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1. MARRIAGE PROPERTY REGIME

As described in the menu item Divorce Consequences – Ecclesiastical Jurisdiction (1558-1783), the predominant marriage property regime in the early modern Archduchy of Austria under the Enns was community of property. The guiding principle in the efforts to codify and standardise civil law in the Habsburg Monarchy was, however, as also explained, not community of property, but the separation of property, the matrimonial property regime, which was predominant in early modern Tyrol, for example. As we will show, many of the regulations already drafted in the Theresian Code of 1766 can be found in the General Civil Law Code of 1786.

GENERAL CIVIL LAW CODE (1786)

The overriding aim of the General Civil Law Code, which was promulgated by patent on 1 November 1786, was to introduced a “uniform, general civil law in all our German hereditary lands”.
For our question about the regulation of the regulation of the consequences of divorce, the third main section, “On the rights between spouses”, is relevant. The General Civil Law Code adopted the husband’s right to chastise his wife from customary law. § 47 defined in a very general way that the husband acquires a “kind of power” over the wife upon marriage, which “must, however, be in accordance with reason, decency and equity”. The determination of what form or degree of physical violence was legitimate or illegitimate was thus left to judicial interpretation. As in the Theresian Code of 1766, §47 required the husband to “maintain the wife according to his status” and to represent her “both in court” and “out of court”. § 49, in return, obliged the wife to “let the husband determine place of residence” and to “help provide food for him in accordance with his status, and to render all help in the household which was in accordance with her status, strength and abilities”.

MARRIAGE PORTION (HEIRATSGUT) AND COUNTER-MARRIAGE PORTION (WIDERLAGE)

The power of disposal over the property that the woman (Heiratsgut) and the man (Widerlage) brought into the marriage was precisely regulated. § 55 generally stipulated that, in the case of marriage portions "first, the status, the dignity of the persons and the powers of the property are to be taken as a measure…". While the Theresian Code had given the husbands only the right to use the marriage portion, § 63 now stipulated that the husband acquired full and irrevocable ownership of the bride's marriage portion, "be it movable or immovable property […]", and that he could "freely do as he pleases" with it as with his own property. In the case of a dissolved marriage, he would not have to pay back what he had received as a marriage portion, but rather only the "depreciated value of it". If the marriage property also included real estate, this remained the property of the wife according to § 66, but the husband received "the mere usufruct" as well as "the full enjoyment of all the benefits accruing."
It was also stipulated that the wife could not reclaim the marriage portion during the marriage. Analogous to the Theresian Code, the General Civil Law Code of 1786 allowed the wife – if she had failed to secure the marriage portion – only to apply for such security, for example by means of a mortgage on the husband's property.
§ 77 stipulated quite generally that everything that is "ordered in respect of the marriage portion" must also apply to the counter-marriage portion made by the bridegroom to the bride. If one reads the other paragraphs, it becomes clear that different rules were apply to the marriage portion than to the counter-marriage portion. While, as stated above, the marriage portion was to pass directly into the ownership of the husband, with the exception of real estate, the wife had no legal right to the counter-marriage portion during the marriage, according to § 79. Unlike the husband, who could sue in court for unpaid marriage portion, the wife could not legally demand payment of the counter-marriage portion.

SEPARATION OF PROPERTY

The separation of property was determined as the legally valid marriage regime:

> "§ 83. Each spouse retains sole ownership of his or her property, both that which he or

> she had before the marriage and that which comes to him or her afterwards; without the other being able to claim it."

However, this rule was weakened by the legal presumption of a tacit power and authority of the husband, which entitled the husband to interfere in the wife's property management, but not vice versa.

Paragraph 84, for example, stipulated at the outset that "each spouse is entitled to the free administration of his or her property, without the other being able to be mistaken about this". The husband, however, would be entitled to "take over the wife's business and the administration of her property, and in cases that do not require any special power of attorney, he has implicit power and authority". In the subsequent sentence, however, the wife was at least granted the right to "object to the husband's further administration at any time and to take over such administration herself".

§ 85 did not in principle exclude that the husband could also transfer asset management to the wife. It stipulated that if "one spouse has expressly entrusted the other with the management of his or her property" and he or she can lawfully prove this, it is "irrevocably limited". § 86 again makes the option of transferring the administration one-sided by granting the wife only the possibility to revoke the "expressly or tacitly" assigned administration of property if she can present evidence that her property is diminished due to "the husband's bad administration".

