Is it ‘grossly unfair' if a husband has to pay maintenance to his separated wife who has a close relationship with a homosexual man? (Judgment of the Federal Court of Justice of 20 March 2002)

By Kirsten Scheiwe

Suggested Citation: Kirsten Scheiwe, *Is it ‘grossly unfair' if a husband has to pay maintenance to his separated wife who has a close relationship with a homosexual man? (Judgment of the Federal Court of Justice of 20 March 2002)*, 3 German Law Journal (2002), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=185

by Kirsten Scheiwe (1) [1] On 20 March 2002, the XIIth Senate of the *Bundesgerichtshof* (BGH - Federal Court of Justice) (2), the highest appeal court in civil law matters, was called to decide a case in which a separated husband had made an application to change a periodical maintenance payment order, arguing mainly that his wife no longer living with him had a close relationship with another man and that it was therefore an undue hardship to him, in the sense of para. 1597 no. 7 *Bürgerliches Gesetzbuch* (BGB - German Civil Code), to continue periodical maintenance payments at all. The separated wife argued that she did not cohabit with the man and had no intimate sexual relationship with him, since he was homosexual, that therefore no marriage-like relationship existed and maintenance payments should continue unchanged, since this obligation was no undue hardship towards the obliged spouse. The Federal Court of Justice judged in the last instance that the decision of the lower court, which had reduced the maintenance obligation, was correct, since the facts showed that a marriage-like relationship between the separated wife and her close friend existed; whether or not they had intimate sexual relations did not matter. [2] The importance of the case lies on the one hand in the legal definition of a ‘marriage-like relationship': to put it simply, as a woman you can have a marriage-like relationship with a gay man, if there are close enough economic and social ties. This raises the question who may have marriage-like relationships with whom, touched upon by the Federal Court of Justice in this case only by the way. On the other hand, this case highlights some general problems of maintenance obligations after marriage-breakdown in cases where it cannot be proved that a third person contributes, as a matter of fact, to the maintenance of the ex-partner, and therefore jurisdiction relies on a fairly general equity clause of para. 1579 CC, which allows for the reduction or termination of a maintenance obligation if such an obligation would be *grob unbillig* (grossly unfair) to the person who has to pay. What kind of relationship of the separated or divorced spouse, entitled to maintenance payments, results in ‘gross unfairness' of the obligation towards the obliged payer? Some reflections on the ideological and gender implications of the case-law seem appropriate. **A. The facts and proceedings** [3] The parties had married in 1966 and separated in 1993 after 27 years. Divorce proceedings were pending since March 1994, but had not yet come to terms, since there was litigation about the distribution of marital property. The husband had been ordered to pay a main-te-nance sum of 1.693 DM (about 800 €) monthly to the separated wife. She was a friend of B.G., with whom she looked for an estate to be used for housing purposes for them both and for business activities of B.G. in 1994. She bought an estate of 2.500 m2 at a price of 275.000 €, while the friend granted her a loan of 100.000 € to finance the purchase, to be paid back within 10 years without any interest payments, and also signed as a co-debtor for other credits amounting to 110.000 € taken up by the defendant, but he did not become co-owner of the property. In compensation, he had a right to use rooms without rent payment. Part of the estate was let to third parties, and the separated wife derived some income from this. From 1995 onwards, she lived in a three-room-apartment on the estate, while the friend B.G. had another apartment, with an office room, storage and sanitary unit, but without kitchen facilities, in use since 1994. When the income situation of the separated husband changed in 1999 (he was no longer employed and received a disability pension of approx. 1.500 €), he applied in March 1999 for a change in the maintenance order. He argued that his income had decreased and that the defendant had an income of her own, but his main argument was that he should no longer be obliged to pay any maintenance at all, since this was ‘grossly unfair' because the entitled wife had been living in a stable relationship with another man for four years. The separated partner rejected the claim and said that she did not cohabit, but had a purely business relationship with this man, who was a homosexual and had a relationship with another man; no intimate contacts ever took place, although relations were friendly and confidential. [4] The competent court of first instance, the *Amtsgericht*, accepted the claim of the applicant and decided he no longer had to pay any maintenance, since the maintenance obligation was an undue hardship in the sense of para. 1597 no. 7 CC. The court argued that his wife had been living together since a number of years in a stable social relationship with B.G., with whom she shared her apartment, went on holidays and to family parties and had close economic ties, as was shown by the interest-free loan he had granted her with the purpose of buying the estate. The defendant appealed to the court of second instance, the *Oberlandesgericht*, which changed the amount of maintenance fixed in 1997 and reduced it to about 270 € monthly from March 1999 onwards, and rejected the wife's appeal in as far as she claimed more. Subsequently, she appealed to the last instance, the Federal Supreme Court (*Bundesgerichtshof*), which upheld the second instance judgment, mainly basing itself on the argument that an obligation to pay full maintenance to a separated wife may constitute an undue hardship within the meaning of para. 1579 no. 7 CC, if the relationship is so stable that it is to be regarded as marriage-like and quasi substitutes a marriage, independently of the existence or non-existence of intimate sexual relations. **B. When is the obligation to pay maintenance after marital breakdown ‘grossly unfair'?** [5] The parties were not yet divorced, although separated since 1993; the wife had mostly not been employed during marriage but for short hours in 1992 and 1993; due to her age and health

