Headnotes

to the Judgment of the First Senate of 29 January 2003

– 1 BvL 20/99 –

– 1 BvR 933/01 –

1. The best interests of the child require that from the child's birth, there be a person who can act in a legally binding manner on behalf of the child. In view of the diversity of the living conditions of children who are born out of wedlock, it is constitutional that custody of a child born out of wedlock is normally attributed to its mother upon the child's birth.

2. The possibility of joint custody, which § 1626a.1 no. 1 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) facilitates to the parents of a child born out of wedlock, is based on a regulatory concept of custody that establishes, in view of the best interests of the child, that the parents' consensus about joint custody be the precondition of joint custody. At present there is no evidence to substantiate that this regulatory concept does not sufficiently take into account the parental right pursuant to Article 6.2 of the Basic Law (*Grundgesetz* – GG) of a father of a child born out of wedlock.

3. In cases in which both parents live with the child and both parents have shown their willingness to cooperate already by factually caring for the child jointly, the legislature was justified in assuming that the parents will generally make use of the statutory possibility of joint custody that now exists, i.e. that they will legalise their factual care by declarations concerning custody.

4. The legislature is obliged to observe the factual development and to review whether its assumption stands the test of reality. If it becomes apparent that this is normally not the case, the legislature will have to ensure that the fathers of children born out of wedlock who live with the mother and a child as a family are opened an access to joint custody that sufficiently takes their parental right under Article 6.2 of the Basic Law into account, with due consideration being given to the best interests of the child.

5. Parents who lived with their child born out of wedlock but who separated before the Act Reforming the Law of Parent and Child came into force on 1 July 1998 must be given the possibility of having judicially reviewed whether joint custody is not contrary to the best interests of the child although one parent does not agree with it.

FEDERAL CONSTITUTIONAL COURT

– 1 BvL 20/99 –

– 1 BvR 933/01 –

Pronounced
on 29 January 2003
Ms Achilles
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings

I.
for a constitutional review of whether

it is compatible with Article 6.2 sentence 1 of the Basic Law and Article 6.5 of the Basic Law that, according to §§ 1626 a and 1672 of the Civil Code, the father of a child born out of wedlock who had lived together with the child's mother and the child for several years in a relationship that was similar to a family cannot be awarded joint custody for his child after the separation of the parents as long as the child's mother withholds her consent, without consideration being given to the circumstances of the individual case

– order of suspension and referral from the Korbach Local Court (*Amtsgericht*) of 16 August 1999 (7 F 10/99 SO) –

– 1 BvL 20/99 –,

II. on the constitutional complaint

1. of Mr G(…),

2. of the minor H(...),
represented by the complainant re 1

– authorised representative: Rechtsanwalt […] –

a) directly against

- the order of the Federal Court of Justice (*Bundesgerichtshof*) of 4 April 2001 – XII ZB 3/00 –,

- the order of the Stuttgart Higher Regional Court (*Oberlandesgericht*) of 2 December 1999 – 18 UF 259/99 –,

- the order of the Tübingen Local Court of 19 May 1999 – 6 F 60/99 –,

b) indirectly against § 1626a.1 no. 1 and § 1626a.2 of the Civil Code

– 1 BvR 933/01 –

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Papier,

Jaeger,

Haas,

Hömig,

Steiner,

Hohmann-Dennhardt,

Hoffmann-Riem

Bryde

held on the basis of the oral hearing of 19 November 2002:

Judgment :

I. 1. § 1626a of the Civil Code in the version of the Act Reforming the Law of Parent and Child (*Kindschaftsrechtsreformgesetz*) of 16 December 1997 (Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I page 2942) is not compatible with Article 6.2 and 6.5 of the Basic Law insofar as there is no transitional arrangement for parents who separated prior to the entry into force of the Act Reforming the Law of Parent and Child on 1 July 1998.

2. The legislature is instructed to bring a constitutional transitional arrangement into being by 31 December 2003. Until such time as a new statutory provision is adopted, court proceedings are to be suspended insofar as the ruling depends on the constitutionality of § 1626a of the Civil Code, taking into account the provisos that are contained in the grounds.

II. 1. The order of the Federal Court of Justice of 4 April 2001 – XII ZB 3/00 –, the order of the Stuttgart Higher Regional Court of 2 December 1999 – 18 UF 259/99 – and the order of the Tübingen Local Court of 19 May 1999 – 6 F 60/99 – violate the complainant re 1 in his fundamental right under Article 6.2 of the Basic Law. The orders of the Federal Court of Justice and of the Higher Regional Court are overturned. The case is referred back to the Stuttgart Higher Regional Court.

2. The constitutional complaint of the complainant re 2 is dismissed as inadmissible.

3. […]

R e a s o n s :

A.

The judge's submission and the constitutional complaint relate to the question of whether it is constitutional that the father of a child born out of wedlock may only have custody of the child together with the mother, who otherwise has sole custody, if both submit appropriate declarations concerning custody or marry one another. 1

I.

1. Prior to the entry into force of the Act Reforming the Law of Parent and Child (*Kindschaftsrechtsreformgesetz* – KindRG) of 16 December 1997 (Federal Law Gazette I p. 2942) on 1 July 1998, the mother alone was entitled to custody of a child born out of wedlock (§ 1705 sentence 1 of the Civil Code, old version). There was no statutory provision for joint custody of their child of parents who were not married to one another. 2

2. The draft Bill Reforming the Law of Parent and Child submitted by the Federal Government in 1996 (*Bundestag* printed paper (*Bundestagsdrucksache* – BTDrucks) 13/4899), with which in particular also the legal differences between children born in wedlock and children born out of wedlock were to be removed as far as possible (see *Bundestag* printed paper 13/4899, p. 1) contained amongst other things a comprehensive reform of parental custody, and in doing so provided for the first time in § 1626a of the Civil Code for joint custody for parents who were not married to one another on submission of concurring declarations concerning custody. 3

