**Headnotes**

**to the judgment of the First Senate of 28 February 2007**

– 1 BvL 9/04 –

**It is in breach of Article 6.5 of the Basic Law to determine the duration of a maintenance claim granted by the legislature to one parent against the other parent because of the care of his or her child differently for children born in and out of wedlock.**

FEDERAL CONSTITUTIONAL COURT

- 1 BvL 9/04 -

**IN THE NAME OF THE PEOPLE**

**In the proceedings
for constitutional review**

of § 1615 l.2 sentence 3 of the Civil Code

– suspension of proceedings and submission order of the Hamm Higher Regional Court (*Oberlandesgericht*) of 16 August 2004 (5 UF 262/04) –.

The Federal Constitutional Court – First Senate –

with the participation of the Justices

President Papier,

Steiner,

Hohmann-Dennhardt,

Hoffmann-Riem,

Bryde,

Gaier,

Eichberger,

Schluckebier

held on 28 February 2007:

1. **The different arrangement of the maintenance claims because of the care or bringing up of children in § 1570 of the Civil Code, on the one hand, and § 1615 l.2 sentence 3 of the Civil Code, on the other hand, is incompatible with Article 6.5 of the Basic Law.**
2. **The legislature is instructed to bring a constitutional transitional arrangement into being by 31 December 2008.**

**Reasons:**

**A.**

The submission relates to the question of whether it is compatible with the Basic Law (*Grundgesetz* – GG) that § 1615 l.2 sentence 3 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) in principle limits the maintenance which a parent may claim from the other parent who is not married to him or her for the care or bringing up of the joint child born out of wedlock to three years after the birth of the child and only provides for an extension in exceptional cases, in particular taking the child's interests into account, whilst § 1570 of the Civil Code, which regulates maintenance owed to one divorced parent by the other parent for the care or bringing up of the joint child born in wedlock, does not contain a time limit and the case-law, on the basis of this statutory provision on claims, grants a maintenance claim in general terms for a considerably longer period than three years. 1

**I.**

1. According to § 1570 of the Civil Code, which was created by the First Act Reforming the Law on Marriage and Family Law (*Erstes Gesetz zur Reform des Ehe- und Familienrechts*) of 14 June 1976 (Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I p. 1421), entered into force on 1 July 1977 and has not been amended since then, a divorced parent may demand maintenance from the former spouse as long as and insofar as he or she cannot be expected to take up gainful employment because of the care or bringing up of a joint child. 2

a) The legislature stated as grounds for this claim that the joint economic basis of the spouses ceased to apply on divorce. Hence, their mutual economic ties were said to end in principle. The joint responsibility of the spouses for one another was however said to continue beyond a divorce in certain cases, for instance if the spouse had to bring up and care for a joint child (see *Bundestag* printed paper (*Bundestagsdrucksache* – BTDrucks) 7/650, p. 60). The maintenance claim granted in this respect in the shape of § 1570 of the Civil Code was said to only apply as long as the spouse is prevented from taking up gainful employment as a result of childcare. It was thus said to cease to apply if the child no longer required care or bringing up (see *Bundestag* printed paper 7/650, p. 123). Here, the legislature deliberately omitted to regulate on instructions or to provide interpretation aids as to the duration of the maintenance claim. It took the view that making a statement on for instance the number and age of the children was inappropriate in view of the diversity of circumstances (see *Bundestag* printed paper 7/4361, p. 29; *Bundestag* printed paper 7/650, p. 122-123). Whether and to what degree one could expect a mother to enter into gainful employment was said to depend not only on the age of the children, but also on other circumstances. 3

b) It is also already stressed in the case-law in this respect that there are no fixed 4

points in time from which age and from what number of children the divorced spouse has to take up gainful employment (see Federal Court of Justice (*Bundesgerichtshof* – BGH), Judgment of 23 February 1983 – IVb ZR 363/83 –, *Zeitschrift für das gesamte Familienrecht* – FamRZ 1983, p. 456 (458)). Not only the age of a child, but also his or her state of health, his or her state of development at school and in other respects, or possible behavioural disturbances, are said to play a role here (see BGH, Judgment of 26 October 1984 – IVb ZR 44/83 –, FamRZ 1985, p. 50 (51)).