It is also regulated in detail whether the property management also included the usufruct or not. § 89 stipulated that even if the wife had tacitly or explicitly left the management and usufruct to the husband, she retained the right to sell her property. But even under the assumption that the wife managed her own property, § 90 granted the husband the right to "watch over her conduct in order to prevent waste and dissipation, especially when there are children".

COMMUNITY OF PROPERTY

Married couples who opted for the marriage regime of community of property had to

explicitly agree on this in a marriage contract. § 92-96 define the rules of the game pertaining to community of property, which essentially correspond to customary law and long-standing practice in the Archduchy below the Enns. Since the married couples examined here adhered to the community of property by means of marriage contracts until well into the 19th century, their provisions will be presented in more detail below.

A distinction must be made between the **general community of property**, in which the present and future property is merged into a common good, and the **partial community of property** which only comprised the future property – with or without expected inheritances.

§ 92 stated in the introduction that a community of property does not change the "ownership of property" which is not brought into the community of property:

> "each spouse retains unrestricted power over it and can also dispose of it against the will of the other spouse." (§ 92)

A "community of property over current and future property, with or without inclusion of inheritance" can be entered into without "further solemnity", as § 95 stated. The marriage contract should contain "a proper and reliable description of the property of both parties" and had to be signed by both spouses. To prevent possible disputes, it should be stipulated in the marriage contract "what belongs in the community and what does not." A distinction had to be made as to whether only the "future property alone, or also all present and future" property should be part of the community of property.

In order for any future inheritance to become part of the partial community of property this had to be explicitly stated in the marriage contract. § 94 stipulated that without the explicit provision, the future inheritance of wife or husband is not included:

> "So what will be inherited in the future does not belong in the community of property unless expressly notification has been made." (§ 94)

In the marriage regime of partial community of property, today also known as community of acquisition, everything that was acquired during the marriage or, if it was stipulated in the marriage contract, was inherited, belonged to both spouses jointly “until the contrary is proven”.

If the the community of property also include land and real estate, the other spouse was to be registered as co-owner in the land register. § 93 stipulated that in this case a spouse

> “[can] make an agreement regarding half, but not an entire piece of land/real estate without the consent of the other.” (§ 93)

In the event of the death of one of the spouses, irrespective of gender, the surviving spouse immediately gained the “full and free ownership” of his or her half of the land or real estate. With full ownership, the surviving spouse also had to take over any mortgages registered in the land register.

Overall, in the event of the death of a part of the marriage, the surviving part had the right

> "to half of what remains in the common property after the death of one spouse." (92)

According to § 96, any debts were to be deducted from the joint property. If the couple had agreed on a general community of property, it was irrelevant whether the debts had been incurred jointly or only by one part of the couple. The question was more difficult when the spouses also had property on their own. It had to be clarified whether the debts were debts of the joint assets or of the own assets.

GENERAL CIVIL LAW CODE (1811)

If the General Civil Law Code of 1786 was already committed to the bourgeois-patriarchal ideology, this can be seen even more clearly formulated in the second main sections of the General Civil Law Code of 1811. Under the heading “On the Rights of Marriage”, the

introductory paragraph defined that the family is established when a marriage contract is entered into.

> “Family relationships are established by the marriage contract. In the marriage contract, two persons of different sexes legally declare their will to live in inseparable union, to beget children, to bring them up, and to stand by each other” (§ 44).

The entry into the marriage contract does not refer to the civil marriage, but rather to the church marriage, which, as shown in the menu item Matrimonial Proceedings | Norms, continued to be the only way to conclude a valid marriage in the Habsburg monarchy. The marriage contract, which until then had been used to refer to the document in which the married couple primarily regulated the property situation during the marriage and the right of inheritance in the event of the death of one of the spouses, was now called the “marriage pact” (§ 1217).

The General Civil Law Code of 1811 refrained from legally anchoring the husband’s right to chastise the wife, whoever, it did declare him to be the “head of the family”:

> “The husband is the head of the family. In this capacity, he has the special right to manage the household; but he is also obliged to provide the wife with decent maintenance according to his means and to represent her in all situations.”