It was stated as reasoning that after the Federal Constitutional Court had issued a call (see BVerfGE 61, 358) for a new provision, it was no longer a matter of the pros and cons of joint custody, but of the modalities of the structure of this legal institution. By means of the requirement of declarations concerning custody, it was said to be ensured that joint custody could not come about against the will of one of the parents. Children who are born out of wedlock were said to be born not only into intact out-of-wedlock communities, but also still into volatile, unstable relationships. Imposing joint custody against the will of one parent would harbour the danger here that from the outset conflicts would be carried out at the expense of the child. Joint custody was said not to be made contingent on any prior court review as to whether it was not contrary to the best interests of the child because this would express unjustified mistrust of those mothers and fathers who wished to share custody (*Bundestag* printed paper 13/4899, p. 58-59). 4

In the context of the legislative procedure, the Committee on Legal Affairs of the *Bundestag* responsible for the Bill, together with the Committee for Family, Youth and Senior Citizens, held an expert hearing. In its recommendation for a resolution and in its concluding report, it named as an important goal of the reform to also facilitate joint parental custody, even if parents are not married to one another. Joint parental custody should be promoted if the parents considered themselves able to implement it because this framework could make the best contribution towards the child being able to establish and maintain relationships with both parents. In order to ensure that the establishment of joint custody was not omitted out of ignorance of this possibility, it was recommended that the youth welfare office should point this out in its advisory and support work. There had been diverging views as to whether joint custody should also be possible against the will of one parent, in particular if the child had lived together with both parents for a prolonged period, but joint custody had not been awarded because the mother had rejected this without further reasoning. The retention of the sole custody of the mother could appear to pose problems here if the child had equally built up relationships with both parents and there were no reasons against joint custody from the point of view of the child. The majority of the Committee had however given priority to the consideration that the enforced establishment of joint custody against the will of one parent would generally entail more disadvantages for the child than advantages because the conflict between the parents about this would shift to conflicts on the exercise of custody. These would ultimately do the child more harm than good. The majority of the Committee on Legal Affairs was therefore said to give preference to the willingness of the parents, strengthened by voluntary advisory and assistance services, to cooperate in the best interests of their child instead of enforced commonality (*Bundestag* printed paper 13/8511, pp. 65-66). 5

3. The regulatory proposal of the Federal Government on joint custody of unmarried parents in § 1626a of the Civil Code remained unchanged in rem in this regard and entered into force on 1 July 1998 with the Act Reforming the Law of Parent and Child, after being adopted by the *Bundestag* and with the consent of the *Bundesrat*. 6

The provision reads as follows: 7

§ 1626a of the Civil Code 8

(1) Where the parents, at the date of the birth of the child, are not married to one another, they have joint parental custody if they 9

1. declare that they wish to take on parental custody jointly (declarations concerning parental custody), or 10

2. marry one another. 11

(2) Apart from this, the mother has parental custody. 12

This enables parents who are not married to one another to have custody jointly if they so desire, regardless of whether they live together, and to submit appropriate declarations concerning custody, which can also already take place prior to the birth of the child (§ 1626 b.2 of the Civil Code). If these declarations concerning custody are not submitted, in principle the mother has sole custody for the child born out of wedlock. The father may only receive custody against the will of the mother if she is deprived of parental custody (§ 1680.3 in conjunction with § 1666 of the Civil Code), she is factually prevented from exercising custody (§ 1678.2 of the Civil Code) or dies (§§ 1680 and 1681 of the Civil Code). The mother may be deprived of custody according to § 1666 of the Civil Code if the physical, mental or emotional best interests of the child are at risk from abuse of custody, by neglect of the child, by non-culpable failure of the mother or by the conduct of a third party, and if – over and above this – other measures have been unsuccessful or it is to be presumed that they are not sufficient to avert the danger. If the mother is deprived of custody, it is transferred to the father if this is in the best interests of the child (§ 1680.2 and 1680.3 of the Civil Code). 13

II.

1. Recent social science studies also confirm that joint parental custody in principle meets the needs of the child for relationships with both parents and makes it clear to him or her that both parents are equally willing to take responsibility for the child […]. Thus, Proksch, who has investigated the implementation of the reform of the law of parent and child, reached the conclusion that joint custody also of separated parents is more suited than sole custody to exert a positive influence on communication and cooperation between the parents, to maintain contact between the child in question and both parents, and to alleviate the adverse effects on the child caused by separation […] However, studies also indicate that a lack of willingness to cooperate and a considerable potential for conflict between the parents may impose serious burdens on the child so that there are considerable reservations against joint custody […]. According to Wallerstein/Lewis/Blakeslee […], it is not so significant for the best interests of the child in the case of the separation of his or her parents whether the parents have joint custody or only one of them is entitled to custody. It is rather said to be the quality of the parent-child relationship and the willingness to cooperate between the 14

parents which are decisive.

2. How many children are affected by the statutory provision on joint custody of parents not married to one another can only be documented with figures by approximation. There were 2.1 million non-marital cohabitations in the Federal Republic in 2001, of whom 27.6 % lived together with children under the age of 18. This concerned 821,000 children. By contrast, 2.12 million children lived with only one parent […]. Hence, 19.4 % of all 15.1 million minor children lived with their unmarried parent or parents, whilst 12.16 million children, that is 80.5 %, lived with their married parents […]. However, it should be taken into account with these figures that children born out of wedlock become born in wedlock by marriage and children born in wedlock may live in a non-marital cohabitation of one parent. According to the study by Vaskovics et al. from 1997, there was no partnership […] between the mother and father of a child born out of wedlock at the time of his or her birth in a total of 17 % of the cases investigated […]. In the first six months after the birth, the share of mothers who no longer had a relationship with the father of the child increased to 35 % in the new federal *Länder* (states) and to half in the old federal *Länder*. In approximately 24 % of the households surveyed, finally, the children lived with their mother and father, in 51 % only with the mother and in 15 % with the mother and a man who was not the father of the child; 42 % of children living with the mother had contact with their father […]. 15

III.