situation she was not expected to take up employment again to support herself. Therefore she had been awarded maintenance rights during separation, based on para. 1361 CC, calculated according to the general principles of need on her side and ability to pay on the side of the debtor. If the person applying for maintenance has own income, this is taken into account to reduce the claim. In this particular case, a change of the maintenance order was needed because his income had changed (he received a disability pension somewhat lower than his former earnings), and her need had changed since she had some rent income; but the husband's claim went further, he had asked to abrogate his obligation completely. – If a third party grants her some benefit in cash or kind, it is contested how these should be legally treated. (3) The problem arises especially in cases where a separated or divorced spouse lives with a new partner. In any case, it is often a difficult task to investigate the facts of relations between the separated partner and the third person in a new relationship; problems of proof arise. In the pending case, there were no clear benefits in cash or kind that the friend B.G. had given the maintenance-entitled wife; he had granted her an interest-free loan, for which he obtained rent-free use of the rooms, but no contributions on his side towards her maintenance had been shown. The legal argument for an abrogation or reduction of the maintenance obligation was therefore based on an equity clause in divorce law in para. 1597 CC, which is applicable also to maintenance obligations in cases of separation (para. 1361 sec. 3 CC states the applicability of para. 1597 no. 2-7 CC). This equity clause lists a number of cases in which the maintenance obligation can be reduced or abolished, if it appears to be *grob unbillig* (grossly unfair) towards the debtor. The cases mentioned include the commitment of a severe crime by the payee against the person obliged to pay or against a closely related person, the arbitrary and wilful causation of need by the entitled person, a serious and long lasting negligence of the fulfilment of his or her marital maintenance and care obligations by the support claimant, the engagement of the entitled person in an obviously wrong behaviour against the debtor of maintenance, and finally the unspecified, broad formula of ‘another reason of equally heavy weight such as the reasons mentioned above' in para. 1595 no. 7 CC. Since 1988 (4) the latter has been used frequently by the Federal Court of Justice to reduce or abolish maintenance obligations as ‘grossly unfair' towards the person who has to pay maintenance in cases where the entitled person cohabits with a new partner. Criteria for a new relationship to be considered as ‘marriage-like' are a certain duration (usually not less than two or three years), as well as intensive personal and economic bonds between the persons involved so that the relationship appears in public to be similar to a marriage. Living together in one house and running a common household is not necessarily a requirement (frequent cases involve two persons living in neighbouring apartments within a house) – this seems reasonable, since even married people are legally not obliged to have a common dwelling. If these criteria were met, the relationship was considered to be marriage-like, and the obligation to pay maintenance ‘grossly unfair' to the debtor. [6] Applying these principles, the Court said that the relationship was more than mere friendship, since the joint search for an estate and the whole mode of financing it together and using it together showed intense economic ties, while the common planning of a future, joint leisure and holiday activities as well as joint participation in family parties were proof of strong personal ties. Although they might not share a common apartment, they had neighbouring rooms within one estate, and the Court suspected that he probably also used her apartment (since he had no kitchen facilities in his rooms). **C. The (non-)relevance of sexual relations and sexual orientation** [7] Intimate sexual relations were not seen as an important criterion for a marriage-like relationship, therefore the claim that B.G. as a homosexual would not engage in intimate relations with the woman had no legal relevance. As the Court said, intimate sexual relations are usually not visible from outside – and, one could add, even a marriage can exist without intimate sexual relations, so why not a marriage-like relationship? Or a married person could, at the same time, have same-sex relationships outside marriage. Why should a court engage in the impossible mission to intrude into the privacy of the parties and inquire about their sexual lives? Concerning the argument that the man had changing intimate relations with other men, the Court said that – assuming these were the facts – this apparently had had no impact upon the behaviour of the applicant and their relationship, therefore the assumption that a marriage-like relationship existed between them was not refuted by the man having other affairs. A firm and stable community of life could exist even if it was somewhat ‘more fluid' for certain periods. It is convincing that arguments about the sexual relations between the partners and the sexual orientation of a partner are of no legal relevance in this context (arguments about sexual behaviour have lost relevance in law anyway, since no-fault divorce has been introduced; where fault is legally important, arguments about sexual conduct come up again, see for example the case-law on para. 1579 no. 6 CC about ‘obvious, grossly faulty behaviour against the person obliged to pay maintenance'). [8] Up to now, the Court has upheld the assumption that a marriage-like relationship presupposes two persons of different sex. In former case-law on post-marital maintenance, the fact that the entitled person cohabited with another person of the same sex had not sufficed to consider the payment of maintenance as an ‘undue hardship' (5), since, due to the lack of a legally enforced institution for a same-sex partnership, there was no generally accepted *Leitbild* (central idea) similar to the institution of marriage which could have justified the assumption that the relationship would guarantee the mutual support of the partners like in a marriage. (6) Although the Court did not have to decide on this issue in the present case, in which the two persons in the relationship were of opposite sex (but had a different sexual orientation), it stated in an ‘*obiter dictum*' that the introduction of the *Lebenspartnerschaftsgesetz* (Partnership Act) (7) of same-sex couples might change this interpretation – obviously, now a ‘Leitbild' of a marriage-like relationship has been legally implemented also for same-sex couples, and the former case-law of the Federal Court of Justice on the maintenance claim of a former spouse living in a same-sex couple (8) might be overturned (which will negatively affect mainly women living in a lesbian relationship after marriage-breakdown, since they are more often entitled to maintenance