In return, the wife was now obliged to,

> “follow the husband to his place of residence, to assist in housekeeping and acquisition to the best of her ability, and as far as domestic order requires, both to follow and to make others follow the measures taken by him”. (§ 91)

MARRIAGE PORTION AND COUNTER-MARRIAGE PORTION

§ 1227 stipulated that “as long as the marital union continues”, both the “usufruct of the marriage portion” and the capital gains belonged to the husband. If the wife’s marriage portion also included cash, promissory notes or other consumable items, the husband now obtained “full ownership”. Only immovable property remained the property of the wife, the husband, however, received the usufruct.

The counter-marriage portion was no longer seen as a natural part of the property which the husband brought into the marriage, but, as § 1230 stated, only as a voluntary contribution by the husband or a third party to the “increase of the marriage portion” of the bride. As had been customary up to then, the wife did not receive any usufruct from the counter-marriage portion, but only received the “free property” when the husband died. § 1231 once again explicitly stated that neither the bridegroom nor his parents were obliged to offer a counter-marriage portion.

SEPARATION OF PROPERTY

The General Civil Law Code of 1811 also stipulated the separation of property as a marriage regime, to which married couples who did not conclude “marriage pacts” were automatically subject.

> “If the spouses have not made a special agreement about the use of their property, each spouse retains his or her previous right of ownership, and the other has no claim to what each spouse acquires during the marriage. In case of doubt it is presumed that the acquisition originates from the husband.” (§ 1237)

The last sentence of the statement cited above represented a new disadvantage for the wife. If she could not prove that something – be it a piece of furniture or even a piece of land – had been bought using her property, the legal presumption now asserted that the purchase had been paid for using the husband’s property.

The subsequent paragraph also worsens the legal position of wives. Here, the authors of the General Civil Law Code also worked with the legal presumption. While the General Civil Law

Code of 1786 gave the husband tacit power of attorney only for those transactions that did not require a special power of attorney, this power of attorney was extended to all transactions:

> "As long as the wife hasn't objected, the legal presumption is that she has entrusted the man, as her legal representative, with the administration of her free property." (§ 1238)

In contrast to the General Civil Law Code of 1786, it was now no longer only the husband's right to sue his wife in the event of any suspicion of wastefulness, but the wife could now also sue for the removal of the husband's administrative power:

> "1241. In urgent cases or if there is a risk of harm, the husband may be deprived of the administration of the property, even if it has been expressly and permanently granted to him. On the other hand, he is also authorized to put a stop to his wife's disorderly management and even to have her legally declared a spendthrift."

COMMUNITY OF PROPERTY

The provisions mentioned in §§ 1233-1236 essentially follow the aforementioned provisions of the General Civil Law Code of 1786.

2. INHERITANCE LAW

In addition to marital property law, inheritance law is also of central importance for the transfer of property between generations. After the latter had essentially been regulated only by customary law until the ABGB (General Civil Law Code) of 1811, the vast majority of brides and grooms also made agreements with regard to inheritance law in the marriage contract, which they adapted to the chosen matrimonial property regime. While the points in the marriage contract which pertained to property law regulated both the ownership of the

assets that the bride and groom owned at the time of marriage and those which they would inherit and acquire during the course of the marriage, the points regarding inheritance law regulated how the deceased spouse's assets were to be divided between the widow or widower, the children and any other possible relatives.

Joseph II's Succession Patent (1786)

The **Succession Patent** (JSG 548), passed on 11 May 1786, pursued the goal of introducing "in the entire German hereditary lands a general order of legal succession (successionis ab intestato) of freely inheritable property, equal for all estates without distinction" (preamble).

Already in the first paragraph, it is made clear that the legal succession was to apply only in cases where the subjects had not arranged their succession in a privately autonomous manner, i.e., the deceased had not made any arrangements about his or her property. Paragraph 2 provided that in such cases the assets of the deceased should go to the biological relatives.

The third paragraph defined the kinship lines: In the first line are the children and their children. If the testator's children were already deceased, their shares in the estate went to their children. The mother and father of the decedents and their children and grandchildren were placed in the second line. If the parents were already deceased, the estate went to the decedents' sibling(s) or, if these were also already deceased, to their children. If there were no persons entitled to inherit in the second line, the grandparents of the decedents or the great-aunts and great-uncles or their children were entitled to inherit in the third line. If there were no more persons entitled to inherit in the third line, relatives up to the sixth line ("great-grandparents in the third degree and the persons descended from them") came into play.