1. The applicant of the original proceedings that gave rise to proceedings 1 BvL 20/99 lived in non-marital cohabitation from 1983 to 1993 with the respondent and her two sons from another relationship. Their joint son, for whom the complainant recognised paternity, was born in 1990. The parents separated in 1993. On the basis of a written agreement, the child initially remained with the father, who looked after him for eight months until he released the child at the request of the mother. During the following years, there was frequent contact and joint holidays between the father and the son. When the mother had a stay in hospital, she placed the child in the care of the father. In 1997 the mother then forbade the father any contact to the child. A contact arrangement was however made through the mediation of the youth welfare office. 16

After one attempt to obtain joint custody together with the mother had already failed, and after the Act Reforming the Law of Parent and Child had entered into force at the end of 1998, the father once more applied to the family court accordingly. He pointed out that he considered the statutory provision to be unconstitutional whereby he could only have custody for his child jointly with the mother with her consent. He had always wanted to be responsible for his son’s future. The mother applied for the application to be rejected on grounds that normal communication had no longer been possible between her and the father since their separation. 17

After hearing the parties to the proceedings, the family court suspended the pro- 18

ceedings and submitted the question to the Federal Constitutional Court for review as to whether it is compatible with Article 6.2 and 6.5 of the Basic Law that according to §§ 1626a and 1672 of the Civil Code the father of a child born out of wedlock who lived together with the child's mother and the child for several years in a relationship that was similar to a family after the separation of the parents, without consideration of the concrete circumstances of the individual case, cannot be awarded joint custody of his child as long as the child's mother withholds her consent (see *Zeitschrift für das gesamte Familienrecht* – FamRZ 2000, p. 629).

[…] 19-20

2. The complainant re 1 of the proceedings 1 BvR 933/01 also lived with the mother of his son, who was born in 1993, for a prolonged period in non-marital cohabitation. After the separation and the mother moving out with the child from the joint home in 1996, the parents agreed on an extensive right of contact of the complainant re 1, enabling him to have the child in his home for half of the week. Furthermore, they agreed to arrange matters relevant to the child by agreement as far as possible. The mother did not however comply with a request of the complainant re 1 to submit a declaration concerning custody. 21

The Local Court rejected the application of the complainant re 1, submitted in 1999 after the entry into force of the Act Reforming the Law of Parent and Child, to grant joint custody to him together with the mother fully, else partly. The Higher Regional Court rejected the complaint lodged against this after hearing the parties to the proceedings and permitted a further appeal on points of law (see FamRZ 2000, p. 632). […] 22

The Federal Court of Justice rejected the further appeal against this (see FamRZ 2001, p. 907). It considers § 1626a of the Civil Code to be constitutional. […] 23

[…] 24-25

This is countered by the constitutional complaint lodged by complainant re 1 also on behalf of his son, the complainant re 2, with which he complains of a violation of Article 1, Article 2, Article 3, Article 6.2 and Article 20.3 of the Basic Law. He considers § 1626a.1 no. 1 and 1626a.2 of the Civil Code to be unconstitutional insofar as this provision makes the establishment of joint custody solely contingent on the consent of the mother. […] 26

IV.

The possibility granted to state an opinion in the proceedings was made use of by the Federal Ministry of Justice on behalf of the Federal Government, by the Federal Court of Justice, by the Academic Association for Family Law (*Wissenschaftliche Vereinigung für Familienrecht*), by the German Women Lawyers Association (*Deutscher Juristinnenbund*), by the German Society for the Protection of Children (*Deutscher Kinderschutzbund*), by the Association of Single Parents (*Verband allein-* 27

erziehender Mütter und Väter), by the Fathers for Children Association (*Verein Väter für Kinder*), as well as by the respondent of the original proceedings that gave rise to the proceedings on the constitutionality of a statute, and these once more submitted their views in the oral hearing. The German Institute for Youth Welfare Services and Family Law (*Deutsches Institut für Jugendhilfe und Familienrecht*) and the respondent of the original proceedings giving rise to the constitutional complaint proceedings also made a statement in the oral hearing.

[…] 28-38

B.

I.

The submission order is admissible. […] 39

However, § 1672 of the Civil Code, also submitted for review, is not relevant to the decision on the underlying case. […] 40

II.

1. The constitutional complaint of the complainant re 1 with which he complains of the incompatibility of § 1626a.1 no. 1 and 1626a.2 of the Civil Code and of the rulings by non-constitutional courts based on this provision with Article 6.2 and 6.5 of the Basic Law, as well as with Article 3.1 of the Basic Law, is admissible. […] 41

[…] 42

2. The constitutional complaint lodged by the complainant re 1 on behalf of his son, the complainant re 2, is inadmissible. […] 43

[…] 44

C.

§ 1626a of the Civil Code is not compatible with Article 6.2 and 6.5 of the Basic Law insofar as there is no transitional arrangement which provides for judicial review of the individual case as to whether the best interests of the child are opposed to joint parental custody held by parents who are not married to one another in cases in which the parents have lived with the child but separated prior to the coming into force of the Act Reforming the Law of Parent and Child on 1 July 1998. In other respects, no reasons are currently recognisable as to why the regulatory concept of § 1626a of the Civil Code on joint custody of parents not married to one another should not be compatible with the Basic Law. 45

I.

