

Major legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners in Germany

by Dirk Siegfried ¹
and Kees Waaldijk ²

Symbols and words used in the national tables:

Applicable answer	Answer code	Colour	Points given for calculation of level of legal consequences
The legal consequence applies.	Yes	White	3 pt
The legal consequence applies in a limited way or not in all circumstances, or it can be contracted out of, or courts can set it aside using some general legal principle, etc.	Yes, but	Light pink	2 pt
The legal consequence only applies in a very limited way or in very few circumstances, or it can be established by contract, or by courts using some general legal principle, etc.	No, but	Middle pink	1 pt
The legal consequence does not apply.	No	Dark pink	0 pt
No information was available on this point, or the legal position is unclear.	Doubt	Middle pink	1 pt
The column is not applicable in the country, because this type of relationship is not legally recognised (yet).	X	Dark pink	0 pt

Additional information	Answer code
The legal consequence is only available after the specified number of years.	>x years
The legal consequence is only available after the specified number of months.	>x months
Year of entry into force of the legislation providing the legal consequence (or the particular relationship type), or year of supreme court decision establishing its existence. (Where two years are given, the first indicates the introduction of a more limited version of the consequence; where no year is given, the legal consequence mostly applies since the introduction of the particular relationship type, or already for a long time.)	(Year)

¹ Advocate and notary, Motzstrasse 1, 10777 Berlin, Germany, mail@wss-kanzlei.de.

² Universiteit Leiden, www.emmeijers.nl/waaldijk.

Introduction

This chapter aims to represent the law as in stood early in 2004.

In Germany marriage is regulated in the Civil Code (*Bürgerliches Gesetzbuch*). Marriage is only available to different-sex couples.

On 1 August 2001 the Registered partnership law (*Lebenspartnerschaftsgesetz*) of 16 February 2001 entered into force. Registered partnership (or 'life partnership') is only available to same-sex couples. To such a partnership the law only attaches a limited selection of the rights and obligations of marriage. Excluded are, among other things: presumption of paternity (see item A1, below), adoption (A4 and A5), statutory survivor's pension (B12), and certain tax reductions (e.g. with respect to income tax and inheritance tax, see items B8 and B13).

At the time of the enactment of the Registered partnership law, a proposal for a *Lebenspartnerschaftsgesetz-ergänzungsgesetz* (Life Partnership Extension Bill), aiming to also attach to 'life partnership' some of the now excluded rights, failed to get a majority in the German Senate (*Bundesrat*). The main bill that became the Registered partnership law did not require approval in the Senate.

It is expected that by the end of 2004 further legislation would raise the level of legal consequences of registered partnership.

Informal cohabitation of different-sex partners, and less often of same-sex partners, has only been recognized in German law for certain specific purposes (including some aspects of social security and of rent law; see items B8, B16 and C8, below).

The text of the Registered partnership law of 16 February 2001, plus a French and English translation of it, can be found at: www.lsvd.de/lpartg/index.html, a website that also contains a guide (*Ratgeber*) in German to the law. An English translation of the Registered partnership law can also be found in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003.

Abbreviations

BGB *Bürgerliches Gesetzbuch*- Civil Code

LPartG *Lebenspartnerschaftsgesetz* - Registered partnership law of 16 February 2001

Table A (Germany): Parenting consequences

	Civil marriage		Registered partnership		Informal cohabitation	
	Different-sex	Same-sex	Different-sex	Same-sex (2001)	Different-sex	Same-sex
1. When female partner gives birth, both partners automatically become legal parents	Yes	X	X	No	No, but	No
2. Medically assisted insemination is lawful for women in such a relationship	Yes	X	X	Doubt	Doubt	Doubt
3. When only one partner is the parent of a child, both partners can have parental authority or responsibilities during their relationship	Yes (2001)	X	X	Yes	No	No
4. When only one partner is the parent of a child, the other partner can adopt it and thus become its second parent	Yes	X	X	No	No	No
5. Partners can jointly adopt a child	Yes	X	X	No	No	No
6. One partner can individually adopt a child	No, but	X	X	Yes, but	Yes, but	Yes, but
7. Partners can jointly foster a child	Yes	X	X	No, but	No, but	No, but
Level of legal consequences	6x3 + 1x1 = 19	7x0 = 0	7x0 = 0	1x3 + 1x2 + 2x1 + 3x0 = 7	1x2 + 3x1 + 3x0 = 5	1x2 + 2x1 + 4x0 = 4

Notes to table A

A1 - Civil marriage: art. 1592(1) BGB. Non-married different-sex partner becomes legal father if both partners agree; art. 1592(2) BGB.