Nonetheless, standards have been formed in court practice for a standard case of child development for a gradual increase in the obligation of divorced parents taking care of children to take up gainful employment, orientated in line with the child's age, and have been incorporated into the Higher Regional Courts' maintenance guidelines (see Palandt/Brudermüller, *BGB*, 66th ed., 2007, *§ 1570*, marginal nos. 8 et seq. with further references). Even if the information on the child's age, to which the obligation of a parent taking care of children to (re)assume gainful employment is to be orientated, is not completely identical in these guidelines, they nonetheless concur that no obligation to take up gainful employment exists for the parents taking care of children until a child reaches the age of eight or until the end of his or her primary schooling. In principle, part-time employment is considered to be reasonable in addition to his or her care when the child is aged between eleven and fifteen, and it is presumed in a standard case at the latest when the child reaches the age of sixteen that childcare does not stand in the way of full-time employment. This age phase concept is followed by the case-law. 5

2. a) With the entry into force of the Act on the Legal Status of Children Born out of Wedlock (*Gesetz über die rechtliche Stellung der nichtehelichen Kinder* – NEhelG) (Federal Law Gazette I (1969) p. 1243) on 1 July 1970, the mother not married to the father of her child was granted a claim against the father for the first time by the newly created § 1615 l of the Civil Code for payment of maintenance which could be granted to her for a maximum of one year after the birth of the child and was conditional on the mother either not being in gainful employment or only being restrictedly employed because the child otherwise could not be cared for. The time limit was reasoned by the first year of life being particularly significant to the favourable development of a child according to the state of psychological and pedagogical knowledge (see *Bundestag* printed paper V/2370, p. 56). 6

b) The Act Amending Assistance for Pregnant Women and Families (*Schwangeren- und Familienhilfeänderungsgesetz* – SFHÄndG) of 21 August 1995 (Federal Law Gazette I p. 1055) amended § 1615 l of the Civil Code such that the duration of the claim for childcare maintenance was extended to three years. This was then no longer permitted only to be granted if the mother was able to prove that there was no other possibility of care for her child, but indeed in all cases in which she could not be expected to take up gainful employment because of the care and bringing up of the child. It was stated as grounds that the father of a child born out of wedlock should shoulder greater responsibility in balancing the opportunities for development of chil- 7

dren who are born out of wedlock and in wedlock to make it possible for the child to be cared for by his or her mother, and hence improve the framework for his or her development. The extension of the duration of the claim to three years was to facilitate full care of the child by his or her mother until kindergarten age (see *Bundestag* printed paper 13/1850, p. 24).

c) The Act Reforming the Law of Parent and Child (*Gesetz zur Reform des Kindschaftsrechts* – KindRG) of 16 December 1997 (Federal Law Gazette I p. 2942) brought about another amendment of § 1615 l of the Civil Code. The three-year time limit on the claim was in principle retained, but was expanded to include the possibility to grant maintenance beyond this time insofar as, in particular taking account of the interests of the child, it would be grossly inequitable to refuse a maintenance claim after expiry of the three-year period. The possibility of extension was reasoned with hardships that might arise in exceptional cases if the time limits were to be applied inflexibly and such hardships were to be avoided. The child might for instance have a disability, and hence rely on more intensive care on the part of the mother, so that it would be equitable to also burden the father for the maintenance of the mother over and above the period of three years (see *Bundestag* printed paper 13/4899, p. 89). What is more, the father who cares for his child born out of wedlock has now also been granted a claim for childcare maintenance against the mother. 8