Since the legal succession was constructed exclusively via the biological relationship, Joseph II's Succession Patent consequently did not provide for the right of spouses to inherit. Only in the rather unlikely case that there were no heirs in all six lines, the estate went to the widow or widower, as stipulated in § 23. If the latter had also died, § 23 defined the estate as "heirless property" which was to be confiscated "for the attention of Our Chamber" or for the attention of all those who had been granted a right to it.

Paragraph 24 again explicitly stated that spouses have no legal succession, apart from the exception described in § 23. However, as explained in § 24, the surviving were entitled to the right of usufruct of parts of the “remaining assets for his or her maintenance”, as long as they did not enter into a new marriage, regardless of whether they had assets of their own. If there were no children or “less than three children”, the widow or widower received the usufruct of one-fourth of the property left behind. If three or more children were entitled to inherit, the share of the usufruct was calculated on the basis of the children’s share. Analogously to the children, who received the same share as assets regardless of gender and birth sequence, the surviving spouse received a child’s share as usufruct “for his or her maintenance”. If, for example, five children were entitled to inherit, the widow or widower received the right of usufruct of one fifth of the estate left behind.

In all cases, as § 24 also stipulated, the assets to which the widow or widower was entitled under the marriage contract were to be included. Whether the widow or widower was entitled to a share of the usufruct of the estate therefore depended centrally on the agreements on the matrimonial property regime and inheritance laws on the one hand, and on the amount of the marriage portion (Heiratsgut) and counter-marriage portion (Widerlage) on the other.

GENERAL CIVIL LAW CODE (1811)

While Joseph II’s Succession Patent regulated the legal succession, but in practice was to be applied only when testators died without inheritance provisions, the ABGB of 1811 was a comprehensive codification of inheritance law. With regard to legal succession, it essentially adopted the provisions of the Succession Patent. The contexts in which intestate succession was to apply were expanded. In addition to the case where the testators had not left a will, intestate succession should now also be applied if the testator

> "has not made proper provision for the persons to whom he or she was bound by law to leave an inheritance; or if the heirs appointed are unable or unwilling to accept the inheritance" (§ 727).

Like the Succession Patent, § 730 declared the biological relatives as legal heirs,

distinguished according to six lines, which it described in detail in the following paragraphs. Also analogous to the Succession Patent, §759 transferred “the entire estate” to the surviving spouse only on the condition that he or she had died without relatives in the six lines and without a will. This, however, as the following sentence limited, was the case only if she or he had been innocent in the case of divorce.

> "However, a spouse divorced through his or her own fault shall not be entitled to the inheritance nor to a share in the inheritance of the spouse." (§ 759)

The rights of widows and widowers were slightly strengthened. First, the provision that the entitlement to usufruct expired upon remarriage was abolished. And secondly, the first attempts to create of a right of inheritance for spouses were introduced, but only in the event that the testator had no children entitled to inherit. In these cases, the surviving spouse no longer received only a quarter of the usufruct, but according to § 758, “the unrestricted ownership of the fourth part of the estate”. However, as the sentence below explains,

> "what the surviving spouse is entitled to from the assets of the other under the marriage contract, an inheritance contract or a testamentary disposition"

was to be added to this inheritance claim.

If there were children who were entitled to inherit, the surviving spouse continued to receive only the right of usufruct over part of the property. The inheritance patent also incorporated the relationship between the usufruct and the number of children entitled to inherit:

> "If there are three or more children, the surviving spouse is to receive as usufruct the same share as each child inherits; but if there are less than three children, he or she shall receive the right of usufruct to the fourth part while the property remains with the children." (§ 757)

While legitimate children were to be entitled to the same inheritance rights as legitimate children, § 754 granted illegitimate children rights to maternal inheritance in the same manner as legitimate children but excluded them from paternal inheritance. The same applied in the case of the death of an illegitimate child without children of their own, where § 756 awarded succession to the mother but not to the father.

Mandatory Share

In the fourteenth main section, the ABGB of 1811 regulated the mandatory share uniformly for all German hereditary lands for the first time. § 762 stipulated that the testator must give a compulsory share to the children or, in their absence, to the parents. For the mandatory share of sons and daughters, §768 determined half, for the mandatory share of parents one third of what they would be entitled to according to the legal succession. Only under certain conditions – apostasy from the Christian faith, failure to render assistance, sentencing to a term of more than twenty years of punishment or immoral conduct – was the testator entitled to disinherit daughters and sons, and also mothers and fathers (§768).

