

krfacts

New family law decisions of the Swiss Federal Supreme Court

In recent months, the Swiss Federal Supreme Court has issued several landmark rulings that will be of importance for family law matters in the future. We have summarized the most important points from these and also from earlier rulings for you in this issue of krfacts and illustrated them with an example.

1. Abandonment of the "45 rule" (BGer 5A_104/2018)

In the decision of February 02, 2021, the Federal Supreme Court abandoned the application of the so-called "45 rule". This rule meant that a spouse could no longer be expected to take up gainful employment if he or she had not worked during the marriage and had already reached the age of 45 at the time the joint house-hold was dissolved or at the time of the divorce.

Now, it must always be assumed that gainful employment is reasonable, provided that such a possibility actually exists and there are no impediments, such as the care of small children.

Consequence: Parents who mainly took care of the children during the marriage and therefore did not pursue gainful employment are forced to take up employment after the dissolution of the marriage, even at an advanced age. Whether this is actually possible in view of the situation on the labor market must be decided by the court in each individual case. If the parent providing care does not want to take up a job, a hypothetical income is imputed to him or her when calculating maintenance, which means that he or she arithmetically earns more income than he or she actually does. As a result, the maintenance payments to which he or she is entitled are lower.

For the sake of completeness, it is mentioned here that the recently introduced "school step rule" will continue to be applied. According to this rule, the main caring parent should in principle work 50% of the time from the youngest child's compulsory enrollment in school, 80% of the time from the child's entry into secondary school, and 100% of the time from the child's 16th birthday.

2. Definition of the concept of "life-defining marriage" (BGer 5A_907/2018).

In its decision of November 3, 2020, the Federal Supreme Court had the opportunity to redefine the content of the concept of a life-defining marriage. In principle, a life-defining marriage is a prerequisite for the claim to maintain the previous marital standard of living or claim to post-marital maintenance. If a marriage is not life-defining, there is no entitlement to post-marital maintenance.

Until now, the Federal Supreme Court relied on presumptions to assess whether a marriage was life-defining or not. With regard to the duration of the marriage, the Federal Supreme Court assumed a life-defining marriage if the spouses lived together for more than ten years. If cohabitation during the marriage lasted less than five years, the court assumed a short marriage. If joint children were born of the marriage, a life-defining marriage was also presumed.

An individual examination is now required to determine whether the specific marriage has had a decisive influence on the lives of the spouses. If this question is answered in the affirmative, the duration of the maintenance claim must be appropriately limited in time against the background of the concrete circumstances of the individual case.

According to new case law, a marriage is life-defining if one spouse has given up his or her economic independence in favor of taking care of the household and children, and it is therefore no longer possible for him or her to continue in his or her former professional position after many years of marriage, while the other spouse was able to concentrate on his or her professional advancement in view of the marital division of duties.

The Federal Supreme Court thus breaks away from its presumptions and in the future wants to subject the life imprint of the marriage to an individual examination.

3. Unification of the maintenance calculation (BGer 5A_311/2019)

In its decision of November 11, 2020, the Federal Supreme Court ruled with regard to the method of calculating maintenance that in the future the two-step method with surplus distribution should be applied in each case. This eliminates the application of the one-stage concrete method, which was used in each case in very good financial circumstances.

In the two-step method with surplus distribution, the available financial resources are first determined. Furthermore, the needs of the persons affected by the maintenance calculation are determined. Finally, the available financial means are distributed among the family members involved in such a way that, in a certain order, the minimum subsistence level under debt collection law or, if there are sufficient means, the so-called minimum subsistence level under family law of the persons involved is covered and then any remaining surplus is distributed on a discretionary basis according to the specific situation.

4. Example

The preceding decisions are illustrated below by means of an example:

X and Y have been married for nine years. X and Y have two children together. X is the main caring parent and during the marriage only worked a 20% part-time job due to raising the children, while Y worked a 100% job. The youngest child (K2) is seven years old at the time of separation.

First, it must be asked whether the marriage of X and Y is of a life-defining nature. It must now be examined individually whether the specific marriage had a decisive influence on the lives of the spouses. In the present case, two children were born of the nine-year marriage. X has reduced her income to a 20% workload due to the care of the joint children. Due to the two joint children and the reduction of employment in favor of childcare, a life-defining marriage would have to be affirmed in the present case. Accordingly, X is entitled to maintain the previous marital standard of living.

X continues to take care of the children. At the time of the separation, X is 46 years old and, according to the old case law, it would no longer be reasonable for X to pursue gainful employment with a higher workload. According to the new case law, however, X is generally expected to take up or increase gainful employment, provided that the actual possibility to do so exists and no obstacles are apparent. In this context, the school step rule must be observed. From the time K2 starts school (upon entry into kindergarten), X can be expected to work 50% of the time according to the school step model. If X refuses to work 50% of the time despite the actual possibility of doing so, a hypothetical income is taken into account to this extent when calculating post-marital maintenance.

5. Consequences for existing judgments

Due to the above-mentioned changes in case law, the question arises as to whether existing maintenance judgments or maintenance agreements can be modified. Actions for modification under family law require a significant and permanent change in the economic circumstances. A change in case law can therefore not be cited as the sole reason for modification. At most, the new case law could be cited together with an actual change in the economic circumstances. However, this would have to be examined in each individual case.

6. Conclusion

The Federal Supreme Court has provided new principles, but ultimately always provides for the examination in the specific individual case. Due to the individual circumstances, deviations from the principles are therefore possible, and the solution in the individual case may look different.

If you have specific questions about your personal situation, we will be happy to assist you.

Visit us at:    

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