1. It furthermore also does not violate the parental right of the father of a child born 46

out of wedlock under Article 6.2 of the Basic Law that, according to § 1626a.2 of the Civil Code, a child is first awarded legally to the mother alone and care and custody is assigned to her in principle (see BVerfGE 56, 363 (389-390); 84, 168 (181)).

a) The bearers of the parental right under Article 6.2 of the Basic Law are also the mother and the father of a child born out of wedlock (see BVerfGE 24, 119 (135); 92, 158 (177-178)). The inclusion of all parents in the scope of protection of this fundamental-rights provision however does not mean that all mothers and fathers must be granted the same rights in the relationship with their child. The parental right needs to be given concrete form by the legislature. Joint exercise of parental responsibility is contingent on the existence of a viable social relationship between the parents, requires a minimum of agreement between them and must be in line with the best interests of the child. If the preconditions for joint assumption of parental responsibility are not met, the legislature may allocate the principal responsibility for the child to one parent (see BVerfGE 92, 158 (178-179)). 47

b) Unlike in the case of the parents of children born in wedlock, who legally undertook, when they married, to take responsibility for each other and for their joint children, the legislature even today cannot make a general presumption in the case of parents who are not married to one another that they are living in a domestic community and are willing and able to take joint responsibility for the child. 48

aa) The number of non-marital cohabitations has continually increased in recent decades. Whilst there were only 137,000 such communities in 1972, there were 2.1 million couples in 2001 who cohabited out of wedlock, 27.6 % of whom lived together with children […]. Equally, the number of children born out of wedlock has increased, whilst the birth figures have fallen further […]. However, in 2001 of the total of 15.1 million minor children only 5.4 %, in other words 821,000 children, lived together with their parents who were united in cohabitation […]. According to the study by Vaskovics et al. from 1997 on the circumstances of children born out of wedlock, roughly 24 % of the children in the cases studied lived with their father and mother after their birth […]. These figures do not permit one to conclude that the vast majority of children who are born out of wedlock are now born into a domestic community of mother and father. 49

bb) There are also no adequate factual indications for the presumption that the father of a child born out of wedlock on birth wishes to take responsibility for the child together with the mother as a rule. For instance, on the birth of a child born out of wedlock it had not yet been ascertained in the vast majority of the cases investigated by Vaskovics who the father of the child was. More than 80 % of fathers recognised their paternity voluntarily. However, in two-thirds of cases this did not take place until after the birth of the child […]. 50

The figures show that children who are born out of wedlock are born into a large number of family constellations even today. There are situations in which the father cannot be or has not been ascertained, in which he does not want to have anything to 51

do with the child over and above paying maintenance, or would like to remain in touch with the child, but not with the mother, ranging to those in which the father would like to hold custody for the child jointly with the mother in agreement or in cohabitation with her.

c) The best interests of the child require that from its birth the child must have a person who can act in a legally binding manner on behalf of the child . In view of the diversity of living conditions into which children born out of wedlock are born, it is justified that parental custody of the child is normally attributed to its mother upon the child's birth and not to the father, or to both parents jointly. 52

A relationship already develops between mother and child during pregnancy, in addition to the biological ties, which continues after birth. Even if the father takes on a considerable significance for the development of the child, he must nonetheless build up a relationship with the child after the birth of the child – assuming he wishes to do so – which already exists between the mother and the child from the outset. Whilst the latter must already deal during pregnancy with the fact that she is soon to bear responsibility for the child once he or she has been born, and has as a rule expressed her willingness to do so through pregnancy, the decision of the father as to how to behave towards his child has in many cases not yet been decided at his or her birth. The mother is the only sure relation who the child finds at his or her birth. If she is given sole custody, this hence ensures that factual and legal responsibility may be borne for the child from the first day onwards. 53

d) The allocation of custody in principle to the mother of the child born out of wedlock according to § 1626a.2 of the Civil Code is also constitutionally unobjectionable because, with § 1626a.1. no. 1 of the Civil Code, the legislature has now granted the possibility to those parents who wish to have joint custody for their child born out of wedlock by means of concurring declarations concerning custody to also already bear custody jointly in legal terms on the birth of the child. 54

The fact that the legislature here has regarded the declared concurring will of the parents as a sufficient foundation of a parent-child relationship on which joint custody can be founded, and did not satisfy itself with cohabitation of the parents as circumstances required for joint custody, is justified and reasoned also in the need to create a clear, secure responsibility for the child from the time of his or her birth. If there is a concurring declaration of will on the part of the parents, there is not only an indication that custody for the child can be borne by the parents jointly, but there is also no need to clarify whether they are equally willing to do so. By tying joint custody to cohabitation of the parents, one would have to start by examining whether the parents of the child born out of wedlock in fact live together when he or she is born and this cohabitation is able to offer a viable, long-term basis for joint custody. Such a future prognosis can however not yet be made solely from the cohabitation at the time of the birth of the child without a corresponding explicit will on the part of the parents. This is also confirmed by the study by Vaskovics according to which prior to the birth of a child 55

born out of wedlock only a total of 17 % of mothers did not have a relationship with the child's father (or no longer had one), whilst this number had increased to roughly 50 % in the old and 35 % in the new Federal *Länder* in the first six months after the birth […]. There would therefore be a danger that the circumstances required for joint custody could not yet be finally clarified at the time of the birth of the child, in particular if the parents took different views on this. This would however be at the expense of the child, who at birth would not experience a clear attribution of legal custody.