For the calculation of the compulsory portion, §788 provided, among other things, that everything the testators had already paid to their children or grandchildren as a marriage portion or counter-marriage portion, now called “Aussteuer” (wedding gift), was to be deducted from the compulsory portion:

> "The property given by the testator during his lifetime to his daughter or granddaughter as a Heiratsgut (marriage portion), to his son or grandson as Ausstattung (marriage portion), or directly to take up an office or profession or to pay the debts of an adult child…, [is] included in the compulsory portion."

This restriction mainly affected married daughters and sons, who had often already received their maternal or paternal mandatory share upon marriage. Although spouses were explicitly not entitled to a mandatory share, §7 96 stipulated that the widowed spouse, “if no provision has been made for survival, and as long as he or she does not contract a second marriage, shall be entitled to the reasonable maintenance”. However, here too, culpably divorced

spouses were excluded from the right to “reasonable maintenance”.

3. REGULATION OF “WORLDLY MATTERS”

JOSEPH II’s Marriage patent (1783) and the GENERAL CIVIL LAW CODE (1786)

As explained in the menu item Matrimonial Proceedings | Norms, with the coming into force of Joseph II’s Marriage Patent in 1783, only uncontested divorces were possible. Joseph II’s Marriage Patent was incorporated without any changes into the General Civil Law Code of 1786. This legal provision not only meant that married couples did not have to present grounds for the divorce, but also meant that the court proceedings, for example in regard to maintenance, the division of property or the custody of children, were no longer possible. § 45 of Joseph II’s Marriage Patent (= § 100 of the General Civil Law Code of 1786) clearly stipulated that a divorce could be approved only if a settlement was concluded in advance:

> “[…] However, a separation of bed and board between spouses should under no circumstances be possible in any other way than when both spouses have agreed to live separately; and if, in addition, both of them have provisionally agreed on the share which each spouse is to keep or receive, without judicial investigation or judicial verdict taking place in that case.”

In contrast to previous provisions, where the consequences of divorce could be settled only court after the divorce or separation from bed and board, the authors of Joseph II’s Marriage Patent and the General Civil Law Code of 1786 proceeded from the basic idea that the married couples could regulate the consequences of divorce themselves. They did not provide for a review of whether the agreements in the divorce settlement severely disadvantaged one of the spouses, nor whether their implementation was realistic. The only stipulation of § 48 of Joseph II’s Marriage Patent (= § 103 of the General Civil Law Code of 1786), was that “all marriage contracts concluded between them [the spouses] remain in full

force”.

Court Decree (1786)

Although the Court Decree of October 1786 granted spouses the right to file a contested divorce action in exceptional cases, it still failed to lay down a set of guidelines for the additional proceedings or side issues closely interwoven with divorce proceedings regarding the economic consequences or the custody of the children.

Court Decree (1791)

With the Court Decree of 1791, the consequences of contested divorce proceedings were taken into account for the first time, albeit in very vague terms. By way of introduction, the Court Decree stated that in cases where the spouse did not agree on the “division of the property connected with the divorce of bed an board“, this could also be negotiated in due process. According to the Court Decree, the rules according to which the judges should make their decisions

> “cannot be determined by special laws, but depend on the various circumstances of the property, the existing contracts, the persons themselves, the requests made by one or other of the disputing parties, and on the application of the legal principles regarding these circumstances”.

It is noteworthy that the Court Decree from 1791 still assumed that both spouses would contribute financially to the household and that the already existing laws contained enough regulations on how “the situation was to be settled with the former community of property, if the spouses do not continue with such”. From the nature of things, it follows “that the contributions made to the common household must be changed in the case of separate management”. The specific regulation is that

> “[attention must be paid] to all circumstances that may arise, including maintenance

> and the greater or lesser degree of guilt in the separation (=divorce), however, [to pay attention].”

The Court Decree explicitly stated that in the case of divorce, the provisions that were intended for the case of death did not come into force. On the one hand, the divorce from bed and board and the dissolution by means of death must not be “mingled”; on the other hand, it is expressly decreed in the “General Civil Law Code, third main section, § 103, that in the case of separation, all marriage contracts concluded between the spouses remain in full force”.