A2 - There is no codification; in regard to non-married women there are different opinions in different states.

A3 - Civil marriage: art. 1687b BGB, introduced by art. 2(13) LPartG; registered partnership: art. 9 LPartG.

A4 - Art. 1741(2) BGB.

A5 - Art. 1741(2) BGB.

A6 - Art. 1741(2) BGB. Civil marriage: single adoption is only possible if the other partner has no legal capacity or is under 21. Non-married people can only adopt singly, but in practice children go to married couples almost exclusively.

A7 - Non-married people can jointly foster a child only if there are specific reasons in the particular case; art. 1775 BGB.

Table B - part one (Germany): Material consequences in private law

	Civil marriage		Registered partnership		Informal cohabitation	
	Different-sex	Same-sex	Different-sex	Same-sex (2001)	Different-sex	Same-sex
1. Properties of each partner are considered joint property	No, but	X	X	No	No	No
2. Debts of each partner are considered joint debt	No, but	X	X	No	No	No
3. In case of splitting up, statutory rules on alimony apply	Yes, but	X	X	Yes, but	No	No
4. In case of splitting up, statutory rules on redistribution of properties apply	Yes, but	X	X	Yes, but	No, but	No, but
5. In case of wrongful death of one partner, the other is entitled to compensation	Yes	X	X	Yes	No	No
6. When one partner dies without testament, the other is an inheritor	Yes	X	X	Yes	No	No
Level of legal consequences	2x3 + 2x2 + 2x1 = 12	6x0 = 0	6x0 = 0	2x3 + 2x2 + 2x0 = 10	1x1 + 5x0 = 1	1x1 + 5x0 = 1

Notes to table B - part one

B1 - Married spouses can establish community of property by contract, but it's outmoded; art. 1415 BGB.

B2 - See B1

B3 - Civil marriage: art. 1361, 1569, 1585 c BGB, spouses can exclude the statutory rules, but the contracts are only valid after divorce and not during separation. Registered partnership: art. 12, 16 LPartG, partners can exclude the statutory rules, but the contracts are only valid after formal ending of the partnership, not during separation.

B4 - Civil marriage: art. 1363 BGB, deviating contracts are possible. Registered partnership: art. 6 LPartG, deviating contracts are possible. Informal cohabitation: only in very specific cases courts grant (re)distribution (mostly based on the company law notion of a commercial partnership).

B5 - Art. 844 BGB.

B6 - Civil marriage: art. 1931 BGB; registered partnership: art. 10 LPartG. The content of the rules is the same.

Table B - part two (Germany): Positive material consequences in public law

	Civil marriage		Registered partnership		Informal cohabitation	
	Different-sex	Same-sex	Different-sex	Same-sex (2001)	Different-sex	Same-sex
7. Relationship can result in lower property tax	No	X	X	No	No	No
8. Relationship can result in lower income tax	Yes	X	X	Yes, but	No, but	No, but
9. Public health insurance of one partner covers medical costs of other partner	Yes	X	X	Yes	No	No
10. Relationship can have positive impact on basic social security payment in case of no income	No	X	X	No	No	No
11. Relationship can have positive impact on statutory old age pension	No	X	X	No	No	No
12. When one partner dies, the other can get a statutory survivor's pension	Yes	X	X	No	No	No
13. Surviving partner pays no inheritance tax (or less than a mere friend would)	Yes	X	X	No	No	No
Level of legal consequences	4x3 + 3x0 = 12	7x0 = 0	7x0 = 0	1x3 + 1x2 + 5x0 = 5	1x1 + 6x0 = 1	1x1 + 6x0 = 1

Notes to table B - part two

B7 - There is no general property tax in Germany.

B8 - Civil marriage: art. 26 EStG (*Einkommensteuergesetz* - Income tax law).

Registered partnership: art. 33a EStG: payments to the partner of up to circa EUR 7000 per year reduces the income tax of the paying partner, but it is much less than the reduction granted to married couples (the so-called *Splitting*).

Informal cohabitation: art. 33a EStG, see explanation of registered partnership, but only if the partners social benefits have been reduced or cut or refused due to the cohabitation.

B9 - Civil marriage: art. 10(1) SGB V (*Sozialgesetzbuch V* - Social Code V of 20 December 1988); registered partnership: art. 10(1) SGB V amended by art. 3 § 52 LPartG; in both cases the public health insurance has to pay only if the other partner has no appreciable income.