Also linking the establishment of joint custody to the recognition of paternity would not make it dispensable to initially allocate to the mother sole custody of a child born out of wedlock. In view of the fact that only for one-third of children born out of wedlock whose paternity is recognised at birth, it is ensured solely by the provision contained in § 1626a.2 of the Civil Code that the child has an established bearer of custody at this time. 56

2. Also § 1626a.1 no. 1 of the Civil Code does not violate Article 6.2 of the Basic Law. 57

a) The possibility facilitated with the Act Reforming the Law of Parent and Child by § 1626a.1 no. 1 of the Civil Code to the parents of a child born out of wedlock to legally hold joint custody for their child is based on a regulatory concept of custody that establishes, in view of the best interests of the child, that the parents' consensus about joint custody be the precondition of joint custody. At present there is no evidence to substantiate that this regulatory concept does not sufficiently take into account the parental right pursuant to Article 6.2 of the Basic Law of a father of a child born out of wedlock. 58

aa) The protection of parental rights according to Article 6.2 of the Basic Law, to which the father and the mother of a child are entitled in equal measure, covers the major elements of custody without which parental responsibility cannot be exercised (see BVerfGE 84, 168 (180)). If the father and the mother live together with the child, and if both are willing and able to shoulder parental responsibility, as a rule this is in line with the best interests of the child if both parents are granted custody, given that the emotional ties of the child to both of his or her parents are legally secured thereby. At the same time, this makes it clear to the parents that they have a joint responsibility for their child, and joint custody can contribute towards perpetuating the parent-child relationship (see BVerfGE 84, 168 (182)). 59

Joint custody is however contingent in the best interests of the child with both parents on their not wishing only to derive rights from their position as parents, but also to shoulder duties towards the child, in other words to take responsibility for the child. The exercise of this joint responsibility in turn requires the establishment of a personal relationship with the child by each parent, and requires a minimum of agreement between the parents (see BVerfGE 92, 158 (178-179)). If this is missing, and if the parents are neither willing nor able to cooperate, joint custody for the child may run counter to the best interests of the child. If the parents carry out their conflict at the ex- 60

pense of the child, the child's ability to maintain relationships may be impaired and his or her development placed at peril. This insight gained from scientific studies […] was confirmed only recently by the long-term studies of Wallerstein/Lewis/Blakeslee […].

bb) The legislature was hence able to presume that joint custody enforced against the will of one parent will as a rule entail more disadvantages than advantages for the child (see *Bundestag* printed paper 13/4899, p. 58 et seq.; *Bundestag* printed paper 13/8511, p. 66). Hence, it has accommodated the best interests of the child which it is called upon to accommodate in shaping parental custody by Article 6.2 sentence 2 of the Basic Law. 61

(1) The legislature lent expression with § 1626a of the Civil Code to the fact that both parents are in principle entitled to joint custody (see *Bundestag* printed paper 13/4899, p. 93). It has presumed with married parents on the basis of the legal tie which they entered on conclusion of marriage that there is an agreement between them as a precondition for an exercise of joint custody serving the best interests of the child, as well as a willingness to hold custody for the joint child jointly, and has hence attributed joint custody to them. 62

With parents who are not married to one another, this indication is missing for a presumption that joint custody is wanted by them and could hence also be exercised in the child's best interests. In order to create an equivalent for this doing justice to the statutory presumption of the exercise of joint custody in the best interests of the child also with parents who are not married to one another, the legislature has granted to them the possibility with § 1626a.1 no. 1 of the Civil Code by means of concurring declarations to lend expression to the fact that they are willing and able to care for their child together. Hence, on the one hand, it has accommodated the different situations of married and unmarried parents, and on the other hand it has made joint custody available to both sets of parents. 63

(2) The presumption on the part of the legislature that the desire of both parents to exercise joint custody, shown by conclusion of marriage or explicitly declared, showed their willingness to cooperate and best guaranteed the joint exercise of custody by the parents which corresponded best to the best interests of the child, is constitutionally unobjectionable. It has been recognised that the quality of the respective parent-child relationship, as well as the willingness to cooperate of the parents with regard to the child, are highly significant for the best interests of the child […]. If this is lacking, conflicts between the parents may have a major impact on the child. Making the declaration of the will of the parents the decisive precondition for joint custody, and not linking to it any further preconditions, such as cohabitation of the parents, also does justice to the right of parents under Article 6.2 of the Basic Law to decide for themselves how they intend to comply with their parental responsibility towards the child (see BVerfGE 47, 46 (69-70); 60, 79 (88); 98, 218 (244)). 64

cc) It is not apparent at the present time that the regulatory concept of joint custody 65

of parents who are not married to one another in § 1626a.1 no. 1 of the Civil Code violates the parental right of the father of a child born out of wedlock under Article 6.2 of the Basic Law.

(1) When shaping the rights of parents of children born out of wedlock, the legislature may take the circumstance into account that one may not presume in general terms the existence of a social relationship between them and the child, and may take into account whether the father shows an interest in the development of the child (see BVerfGE 92, 158 (179)). The legislature has initially allotted custody of the child to the mother in a constitutionally unobjectionable manner. The establishment of joint custody of unmarried parents hence requires a constitutive act opening to the father access to custody for his child together with the mother. Such access has been created for the father by virtue of the possibility to submit corresponding declarations concerning custody together with the mother. Here, the concurring declarations concerning custody of the parents as a requirement for joint custody are an expression of the willingness to cooperate in taking care of and bringing up the child; they are at the same time to ensure that joint custody has a basis on which it can be exercised in the best interests of the child. 66

That by these means access of the father of a child born out of wedlock to parental custody also depends on the willingness of the mother to hold joint custody with him is constitutionally unobjectionable. The legislature hence does justice to the fact that the exercise of the parental right requires a minimum of agreement between the parents. The mother is initially allocated parental custody of the child from which she cannot withdraw – in contradistinction to the father. However, she can also not share custody for the child with the father unless he is willing. Both parents hence receive equal access to joint custody only if they agree on wanting to do so. This by itself does not constitute an unjustified restriction of the father's parental right. Even with married parents, joint custody is based on concurring declarations submitted in the marriage vows. 67

(2) The object of the Act Reforming the Law of Parent and Child, with which § 1626a of the Civil Code was introduced, was to also facilitate – in the interest of the children – joint parental custody for parents who are not married to one another, to promote this form of custody and in doing so to strengthen parents' autonomy (see *Bundestag* printed paper 13/8511, pp. 64 et seq.). For this reason, it was rejected to make the establishment of joint custody contingent on a review of the best interests of the child in individual cases (see *Bundestag* printed paper 13/4899, p. 58-59). With the Reform Act, the youth welfare offices have been obliged by § 52a of the Eighth Book of the Code of Social Law (*SGB VIII*) to notify the mother of a child born out of wedlock of the possibility of establishing joint custody. 68

(a) The legislature has presumed that as a rule joint custody comes about according to § 1626a.1 no. 1 of the Civil Code if the parents are willing to cooperate. This applies in particular to cases in which both parents live with the child and both parents 69

have already shown their willingness to cooperate by factually caring for the child jointly. This provision did adequate justice to the parental right of the father under Article 6.2 of the Basic Law. The legislature was justified in assuming that the parents will generally make use of the statutory possibility of joint custody that now exists, i.e. that they will legalise their factual care by declarations concerning custody. This is all the more so, given that the legislature has also enabled both unmarried and married parents with joint custody according to § 1671 of the Civil Code in case of subsequent separation and conflicts to have a court review carried out as to whether joint custody is still in the best interests of the child.