As already mentioned, in the marriage regime of community of property, the surviving spouse inherited at least half of the property – depending on the number of children. This is not the case in the marriage regime of separation of property, where the inheritance of the surviving spouse is regulated in great detail in paragraphs 116 to 118.

GENERAL CIVIL LAW CODE (1811)

As also described in the menu item Matrimonial Proceedings | Norms, the General Civil Law Code continued to allow uncontested divorces only if there was an agreement on the consequences of the divorce. In the case of contested divorces of Catholic couples, the regulations were to be applied, which the General Civil Law Code provided for the contested “separation of the marriage” of those Christian denominations or the Mosaic religion, which in certain circumstances allowed for divorce with the option of remarriage.

PROVISIONAL MAINTENANCE

§ 117 of the General Civil Law Code of 1811 advised the judges to regulate disputes “which relate to a further contract, to the separation of property, to the maintenance of children, or to other claims and counterclaims” through settlements. If such a settlement could not be reached, it was up to the judge to refer the disputing parties to due process, whereby for the duration of the proceedings “the spouse and children are to be awarded the appropriate amount of maintenance.”

COMMUNITY OF PROPERTY

The 28th main section, “On Marriage Covenants”, also regulates the consequences of divorce in the case of a community of property. While the General Civil Law Code of 1786 had stipulated that the marriage contracts would remain in force in the event of a divorce, § 1263 granted the married couple the right to decide in the case of an uncontested divorce whether they wished to allow the “marriage pacts to continue or in what way they wished to amend them”. In the case of contested divorces, which were not decided by settlement but by a court judgment, the question of fault was now applied. If the marriage was divorced through no fault of one or the other spouse, or due to the fault of both, one spouse could demand that the marriage pact, i.e. the marriage contract, be annulled. § 1264 gave the spouse who was “blameless” in the divorce the right to “demand the continuation or annulment of the marriage pact, or, according to circumstances, reasonable maintenance”.
If the marriage was annulled, the marriage contracts lost their validity and “the marriage pacts were also dissolved ; the assets, insofar as they exist, revert to their previous status. However, the guilty party must compensate the innocent party (§. 102).” (§ 1265)

The division of property is again regulated precisely only for married couples who did not belong to the Catholic religion (“other Christian religious relatives” (§115) and “Jews” (§133)). Here too, a differentiation is made according to fault. If the separation of the marriage is approved due to “insurmountable aversion” on the part of both spouses, the “marriage pacts” are considered, if no settlement has been reached, to “be extinguished for both spouses”. If the marriage is separated by a court judgment, the innocent spouse receives

> “not only full satisfaction, but everything that was stipulated to him/her in the marriage pacts in the event of survival starting from the point in time of the recognised separation. The property over which a community of property has existed shall be divided as it is in the case of death, and the right under a contract of inheritance is reserved for the innocent party in the event of death. The intestate succession (§§. 757-759) cannot be appealed by a separated, although innocent, spouse.”

4. CUSTODY

Towards the end of the 18th and the beginning of the 19th century, the regulation of rights and duties of the underage population also increased. On a normative level, the education ad care of minors – legitimate, illegitimate or adopted children – became a focus of the authorities.

The bourgeois-patriarchal view of the world, which was also the basis of the General Civil Law Codes of 1786 and 1811, assigned the responsibility for the financial maintenance of the family to the husbands, while the tasks of household management and childcare were anchored in the sphere of responsibility of the wives.

JOSEPH II's marriage patent (1783)

Analogous to the regulation of financial situation, Joseph II's Marriage Patent also did not contain any provisions on the custody of the children after the divorce, as this also had to be clarified in the divorce settlement. However, orders on the custody of the children can be found for those cases in which the court annulled the marriage, i.e. declared it null and void. Here, § 43 stipulated that "any children produced should always remain under the authority of the father", but that the wife also had to contribute to their maintenance and upbringing from her property.

