), which means that a partner may inherit the estate of his/her deceased companion only if there do not exist any other statutory heirs under section

67 *Roth*: Außerstreitverfahrensrecht, 6th Edition, 2019, p. 93.
68 Section 97 (2) Austrian Marriage Act.
69 *Deixler-Hübner*: Aufteilung des Ehevermögens, in *Deixler-Hübner* (ed.), Handbuch Familienrecht, 2nd Edition, 2020, p. 950.
70 Section 97 (2) Austrian Marriage Act.
71 Section 97 (3) Austrian Marriage Act.
72 Federal Law Gazette I No. 87/2015.

730 General Civil Code. Moreover, this statutory right is restricted to partners who have lived in a common household for at least three years.[73] Solely by way of exception, when a common household has not been practicable for substantial reasons, such as matters of health or work, this prerequisite is abandoned as long as there has existed a 'special bond typical for informal partners' *(eine für Lebensgefährten typische besondere Verbundenheit*) over the period of at least three years.[74] Given the lack of a legal definition of an informal partnership, the statutory requirement of a special bond including a sense of solidarity and devotedness is remarkable: for the first time the Austrian legislator adopts such an emotional element as a criterion for an informal relationship, which previously has only been acknowledged by case law.[75]

Furthermore, partners of informal relationships have the right to the statutory preferential legacy (*gesetzliches Vorausvermächtnis*).[76] This right ensures that spouses and partners of the decedent can continue to live in the common apartment and use the household goods. Prior to the 2015 Inheritance Law Amending Act this right only existed for spouses. Section 745 (2) General Civil Code provides, however, that the remaining de facto partner must have had a joint residence with the decedent for at least three years before his or her death and that at the time of death he or she does not live in a registered partnership or a marriage with a third person. The statutory preferential legacy in the case of informal partners lasts only for one year after the partner died. These limited rights can be seen as rights of usage[77] and they shall protect the informal partner of the decedent so that he or she has enough time to search a new apartment and to cope with the new living circumstances.

Moreover, informal partners and their children can claim a nursing legacy (*Pflegevermächtnis*) if they have taken more than minor care of their deceased partner. In order to claim this statutory legacy, the informal partner must have nursed the other partner for at least six months during the past three years.[78] This right, however, can be deprived through disinheritance. It is worth considering that any prosecutable act, committed intentionally and punishable with more than a year of deprivation of liberty, against an informal partner is a reason for disinheritance (*Enterbungsgrund*)[79]

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73 Section 748 (1) General Civil Code.

74 Section 748 (2) General Civil Code; *Scheuba* in *Kletečka/Schauer*, ABGB-ON, version 1.04, section 748, marg. No. 3 (21.04.2021).

75 *Beclin*: Nichteheliche Lebensgemeinschaften, in *Deixler-Hübner* (ed.), Handbuch Familienrecht, 2nd Edition, 2020, p. 137, 172.

76 Section 745 (2) General Civil Code.

77 *Beclin*: Nichteheliche Lebensgemeinschaften, in *Deixler-Hübner* (ed.), Handbuch Familienrecht, 2nd Edition, 2020, p. 170.

78 Section 677 General Civil Code.

79 Section 770 para. 2 General Civil Code.

or unworthiness of inheritance (*Erbunwürdigkeit*).[80] Furthermore, an informal partner can no longer be a witness to the last will of his/her partner.[81]

When the informal relationship ends during the lifetime of both partners, it is assumed that any testamentary disposition in favor of the former partner expires, according to section 725 (1) General Civil Code. The termination of such an informal relationship is, due to the lack of legal provisions, not easy to determine. The prevailing opinion states that the dissolution of the common household and joint bank account, as well as a separation agreement indicate the termination of an informal relationship.[82]

[80] Section 541 para. 1 General Civil Code.

[81] Section 588 (1) General Civil Code.

[82] *Mondel/Knechtel* in *Kletečka/Schauer*, ABGB-ON, version 1.04, section 725, marg. No. 2 (27.01.2021); *Eccher/Niedermayr* in *Schwimann/Kodek,* 5th Edition, section 725, marg. No. 4.