(b) The legislature has been aware of the fact that there may nonetheless be cases in which the mother does not wish to submit a declaration concerning custody, despite living together with the father and the child (see *Bundestag* printed paper 13/8511, p. 66). Its assessment that in such cases the refusal of the mother constituted an expression of a conflict between the parents which has a negative impact on the child in the case of a dispute also occurring with regard to joint custody is justifiable. The legislature was justified in presuming that a mother, particularly when she lives with the father and the child, will only exceptionally reject the wish of the father for joint custody, and that she will only do so if she has serious reasons for this based on the defence of the best interests of the child, that she therefore does not misuse the possibility of refusing to submit a declaration concerning custody as a power position towards the father. Making such an assumption, it is compatible with Article 6.2 of the Basic Law that the legislature refrained from admitting judicial review of the individual case if no concurring declarations were reached concerning custody. For if the reasons for the failure to reach concurring declarations concerning custody are so serious and the conflict between the parents so major despite living together, it cannot be expected that the courts will consider joint custody of the parents to be beneficial to the best interests of the child. The court dispute by itself could once again be to the detriment of the child, quite apart from the other conflicts. 70

(c) Finally, it is constitutionally unobjectionable that the legislature above all opened joint custody to parents not married to one another by virtue of the requirement of concurring declarations concerning custody de facto above all at the time when the parents are in a relationship with one another and with the child that is marked by agreement, in particular therefore if they live together and in fact take care of the child together, and not only when they have separated. 71

The study by Proksch […] has now confirmed that joint custody is beneficial to the best interests of the child in many cases, even if the parents have separated. This finding however relates to the continuance after separation of joint custody already existing during cohabitation. If however joint custody is to be established for the first time after the separation of the parents, there is all the more need of an indication for the presumption that the parents are willing and able to cooperate. If therefore § 1626a.1 no. 1 of the Civil Code also takes concurring declarations concerning custody here as a precondition for the establishment of joint custody, and where such de- 72

clarations are not provided indeed does not provide the father with a possibility of joint custody, this is adequately factually justified by consideration of the best interests of the child. If the cohabitation of the parents has already not led to their joint custody although the possibility for this was in existence, the presumption on the part of the legislature is all the more justified, if the parents separate and if there is a dispute between them on joint custody, that opening up joint custody as a rule would now entail more disadvantages than advantages for the child for a lack of a basis for cooperation between the parents (see *Bundestag* printed paper 13/8511, p. 66).

(3) (a) If the presumptions of the legislature prove to be correct, the parental right of the father of a child born out of wedlock has been adequately taken into account by § 1626a.1 no. 1 of the Civil Code. If he does not have a social relationship with the child, or at least initially with the mother, there is no basis for joint custody in the best interests of the child. If he lives with the mother and the child, or if there is otherwise agreement between the mother and him, this will as a rule lead to joint custody, unless grievous reasons concerned with the best interests of the child make it impossible to reach concurring declarations concerning custody. Hence, the father as a rule also continues to have custody jointly with the mother in the case of separation, unless reasons related to the best interests of the child require a different kind of custody in an individual case. The father can also still obtain joint custody after separation from the mother if both so wish. 73

(b) If the presumptions of the legislature were however to be incorrect, in particular were it to emerge that even if the parents live together with the child in a large number of cases no joint custody is attained according to § 1626a.1 no. 1 of the Civil Code for reasons that are not supported by the best interests of the child, § 1626a.1 no. 1 of the Civil Code would reveal itself to be incompatible with Article 6.2 of the Basic Law. Then, the statutory definition of typical facts would no longer be justified, and it would violate the parental right of the father of a child born out of wedlock under Article 6.2 of the Basic Law if he is excluded from custody despite living together with the mother of his child and despite factual joint custody for the child although the ability and willingness of both parents to cooperate is proven by factual joint custody for the child, and therefore cannot be the real reason behind the negative stance of the mother. 74

(4) There have been no indications so far to place the correctness of the presumptions of the legislature in serious doubt. In particular, there is no secure knowledge as to whether despite the possibility which has been created for joint custody of parents of a child born out of wedlock in the long term there is a considerable number of cases in which joint custody does not come about even though the parents live together with the child, and which reasons are relevant for this. No data are currently available relating to the number of declarations concerning custody submitted since the entry into force of the Act Reforming the Law of Parent and Child. It is also not known how large the share of family communities is in which parents live with their child born out of wedlock who have submitted a joint declaration concerning custody, as against the share in which this has not yet taken place. It should finally be taken into account that 75

parents who are not married to one another have only had the possibility of joint custody since 1 July 1998. Since such a recently created legal form requires to become widely known and more widely publicised in order to become entrenched in society, the time which has passed so far is in fact too short to already be able to make viable statements regarding the impact of the statutory reform.