B10 - No form of partnership results in higher social security payment.

B11 - There is no positive impact of any partnership on statutory old age pension.

B12 - Art. 46 SGB VI (*Sozialgesetzbuch VI* - Social Code VI of 18 December 1989). Normally the other spouse will get a statutory survivor's pension.

B13 - Art. 15, 16, 17 ErbStG (*Erbschaftsteuer- und Schenkungsteuergesetz* - Inheritance and gift tax law of 27 February 1997) - A surviving married partner can get up to 563.000 € tax free. A surviving registered partner or informal cohabitant or a mere friend can get only 5.200 € tax free.

Table B - part three (Germany): Negative material consequences in public law

	Civil marriage		Registered partnership		Informal cohabitation	
	Different-sex	Same-sex	Different-sex	Same-sex (2001)	Different-sex	Same-sex
14. Relationship can result in higher property tax	No	X	X	No	No	No
15. Relationship can result in higher income tax	No	X	X	No	No	No
16. Relationship can have negative impact on basic social security payment in case of no income	Yes	X	X	Yes	Yes	Doubt
17. Relationship can have negative impact on statutory old age pension	No	X	X	No	No	No
Level of legal consequences	1x3 + 3x0 = 3	4x0 = 0	4x0 = 0	1x3 + 3x0 = 3	1x3 + 3x0 = 3	1x1 + 3x0 = 1

Notes to table B - part three

B14 - See B7 - There is no general property tax in Germany.

B15 - No form of partnership results in higher income tax compared to single individuals.

B16 - Civil marriage: art. 11(1) BSHG (*Bundessozialhilfegesetz* - Federal social welfare law of 23 March 1994; registered partnership: art. 2 BSHG; informal different-sex cohabitation: art.122 BSHG.

Informal same-sex cohabitation: there are different opinions about the question whether art. 122 BSHG refers to them.

B17 - No form of partnership can have negative impact on statutory old age pension.

Table C (Germany): Other legal consequences

	Civil marriage		Registered partnership		Informal cohabitation	
	Different-sex	Same-sex	Different-sex	Same-sex (2001)	Different-sex	Same-sex
1. One partner can have or use surname of the other	Yes	X	X	Yes	No	No
2. Foreign partner of a resident national is entitled to a residence permit	Yes	X	X	Yes	No	No
3. Relationship makes it easier for foreign partner to obtain citizenship	Yes	X	X	Yes	No	No
4. In case of criminal prosecution, one partner can refuse to testify against the other	Yes	X	X	Yes	No, but	No
5. When one partner uses violence against other partner, specific statutory protection applies	No	X	X	No	No	No
6. In case of accident or illness of one partner, the other is considered as next of kin for medical purposes (even without power of attorney)	Doubt	X	X	Doubt	Doubt	Doubt
7. Organ donation from one living partner to the other is lawful	Yes	X	X	Yes	No	No
8. When one partner dies, the other can continue to rent the home	Yes	X	X	Yes	Yes (1993) (2001)	Yes (2001)
9. Partners have a duty to have sexual contact	No	X	X	No	No	No
Level of legal consequences	6x3 + 1x1 + 2x0 = 19	9x0 = 0	9x0 = 0	6x3 + 1x1 + 2x0 = 19	1x3 + 2x1 + 6x0 = 5	1x3 + 1x1 + 7x0 = 4

Notes to table C

C1 - Civil marriage: art. 1355 BGB; registered partnership: art. 3 LPartG.

C2 - Civil marriage: art. 17, 18, 23 AusIG (*Ausländergesetz* - Immigration law of 09 July 1990); registered partnership: art. 27 a AusIG, introduced by art. 3 § 11 LPartG.

Informal same-sex cohabitants could according to a decision of the Federal administrative court (*Bundesverwaltungsgericht* - BVerwG 1 C 41./93) of 27 February 1996 get a residence permit if there was enough income. The court used a general legal norm (art. 7, 15 AusIG) because of the lack of a registered partnership. It seems that authorities and courts do not grant a residence permit to an informal cohabitant after having the possibility of registration.

C3 - Civil marriage: art. 9 StAG (*Staatsangehörigkeitsgesetz* - Citizenship law); registered partnership: art. 9 StAG, amended by art. 3 § 1 LPartG.

C4 - Civil marriage: art. 52 StPO (*Strafprozeßordnung* - Criminal procedure law); registered partnership: art. 52 StPO, amended by art. 3 § 18 LPartG.