The *Bundesrat* had criticised in the legislative procedure that the arrangement allegedly continued to maintain the differences between children born in wedlock and out of wedlock with regard to maintenance without any convincing reason. Post-marital solidarity was also said not to be a suitable criterion for the differentiation. Children born out of wedlock should be placed on an equal footing with those born in wedlock with regard to the care opportunities. The *Bundesrat* proposed to apply § 1570 of the Civil Code to the maintenance claim of the mother not married with the father of her child accordingly unless such an expansion of the claim was grossly inequitable for serious reasons (see *Bundestag* printed paper 13/4899, p. 149). The Federal Government opposed this, arguing that the proposal gave too little consideration to the fact that the claim was not one of the child, but of his or her parent taking care of him or her. In realising the constitutional mandate emerging from Article 6.5 of the Basic Law, the time limit on the care-related maintenance claim was favoured by the fact that care of the child was as a rule guaranteed by other means on his or her reaching the age of three. Special situations could however require the claim to be extended (see *Bundestag* printed paper 13/4899, p. 167). The *Bundestag's* Committee on Legal Affairs had also recommended that the Government Draft be adopted without amendment. The claim of the mother against the father was said to depend on the legal nature of the relationship between the parents. This was said to justify making the claim of the divorced wife stronger in terms of post-marital solidarity than that of a mother who was not married to the father of the child (see *Bundestag* printed paper 13/8511, p. 71). 9

The relevant subsections of § 1615 l of the Civil Code in the version adopted at that time, which entered into force on 1 July 1998, and updated since then, read as follows: 10

*§ 1615 l* 11

*Maintenance claim of mother and father by reason of the birth* 12

(1) … 13

(2) To the extent that the mother is not engaged in gainful employment because as a result of the pregnancy or of an illness caused by the pregnancy or the delivery she is incapable of doing so, the father is obliged to pay her maintenance for a period exceeding the period set out in subsection (1) sentence 1. The same applies to the extent that the mother cannot be expected to be engaged in gainful employment by reason of the care or upbringing of the child. The obligation to maintain begins at the earliest four months before the birth; it ends three years after the birth unless it would be grossly inequitable, taking account of the interests of the child, to refuse a maintenance claim on expiry of this period. 14

(3) … 15

(4) If the father cares for the child, he has the claim under subsection (2) sentence 2 against the mother. … 16

d) Case-law has now formed with regard to the question of when gross inequity within the meaning of § 1615 l.2 sentence 3 of the Civil Code exists, distinguishing between “child-related” and “parent-related” reasons (see Frankfurt Higher Regional Court, Judgment of 13 October 1999 – 2 UF 335/98 –, FamRZ 2000, p. 1522 (1523); Celle Higher Regional Court, Judgment of 21 November 2001 – 21 UF 96/01 –, *FamRZ* 2002, p. 636; Karlsruhe Higher Regional Court, Judgment of 4 September 2003 – 2 UF 6/03 –, *Neue Juristische Wochenschrift* – NJW 2004, p. 523 (524); Hamm Higher Regional Court, Judgment of 4 November 2004 – 3 UF 555/01 –,NJW 2005, p. 297 (298); Düsseldorf Higher Regional Court, Judgment of 23 May 2005 – II-2 UF 125/04 –, FamRZ 2005, p. 1772). Having said that, there are not many among the published rulings in which a maintenance claim has been granted beyond the child’s third birthday. If gross inequity is presumed, the claim – where it can be ascertained – has not been granted for longer than until the child’s sixth or seventh birthday in most cases. 17

e) The question of the constitutionality of § 1615 l.2 sentence 3 of the Civil Code is the subject of controversial discussion in legal literature. For instance, the view is taken that the different manifestations of childcare maintenance violate Article 6.5 of the Basic Law in particular. It is said that there is no convincing reason to presume that it was harmless for a child born out of wedlock if, because of gainful employment of the mother, he or she had to forgo the mother’s constant attention, whilst it was pre- 18