b) Since the legislature has enacted provisions which only secure the parental right of the father of a child born out of wedlock under Article 6.2 of the Basic Law if its prognostic presumptions are correct, it is obliged to observe the factual development as to and to review whether its assumptions stand the test of reality. If it becomes apparent here that this is not the case, the legislature will have to ensure by means of a correction to the provision that fathers of children born out of wedlock who live with the mother and the child as a family are opened an access to joint custody that sufficiently takes their parental right under Article 6.2 of the Basic Law into account, with due consideration being given to the best interests of the child. 76

3. The statutory regulation of joint custody of parents of a child born out of wedlock in § 1626a of the Civil Code is however constitutionally inadequate insofar as the legislature has omitted to make a transitional arrangement for parents who lived with their child born out of wedlock, and took care of the child jointly, but separated before the entry into force of the Act Reforming the Law of Parent and Child on 1 July 1998. They, in particular the fathers, must be given the possibility to have a judicial review carried out as to whether joint custody can be established although the other parent does not agree with it, taking account of the best interests of the child. It violates the parental right of the father of a child born out of wedlock under Article 6.2 of the Basic Law if he only does not have access to joint custody for his child because there was no possibility for him and the mother to establish joint custody for the child at the time when he lived with the mother and the child, and after separation the mother is not (or is no longer) willing to submit a declaration concerning custody although joint custody is in the best interests of the child. 77

a) With the legal reform, the legislature has opened up a possibility of joint custody for parents of a child born out of wedlock which is to make joint custody the rule where parents are willing and able to take care of their child together. 78

If the parents are living together and are taking care of the child together, so that the legislature may presume that they will indeed make use of the possibility of joint custody facilitated to them, the necessity of a review of the individual case to establish it would on the one hand restrict the parents' freedom without there being indications that joint custody on the basis of the will of both parents was contrary to the best interests of the child. On the other hand, recourse to a court would be opened, with the burdens also affecting the children, for such cases in which the courts, taking account of the best interests of the child, would as a rule also not be able to establish joint custody because of the conflicts between the parents. This justifies not making joint parental custody contingent on a judicial review of the individual case. 79

At the same time, the legislature permits joint custody of parents of a child born out of wedlock established by declarations concerning custody to continue to be valid even after their separation unless it emerges on judicial review according to § 1671 of the Civil Code that this is no longer in the best interests of the child. For this reason, the legislature was able to presume that, if joint custody was not established even when the parents were living together, the conflicts between them were likely to be all the more serious on their separation, so that a judicial review of the individual case would only lead to further burdens for the child, but not to joint custody between the conflicting parents. This in principle justifies not granting to the father the possibility in the individual case to have a judicial review carried out as to whether the conditions for joint custody are met if the mother refuses to submit a declaration concerning custody. 80

b) If however there was no possibility at all for the parents to be granted joint custody while they were living together with the child, there are no circumstances from which one could conclude, following a definition of typical facts, that the parents did not have the necessary willingness to cooperate related to custody for their child. The separation of the parents or the refusal of the mother declared after separation to submit a declaration concerning custody is also not an adequate indication of this. It suggests itself that a mother who, just as the father, could not have joint custody during their cohabitation, and who was hence the sole holder of custody during this period, as a rule is not going to be willing to share custody for the child with the father when she and the father of the child have now separated and they have only been given the possibility to have joint custody after separation. It is not possible to absolutely conclude from such conduct that parental conflicts remove the necessary foundation for joint custody, and hence impair the best interests of the child. Then it is however not justified, and violates the parental right of the father under Article 6.2 of the Basic Law who in fact took care of his child born out of wedlock for a prolonged period which was relevant to his or her development, to also continue to exclude him from joint custody simply because the mother is not, or no longer, willing to submit a declaration concerning custody after separation. 81

c) It may however not be presumed in such cases that joint custody of the parents as a rule serves the best interests of the child. Joint custody of the parents may also prove to be decisive for the best interests of the child born out of wedlock after their separation (see BVerfGE 61, 358 (376 et seq.); 84, 168 (182)). Separation and the concomitant conflicts between the parents may however impact their willingness and ability to cooperate in custody for the child to such a degree that joint custody is not in the interest of the child. For cases in which parents separated before the entry into force of the Act Reforming the Law of Parent and Child, after living with the child for a prolonged period, and in which the father now wishes to receive joint custody with the mother, but the mother does not submit a declaration concerning custody, the legislature must hence open up a judicial review of the individual case as to whether the best interests of the child stand in the way of joint custody. 82

d) In contradistinction to the view of the Federal Court of Justice, § 1666 of the Civil Code does not provide in such cases to the father of a child born out of wedlock a way to obtain a judicial review of the individual case adequately taking account of his parental right with regard to joint custody. 83

§ 1666 of the Civil Code does not aim to balance the parental rights in conflict situations between parents. The provision rather draws a boundary for encroachments on the part of the state on the right of parents, and hence determines under what preconditions the state must carry out its watchdog function under Article 6.2 sentence 2 of the Basic Law. This standard is not suited as a criterion to determine which position in the law on custody each of the parents is to be given if they are unable to agree on custody. The abuse threshold makes the parental right of the father take second place to that of the mother in a disproportionate manner in contradiction to Article 6.2 of the Basic Law if the father is only to participate in custody for the child if the best interests of the child are placed at risk by the mother, and not if this is merely in the best interests of the child. Also, the mere refusal of the mother to submit a declaration concerning custody cannot be deemed to constitute abusive exercise of her parental responsibility. 84

II.