Informal cohabitation: different-sex partners engaged to be married can refuse to testify against each other (art. 52(1) StPO), however, in terms of same-sex partners there is no recognized engagement period.

C5 - There is no specific protection in any partnership.

C6 - There is no federal codification regarding this question, even married couples are advised to establish this through power of attorney.

C7 - Married spouses: art. 8(1) TPG (*Transplantationsgesetz* - Organ donation law of 05 November 1997); registered partners: art. 8 (1) TPG amended by art. 3 § 7 LPartG.

C8 - Married spouses can continue to rent the home if they lived together with the dead spouse. They are ranking above children of the dead spouse; art. 563(1,2) BGB. Registered partners who had lived together with the dead partner are ranking at the same level with children of the dead partner, if the children had lived together with the dead partner; art. 563(2) BGB amended by art. 2 LPartG. If the children did not live together with the dead partner, they are ranking above the surviving registered partner. Informal cohabitants are ranking below spouses, children and registered partners if someone from the latter three categories lived together with the dead partner; if not, spouses, children and registered partners are ranking below the informal cohabitant who had lived together with the dead partner; art. 563(2) BGB amended by art. 2 LPartG.

Before the amendment of the law there were differing decisions to this question, until the Federal civil court (*Bundesgerichtshof*) in its judgement of 13 January 1993 VIII (ARZ 6/92) affirmed this right for different-sex partners, denying it for same-sex partners, which was remarkable, because it was no case of same-sex partners. Because of this fact lower courts were not bound to this decision in same-sex cases.

C9 - There is no duty to have sexual contact in Germany.

Table D (Germany): Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation

	Between married spouses and registered partners	Between married spouses and informal cohabitants	Between registered partners and informal cohabitants	Between same-sex and different-sex partners (with same status)
1. With respect to housing	No	No	No	No
2. With respect to life insurance	No	No	No	No
3. With respect to health insurance	No	No	No	No
4. With respect to medically assisted insemination	No	No	No	No
5. With respect to other services	No	No	No	No
6. With respect to an occupational survivor's pension	No	No	No	Doubt
7. With respect to other spousal benefits in employment	No, but	No	No	Doubt

Notes to table D

D1 - There is no relevant federal or state anti-discrimination legislation in Germany.

D2 - See D1.

D3 - See D1.

D4 - See D1.

D5 - See D1.

D6 - There may be some protection against discrimination on the basis of sexual orientation because of art. 75 of the *Betriebsverfassungsgesetz* (Act on the Constitution of Companies).

D7 - A decision of the *Bundesarbeitsgericht* (Federal Labour Court) of 29 April 2004, based on the 'Federal collective wage agreement', has outlawed certain discriminations between married spouses and registered partners. See also D1 and D6.

Table E (Germany): Types of couples that qualify for starting a civil marriage or registered partnership in the country itself

		Civil marriage		Registered partnership	
		Different-sex	Same-sex	Different-sex	Same-sex (2001)
Resident national with:	1. Resident national	Yes	X	X	Yes
	2. Non-resident national	Yes	X	X	Yes
	3. Resident foreigner	Yes	X	X	Yes
	4. Non-resident foreigner	Yes	X	X	Yes
Non-resident national with:	5. Non-resident national	Yes	X	X	Yes
	6. Resident foreigner	Yes	X	X	Yes
	7. Non-resident foreigner	Yes	X	X	Yes
Resident foreigner with:	8. Resident foreigner	Yes	X	X	Yes
	9. Non-resident foreigner	Yes	X	X	Yes
Non-resident foreigner with:	10. Non-resident foreigner	Yes	X	X	Yes
11. Sister or brother with sister or brother		No	X	X	No
12. Parent with child		No	X	X	No

Notes to table E

E1 - There is no limitation concerning citizenship, residency or duration of residency.

E2 - See E1.

E3 - See E1.

E4 - See E1.

E5 - See E1.

E6 - See E1.

E7 - See E1.

E8 - See E1.

E9 - See E1.

E10 - See E1.

E11 - Civil marriage: art. 1307 BGB; registered partnership: art. 1(2) LPartG.

E12 - See E11.

Table F (Germany): Authority for starting a civil marriage or registered partnership

	Civil marriage		Registered partnership	
	Different-sex	Same-sex	Different-sex	Same-sex (2001)
1. Registry of births, marriages and deaths	Yes	X	X	Yes, but
2. Local population administration	No	X	X	Yes, but
3. Church	No	X	X	No
4. Court	No	X	X	No
5. Private person with special authorisation	No	X	X	No
6. Public notary	No	X	X	Yes, but
7. Administrative magistrate	No	X	X	Yes, but

Notes to table F

F1 - Art. 1 LPartG: The registering authority varies from state to state and in some states from town to town. In 8 of 16 states the registry of births, marriages and deaths was installed as the authority of starting a registered partnership.