than men). [9] In short, the essence of marriage consists in close economic and personal ties of a certain duration, and this is also the criteria for a marriage-like relationship. If the relationship is similar to ‘how a marriage looks like from outside', the assumption is reasonable that the entitled person is ‘supported like in a marriage', says the Court. If it is not necessary that the two persons have the same sexual orientation (at least if they are of different sex), the question arises whether in future also the opposite sex requirement may fall, and a cohabiting same-sex couple might be considered to have a ‘marriage-like relationship' if mutual personal and economic commitments between them exist. Formerly, the definition of a marriage-like relationship (or non-married cohabitation) given by the *Bundesverfassungsgericht* (BVerfG - Federal Constitutional Court) (9) was still based on the assumption that the partners were of different sex. After the enactment of the Partnership Act, in force since 1 August 2001, and the judgment of the Federal Constitutional Court of 17 July 2002 (10), which has upheld the conformity of this statute with the German constitution, the *Grundgesetz* (GG - Basic Law), things might change. However, there will be a ‘two-way track', since the judgment insisted that a constitutive element of the marriage-institution to be protected by Article 6 sec. 1 German Basic Law is that partners are of different sex. (11) The institution of registered partnership of a same-sex couple would therefore be an *aliud* (12) and not the same as marriage. The Court did not take up the opportunity to consider whether the meaning of marriage and societal practices and views might have changed in this respect. Therefore we will have marriage on the one hand, and marriage-like relationships (either same-sex, registered partnership or not, or heterosexual cohabitation) on the other hand, which will be treated alike under different legal statutes. Changes are to be expected though; the Federal Constitutional Court has explicitly mentioned the necessity of changing the Income Support Regulations, in which the income of a cohabiting same-sex partner is not taken into account in the income-test of an applicant for income support. (13) This will affect the interpretation of the concept of marriage-like relationships under maintenance provisions.