GENERAL CIVIL LAW CODE (1786)

Regarding the custody of the children, the Austria Civil Code of 1786 referred to the fact that the provisions regulating the consequences of annulment were to be applied analogously. These further provided that "any children produced in an invalid marriage shall always remain under the authority of the father" and that both parents must "contribute proportionately" from their propery to their "maintenance and upbringing". (§ 115)

For the first time, the general duties of fathers and mothers towards their children within wedlock were specified. In contrast to the determination of maintenance after an annulment or divorce, where both parents had to make a contribution "to the maintenance and

upbringing” of the common children, there is no indication here that the wives were also liable to pay maintenance during the marriage. In fact, it was quite the opposite. The fathers were responsible for the upbringing and financial security of the children. According to paragraph 3, it is

> “the duty of the husband […] to bring up the children to a position useful for the state and, if they have no property of their own, to provide an income which is sufficient to maintain them until they can support themselves.”

According to this, wives should primarily take care of and “maintain” the children and contribute to their upbringing. The General Civil Law Code did not require the wife to contribute financially to the support of the children during the marriage but imposed this obligation on them in the case of divorce and in the case of the husband’s death.

> “The mother is obliged to look after the children with care, to maintain and to contribute to their upbringing to the best of her ability. During the marriage, however, she is not obliged to contribute anything from her own property to their maintenance, as if the father is unable to do so.” (§. 5)

GENERAL CIVIL LAW CODE (1811)

More explicit regulations were made only in the General Civil Law Code of 1811. With the full reintroduction of contested divorces, as described under the menu item “Assets”, the right to a separate place of residence and provisional maintenance was also re-implemented, but with the subtle difference that the latter was explicitly granted only to wives (and children).

For the first time, the joint custody obligations of fathers and mothers were also stipulated on a normative level, only to embed them in a contradictory manner in the patriarchal ideology through further paragraphs. Paragraph 139 explicitly took both parents to task. Parents were obliged “to bring up their legitimate children, […] to care for their life and health, to provide them with a decent living, to develop their physical and mental powers, and to lay the

foundation for their future welfare by teaching them religion and useful knowledge".

Paragraph 141 split the duties of the parents and determined that

> "the main duty of the father is to provide for the [financial] maintenance of the children until they can support themselves. The care of their bodies and their health is mainly the duty of the mother."

A novelty was the legal arrangement for the age-specific division or allocation of children after a contested divorce and the parental provisions of maintenance differentiated according to gender. Paragraph 142 stipulated that in the event that the couple could not come to an agreement, "children of the male sex up to the age of four years; those of the female sex up to the age of seven years, should be cared for and brought up by the mother". The only exceptions to this were cases in which "substantial reasons, especially those arising from the cause of the divorce or separation, demand a different arrangement. The costs of upbringing must be borne by the father."
However, if the father is destitute, paragraph 143 states that the mother must "first and foremost provide for the maintenance". After the father's death, the mother alone had to take care of the upbringing. If the mother was destitute or died, the General Civil Law Code transferred the obligation to "the paternal grandparents, and after them to the maternal grandparents".

Even though § 144 entitled both parents to "direct the actions of their children by mutual agreement", the ultimate decision-making power was still subject to the so-called "paternal authority" (§ 147), which included the choice of the children's education and occupation (§ 148).

CHILD SUPPORT

Child support payments always had to be determined and/or approved by the chief curatorial authority in the case of divorce. Paragraph 219 stipulated that the custodial court should determine the maintenance costs in terms of the amount, the father's court order and the

guardian's opinion, and "must take into account the minor's assets, status and other circumstances".

To counteract ambiguities in the payment periods, it was stipulated under § 1418 that maintenance had to be paid "at least one month in advance".

GUARDIANSHIP AND CUSTODIANSHIP

The fourth main section of the General Civil Law Code stipulated how and under what conditions the custody of children had to be regulated if the father was unable to exercise his paternal authority over his child(ren). Guardians and custodians were primarily obliged to "take excellent care of the minor" and "at the same time to manage his or her assets".

Provisions relating to guardianship resulting from divorce proceedings affected both parents with minor children and underage spouses themselves. However, following patriarchal logic, male guardians and custodians were granted more rights than female guardians and custodians. According to paragraph 211, "mothers and grandmothers" had to be assigned a co-guardian". When selecting a co-guardian, first "the declared will of the father, then the proposal of the guardian, and finally the relatives of the minor" had to be taken into consideration in descending order. If the mother remarried, the court had to decide on the continuation of the guardianship. A guardianship could be terminated only if the father was able to exercise it again (§ 250) or by reaching the age of majority.