sumed to be detrimental to the development of children born in wedlock if they were not cared for by a parent in person until the age of at least eight (see Schwab/Borth, *Handbuch des Scheidungsrechts*, 5th ed., 2004, Part IV, marginal no. 1412; Peschel-Gutzeit/Jenckel, *Familie und Recht* – FuR 1996, p. 129; Puls, FamRZ 1998, p. 865; Müller, *Der Amtsvormund* – DAVorm 2000, p. 830; Seidel, *Der Anspruch der Mutter eines nichtehelichen Kindes gegen den Kindesvater auf Betreuungsunterhalt im Lichte des Verfassungsrechts*, 1999, pp. 89 et seq.). In contrast, it is argued that the differentiation in childcare maintenance is justified by there being post-marital solidarity after the failure of a marriage which is said to give rise to an obligation to pay maintenance for a longer period, whilst there is no legal bond between unmarried partners who had children. The constitution was hence said not to require an equal position. With a not too narrow interpretation in conformity with the constitution of the equitability clause contained in § 1615 l.2 sentence 3 of the Civil Code, constitutionally objectionable outcomes could be avoided for individual cases by bringing together the duration of the maintenance claim and the claim regulated by § 1570 of the Civil Code (see Wichmann, FuR 1996, p. 161; Derleder, *Deutsches und europäisches Familienrecht* – DEuFamR 1999, p. 84; Büttner, FamRZ 2000, p. 781; Wever/Schilling, FamRZ 2002, p. 581; Hahne, *Forum Familienrecht* – FF 2006, p. 24).

f) In its judgment of 5 July 2006 – XII ZR 11/04 – (FamRZ 2006, p. 1362), the Federal Court of Justice held § 1615 l of the Civil Code to be constitutional. The different manifestation of the maintenance claim for care of a child after a dissolved marriage according to § 1570 of the Civil Code and of the claim according to § 1615 l.2 sentence 2 of the Civil Code was said to correspond to the different circumstances on which the regulations were based. The claim from § 1570 of the Civil Code was said to also be justified by Article 6.1 of the Basic Law, which protects the ongoing effect of marriage, including the maintenance arrangement. The elements of maintenance contained in § 1570 of the Civil Code and § 1615 l.2 of the Civil Code had in common that the parent with whom the joint child lived was to be released from gainful employment as long as, and to the degree that, the child required care and bringing up. In this respect, the maintenance claim of the needy spouse was also said to serve initially to ensure that parental responsibility was assumed. The vital difference was however said to lie in maintenance also being granted to the divorced spouse for his or her own sake because of post-marital solidarity, emerging from marriage, which was however not correspondingly transferable to partners in non-marital cohabitations. § 1615 l.2 of the Civil Code was said to cover a large number of different circumstances. It was said that the maintenance claim could even arise out of a relationship between the parents which had been restricted to procreation of the child; it was however also said to exist in cases in which the parents had lived together for a prolonged period without marrying, and had indeed had several children. This by itself was said to show that a differentiation was necessary, opposing treating this maintenance claim in exactly the same way as claims under § 1570 of the Civil Code. It was hence said to be constitutionally unobjectionable that, in § 1615 l.2 of the Civil Code – unlike for post-marital maintenance –, the legislature had determined a short minimum peri- 19

od, but one coordinated with state assistance, which could be extended, consideration being given to the individual case. It is said to be not immaterial to the interpretation of this provision whether the joint child had emerged from a community similar to marriage. If the partners of such a community considered themselves to be responsible for one another to such an extent that they initially made certain of their joint livelihood before they used their personal incomes to meet their own needs, their situation was said to be comparable to that of spouses. Parent-related reasons were also said to be able to thus influence the duration of the maintenance claim by these means.

The parental right contained in Article 6.2 of the Basic Law is said to protect the possibility of the parent entitled to bring up the child to ensure the care and bringing up of the child without being prevented from doing so by their own gainful employment. Where personal care by a parent was absolutely necessary, it was said to be therefore necessary to structure the maintenance claims ensuring care in an identical fashion. Particularly during the first three years of life, when the parents could not rely on state assistance in the shape of crèches, a child was said to rely on personal care, whether he or she was born in or out of wedlock. This was said to be allowed for by § 1615 l.2 of the Civil Code. Accordingly, the child was said to be entitled to a statutorily guaranteed kindergarten place. However, insofar as state assistance could not be claimed, it was said to be constitutionally required to enable a parent to bring up the child in person. This was said to be to be considered in the framework of the interpretation of § 1615 l.2 sentence 3 of the Civil Code. 20