---

(1) Professor of Law, Faculty of Social Sciences, University of Hildesheim

(2) *Bundesgerichtshof* (BGH - Federal Supreme Court), XIIth Senate, Judgment of 20 March 2002, case XII ZR 159/00, *Zeitschrift für das gesamte Familienrecht* 12/2002, pp. 810-812; for a short summary see the press release of the Court (http://www.bundesgerichtshof.de/PressemitteilungenBGH/PM2002/PM_0312_2002.htm).

(3) Most case law and jurisdiction argue that, since these benefits are granted voluntarily, they are not intended to ease the maintenance burden of the support debtor and cannot be taken into account to decrease the need of the recipient. Others are of the opinion that all benefits granted by a third person should always be taken into account, if they reduce the need for support – see Gernhuber/Coester-Waltjen, *Lehrbuch des Familienrechts*, 4th edition, Munich: Beck, 1994, § 21 II 5, or Staudinger/Kappe, *Kommentar zum Bürgerlichen Gesetzbuch*,Viertes Buch Familienrecht, revised edition 2000, Berlin: De Gruyter, § 1602, note 49 f. This seems to be the most simple and convincing approach, since in maintenance law the intention of a third person who *regularly* grants some benefit (in cash or kind or as a service) towards the needy person should not be of central importance. This would help to overcome some contradictions in case law (sometimes the intention of the third party matters, but sometimes it is ignored in case-law (Kalthoener/Büttner, *Die Rechtsprechung zur Höhe des Unterhalts*, 6th ed., München: Beck, note 528, give two examples where the intention of the third party is ignored, but no reason is given by the court why they do it). However, the Federal Supreme Court and most of the jurisprudence take the position that a voluntarily granted benefit of a third party is, as a rule, intended only to benefit the recipient and not to relieve the person obliged to pay maintenance (see, for instance, the Federal Supreme Court's decisions, *Zeitschrift für das gesamte Familienrecht* 1993, 417; 1995, 537; 2000, 153). This position imposes difficulties in those cases where a separated or divorced spouse, entitled to maintenance, cohabits with a new partner. In these cases, the Federal Supreme Court solves the problem by interpreting the support of the third party as a sort of a ‘hidden wage' received by the person entitled to maintenance, which reduces the claim. Another way of settling these cases is through the application of the general equity clause of para. 1579 no. 7 CC explained above. However, the use of para. 1579 no. 7 CC does not seem to be so appropriate in my view, since the fact of cohabitation or having a new partnership is not of the same nature as the other forms of behaviour mentioned in para. 1579 no. 1 – 6 CC.

(4) Decision of the Federal Supreme Court of 21 December 1988, *Neue Juristische Wochenschrift* 1989, 1083.

(5) Judgment of the Federal Supreme Court of 14 December 1994, *Zeitschrift für das gesamte Familienrecht* 1995, 344.

(6) *Ibid.* , p. 345.

(7) See Miller and Röben in GLJ vol. 3 no. 8, 1 August 2002 for a discussion of the decision of 17 July 2002 (case 1 BvF 1/01) of the Federal Supreme Court which declared that the statute was in conformity with the German Basic Law.

(8) It had already been criticised as inconsistent by Johansen/Henrich/Büttner, *Eherecht, Scheidung, Trennung, Folgen*, 3rd ed., 1998, § 1579 note 38, and Kalthoener/Büttner, *Die Rechtsprechung zur Höhe des Unterhalts*, 6th ed., München: Beck, note 1055-1148.
(9) Judgment of the *Bundesverfassungsgericht* (BVerfG - Federal Constitutional Court) of 17 November 1992, *Bundesverfassungsgerichtsentscheidungen* (BVerfGE) vol. 87, p. 234. According to this case, a relationship similar to marriage presupposes a community of joint responsibility and mutual support and is characterised by personal ties, which lead to reciprocal support. The partners must be of different sex.

(10) Judgement of the First Senate of the Federal Constitutional Court of 17. Juli 2002 (Case 1 BvF 1/01 and 1 BvF 2/01), http://www.bverfg.de.

(11) This assumption was made explicitly by a former decision in *BVerfGE* vol. 10, p. 59, 66; although the necessity to be of different sex was never explicitly stated in positive law, it was seen as a '*Wesensmerkmal*', a natural requirement.

(12) Judgment of the First Senate of the Federal Constitutional Court of 17. Juli 2002 (Case 1 BvF 1/01 and 1 BvF 2/01), note 103.

(13) *Ibid.*, note 96.