While sons could attain the age of majority already from the age of 20, for example by marrying and therewith running their own household (§174), this right was not granted to underage daughters when they married. They remained under the guardianship of their father or husband until they reached the age of majority. § 175 stipulated that at the time of marriage "a minor daughter comes under the authority of the husband in regard to her person". Regarding property, "however, the father has the rights and duties of a guardian until she reaches the age of majority". Guardianship could also be "assigned to the spouse" by the court (§ 260). If the husband died when the wife was still a minor, she "returned to paternal authority". (§ 175)

In the case of divorce, according to paragraph 106, "a spouse who is a minor or in need of

care […] may consent to the divorce on his or her own behalf; however, the consent of the legal representative and the custodial court is necessary for the agreement with regard to the spouses' property and maintenance, as well as with regard to the provision for the children".

5. LAW ENFORCEMENT

Many of those who got divorced – primarily the husbands – did not fulfil the obligations either agreed upon in the divorce settlements or ruled in the verdict (e.g. the transfer of movable property or maintenance payments). The plaintiffs had the right to request the court to impose execution of payment.

The court order referred to the enforcement of the verdict as an "execution". So-called "**execution proceedings**" were, for example, a means through which the (ex)spouses could force the opposing party to hand over furniture or items of clothing. The most common reason for such proceedings being that the divorced women wanted to receive maintenance payments which were not being paid.

Just as in the Execution Order for Austria below the Enns of 1655, the requirement for the approval of execution was the submission of a verdict or a legally binding contract. The time period in which the debtor was to pay was to be stated in the verdict (14 days) or in the contract (arbitrarily agreed upon by the parties). After this deadline the aggrieved party could request compulsory execution.

The execution could be carried out on both movable and unmovable goods, on contracted but not yet completed work, as well as upon unpaid debts. In the case of unmovable goods, the court was required to ensure that the plaintiffs were given back their property. For this purpose, the authority, "under which the property fell", was to be informed, so that the plaintiff could be registered in the land title registry.

In the case of movable goods, the court had to appoint the bailiff to retrieve the goods from the debtor and to hand them over upon receipt to the plaintiff. If the debtor did not possess (or no longer possessed) the goods demanded, he or she had to buy them or provide

replacements and compensation to the plaintiff.

In the case of money owed (for example maintenance payments) the plaintiff had to declare which of the debtor's possessions were the subject of execution proceedings. If the court approved the seizure of the salary of the debtor, the court was to inform the person responsible for the payment of employees at the workplace of the debtor to pay out the sum which was due to the plaintiff.

IMPLEMENTATION OF EXECUTION

In the case of immovable goods, the judge was to ask the authorities to carry out the execution (recording of the plaintiff in the land title registry). After this was done the plaintiff was authorised to request the calculation of the estimated value.

If after a designated time period of 30 days no party had requested an "auction", the plaintiff had to accept the property at the value estimated. If one of the parties requested an "auction", this request had to be approved and three dates (each with a time limit of 30 days) were to be appointed. In addition to this it had to be publicised "that if it was not possible to sell the goods for or above the estimated value at the first or second auction that the goods could be sold at a price under the estimated value at the third auction."

In the case of movable goods, the plaintiff was to specify the goods to be seized. The following could not be seized: "essential clothing" and "equipment required for carrying out work done to earn a living for oneself and for the family". The confiscation of goods which the debtor needed for his or her "trade or business, or the lack of which would lead to particular disadvantage, or for which the loss would lead to insult", could be confiscated only under certain conditions (e.g. when there were no other goods which could be taken).

After the execution request was submitted the judge had to appoint the bailiff to carry out the act of confiscation. Together with the plaintiff (or the plaintiff's lawyer) the bailiff was to go to the debtor and, after handing over an authorized confiscation order, write down a detailed list of the goods to be seized. After the confiscation the bailiff was to make a report ("relation") to the court and submit the description (inventory of seized goods). In regard to the value estimate, the devolution (transfer) and auction of the seized goods, the same rules

as with immovable goods applied, the only difference being, that the time limit set for the public auction was only 14 days.

If the debtor had no goods, or not enough goods to cover the demands, the judge, upon request from the plaintiff, could “instruct the debtor to supply a list of all his/her goods within 3 days, under threat of arrest”.

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Next sub-item: Method

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