F2 - See F1.

F3 - The federal law gives no opportunity to install the church as registering authority for registered partnerships. Church weddings do not have any legal status. They are even forbidden if the couple has not first married at the registry of births, marriages and deaths; art. 67 PStG (*Personenstandsgesetz* - Personal status law of 08 August 1957).

F4 - The federal law gives no opportunity to install courts as registering authorities.

F5 - The federal law gives no opportunity to install private persons as registering authority.

F6 - See F1. In Bavaria the public notary was installed by state law as registering authority.

F7 - See F1.

Table G (Germany): Means of ending a marriage or registered partnership

	Civil marriage		Registered partnership	
	Different-sex	Same-sex	Different-sex	Same-sex (2001)
1. By court decision (after joint or individual petition)	Yes	X	X	Yes
2. By mutually agreed contract (outside court)	No	X	X	No
3. Unilaterally by one partner (outside court)	No	X	X	No
4. By conversion of marriage into registered partnership, or vice versa (outside court)	No	X	X	No
5. By one registered partner marrying a third person (or starting a registered partnership with a third person)	No	X	X	Doubt
6. By the registered partners marrying each other (or by the married partners starting a registered partnership together)	No	X	X	No
7. By administrative decision (after joint or individual petition)	No	X	X	No

Notes to table G

G1 - Civil marriage: art. 1313 BGB; registered partnership: art. 17 LPartG.

G2 - See G1.

G3 - See G1.

G4 - There is no same-sex marriage and no different-sex registered partnership.

G5 - Registered partnership: there is no reference to this case in LPartG, but the Federal constitutional court (*Bundesverfassungsgericht*) has requested a solution to this question by legislation or jurisdiction in its decision of 17 July 2002 (1 BvF 1/01, 1 BvF 2/01- two source numbers because of two applications, but one decision).

G6 - See G4.

G7 - See G1.

Some literature in English

- Yuval Merin, *Equality for Same-Sex Couples. The legal recognition of gay partnerships in Europe and the United States*, Chicago/London: The University of Chicago Press, 2002, p. 142-147.
- Roland Schimmel and Stefanie Heun, 'The Legal Situation of Same-Sex Partnerships in Germany: An Overview', in: Robert Wintemute & Mads Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart Publishing, 2001, p. 575-590.
- Karsten Thorn, 'The German Law on Same-Sex Partnerships', in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003, p. 84-98.

Some literature in German

Civil marriage:

- Kurt H. Johannsen / Dieter Henrich: *Eherecht*, 3rd edition, München, 1998.
- Otto Palandt (Hrsg.): *Bürgerliches Gesetzbuch*, 62nd edition, München: Beck, 2003.
- Dieter Schwab: *Das neue Familienrecht*, Bielefeld, 1998.

Registered partnership:

- Manfred Bruns / Rainer Kemper (Hrsg.): *Handkommentar zum Lebenspartnerschaftsgesetz*, Baden-Baden: Nomos, 2002.
- Herbert Grziwotz: *Beratungshandbuch Lebenspartnerschaft*, München, 2003.
- Stephan Ladnar / Manfred Bruns: *Eingetragene Lebenspartnerschaft*, LSVD-Rechtsratgeber, Berlin: Lesben- und Schwulenverband in Deutschland e.V., 2001.
- Karl-Heinz Muscheler: *Das Recht der Eingetragenen Lebenspartnerschaft. Begründung - Rechtsfolgen - Aufhebung - Faktische Partnerschaft*, Berlin: Erich Schmidt Verlag, 2001.
- Dieter Schwab: *Die Eingetragene Lebenspartnerschaft - Text, amtliche Materialien, Abhandlungen*, Bielefeld, 2002.

Informal cohabitation:

- Herbert Grziwotz: *Rechtsfragen des nichtehelichen Zusammenlebens*, 2nd edition, München: dtv, 2002.
- Herbert Grziwotz: *Rechtsprechung zur nichtehelichen Lebensgemeinschaft*, *Zeitschrift für das gesamte Familienrecht*, 1994, S. 1217 ff und 1999, S. 413 ff.
- Ida Schillen / Elisa Rodé: *Familienbuch*, Berlin: Lesben- und Schwulenverband in Deutschland e.V., 2002.