1. With the exception of the omitted regulation of the old cases mentioned [i.e. the cases arising prior to the current statutory regulation], for the above reasons § 1626a of the Civil Code also does not violate the requirement addressed to the legislature under Article 6.5 of the Basic Law to create the same conditions for the development of children born out of wedlock as for children born in wedlock. 85

It follows from Article 6.5 of the Basic Law that children who are born out of wedlock in principle may not be treated less well than those born in wedlock unless their special situation leads to justifying reasons for unequal treatment (see BVerfGE 84, 168 (185); 96, 56 (65)). The fact that a child born out of wedlock, in contradistinction to a child born in wedlock, cannot necessarily be legally attributed to a father at his or her birth, and one may also not presume that the father wishes to have custody for the child or will build up a relationship with the child by living with the mother, justifies arranging custody for a child born out of wedlock differently than that for a child born in wedlock as long as the statutory provision creates a suitable framework to bring about joint custody. Apart from the lack of an arrangement on old cases, this has taken place. 86

The presumption of the legislature that the lack of willingness of parents who live together to legally agree on joint custody allowed the conclusion to be drawn that there are such conflicts between the parents which would be disadvantageous for the child were joint custody to be established against the will of one parent, is comprehensible and currently not refutable. In this sense, it is justified to leave sole custody with the mother in such cases, without a judicial review of the individual case. 87

However, in cases in which the parents did not have the possibility prior to their separation to certify their willingness to hold joint custody, the children born out of wedlock affected by this are placed at a disadvantage in violation of Article 6.5 of the Basic Law until such time as a way is opened up to reach joint custody after all via a judicial review of the individual case. 88

2. Finally, § 1626a of the Civil Code also does not violate Article 3.1 of the Basic Law. In the case of fathers of children born out of wedlock, as with fathers of children born in wedlock, joint custody with the mother is contingent on her consent, but with the difference that in one case consent is already given on conclusion of marriage, whilst in the other case it is submitted by a declaration concerning custody. This is however founded factually by the different situation in which the fathers of children born out of wedlock find themselves in comparison to fathers who are married to the mother. The further differences in shaping the law on custody which result from this are justified, as has been explained, by the currently unobjectionable presumption of the legislature that this is in the best interests of children born out of wedlock. 89

D.

The court rulings impugned in the proceedings 1 BvR 933/01 are also not compatible with the Basic Law in terms of the above statements at C. 90

The ruling of the Federal Court of Justice violates the complainant re 1, who lived for a prolonged period with the mother of his child born out of wedlock and with the child before the parents separated prior to the entry into force of the Act Reforming the Law of Parent and Child, in his parental right under Article 6.2 of the Basic Law. The ruling is based on § 1626a of the Civil Code, which for such old cases does not provide for judicial review of the individual case, and hence violates Article 6.2 and 6.5 of the Basic Law. 91

The impugned ruling of the Higher Regional Court is not only based on § 1626a.1 no. 1 of the Civil Code, since the court, regardless of the wording, has carried out a review of the individual case. In doing so, however, it already did not take adequate account of the parental right of the complainant re 1 under Article 6.2 sentence 1 of the Basic Law because it has not done justice to the constitutional reservations existing against the application of the provision to the above old cases. 92

Finally, the impugned ruling of the Local Court also violates the fundamental right of the complainant re 1 under Article 6.2 of the Basic Law because it is based on the provision of § 1626a of the Civil Code, which is unconstitutional in this respect. 93

E.

I.

If a provision is not according to the Basic Law, it is to be in principle declared null and void (§ 82.1 in conjunction with § 78 sentence 1, § 95.3 of the Federal Constitu- 94

tional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG)). The situation is different if the unconstitutionality of the provision is not due to its regulatory content, but to the omission of a transitional arrangement for old cases, if there are several possibilities to eliminate the unconstitutional situation and the declaration of nullity would encroach on the latitude of the legislature (see BVerfGE 84, 168 (186-187); 92, 158 (186)). Accordingly, a declaration of nullity is ruled out in this instance. The legislature may remedy unconstitutionality by a variety of means. For instance, it may grant to each parent to whom these conditions apply a right to apply for a judicial review as to whether joint custody with the other parent is in the best interests of the child. The legislature may however also open up to the parent the possibility to have the lack of consent of the other parent reviewed in court by the standard of the best interests of the child, and where appropriate have it substituted.

II.

If the Federal Constitutional Court establishes the incompatibility of a provision with the Basic Law, the legislature is obliged to bring the legal situation into accordance with the Basic Law without delay. Because of the significance of the passage of time, particularly in cases of the law of parent and child, the legislature is set a deadline until 31 December 2003 for the supplementary new statutory regulation. Within the scope of the declaration of incompatibility, the provision may no longer be applied by the courts and administrative authorities (see BVerfGE 82, 126 (155); 84, 168 (187)). No exception from this principle is necessary here. In cases in which the parents of a child born out of wedlock have lived with the child for a prolonged period and separated prior to the entry into force of the Act Reforming the Law of Parent and Child, the courts may accordingly not refuse the joint custody striven for by one parent for the child because there is no declaration concerning custody on the part of the other parent according to § 1626a.1 no. 1 of the Civil Code. Rather, such proceedings should be suspended until a new provision enters into force. 95

[…] 96

By Article 1 of the Act Implementing Family-law Decisions of the Federal Constitutional Court (Gesetz zur Umsetzung familienrechtlicher Entscheidungen des Bundesverfassungsgerichts) *of 13 December 2003 (Federal Law Gazette I 2003 p. 2547), the legislature, with effect from 31 December 2003, enacted the transitional arrangement demanded in the decision by amending Article 224 §2 of the Introductory Act to the Civil Code* (Einführungsgesetz zum Bürgerlichen Gesetzbuch) *as follows:*

“(3) If parents who were not married to one another jointly exercised parental responsibility for their child in a domestic community for a prolonged period of time and separated before 1 July 1998, the Family Court, upon the application of one parent, shall substitute the other parent’s declaration concerning custody according to § 16261.1 no. 1 of the Civil Code where joint parental custody serves the child’s best in-

terests. As a general rule, joint exercise of parental responsibility exists if the parents lived together with the child for at least six months without interruption."

Papier	Jaeger	Haas
Hömig	Steiner	Hohmann-Dennhardt
Hoffmann-Riem		Bryde

Bundesverfassungsgericht, Urteil des Ersten Senats vom 29. Januar 2003 - 1 BvL 20/99, 1 BvR 933/01

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