Article 3.1 of the Basic Law was also said not to require the maintenance claims to be treated equally, given that the claim of a divorced spouse for care of a child, unlike the claim according to § 1615 l.2 of the Civil Code, was said to be simultaneously based on the ongoing impact of a dissolved marriage in addition to the child-related reasons. Whilst Article 6.5 of the Basic Law was said to place the legislature under an obligation to create the same conditions for the physical and mental development and status in society of children not born in marriage as children born in wedlock. The child's best interests protected by this fundamental rights-related provision were however said to impact the claim under § 1615 l.2 of the Civil Code only insofar as the maintenance was to enable the caring parent to facilitate the care and bringing up of the child without being prevented from doing so by gainful employment. Only to this degree was it said that the provision was covered by the protective purpose of Article 6.5 of the Basic Law, whilst the interaction in particular regarding Article 6.1 of the Basic Law had to be considered. Since the claim from § 1615 l.2 of the Civil Code was said to impact not the maintenance of the child born out of wedlock, but that of the caring parent, Article 6.5 of the Basic Law was said to require equal treatment only insofar as the maintenance of the parent had a direct impact on the development of the child and his or her social status. The legal term of gross inequity, to which the possibility of extending the maintenance claim links, was said to be interpreted broadly if the circumstances of the individual case, in spite of state assistance, did not offer a 21

guarantee that the physical and mental development of the child was safeguarded. § 1615 l.2 sentence 3 of the Civil Code was said to permit an interpretation in conformity with the constitution, accommodating child-related and parent-related reasons. Since the child-related reasons took on particular significance, an extension of the maintenance claim was said to already be conceivable if the postponement of the mother's gainful employment appeared to be expedient and in the child's best interests either in objective terms because of the special needs of the child, or the child was in particular need of care. Parent-related reasons, by contrast, might apply if the party obliged to provide maintenance had created a special trust towards the beneficiary, for instance because the parents had had the child in an expectation of a lasting co-habitation.

**II.**

The plaintiff of the initial proceedings is the mother of a child born in April 1997, cared for by her, whose father was not and is not married to her. He was sentenced in 1998 to pay maintenance to the plaintiff of DM 1,230 per month until the child reached the age of three according to § 1615 l.2 of the Civil Code, and is the defendant of the initial proceedings. In May 2001, the plaintiff had another child born out of wedlock from another man. The father of this child was obliged by the court to pay childcare maintenance to the plaintiff of € 211 per month for the period from February 2002 to May 2004. The plaintiff also has two more children from a dissolved marriage, one of whom lives with the plaintiff. 22

1. In 2002, the plaintiff applied for legal aid for intended court action against the defendant in respect of payment of childcare maintenance from February 2002 amounting to € 451 per month, whereby she deducted the maintenance payment of the father of her child born in 2001 when calculating the amount of the maintenance. Both the Local Court (*Amtsgericht*) and the Higher Regional Court rejected the application due to lack of prospects of success. The claim according to § 1615 l.2 of the Civil Code was said to be restricted in principle to three years after the birth of the child. This time limit was said not to be unconstitutional. It was said that the plaintiff had not put forward any circumstances making the time limit appear grossly inequitable. 23

The Federal Constitutional Court rescinded the rulings of the Local Court and of the Higher Regional Court by order of 4 February 2004 (Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK) 2, 275) and referred the case to the Local Court. The constitutionality of § 1615 l.2 sentence 3 of the Civil Code was said not to be a simple question or one that could be ruled on clearly or decided on in the summary legal aid proceedings. Childcare maintenance according to § 1570 of the Civil Code, and according to § 1615 l.2 of the Civil Code, was said to serve to facilitate the personal care of the child by a parent. Against this background, the constitutionality of the different manifestation of childcare maintenance with regard to the principle of the equal treatment of children who are born in wedlock and out of wedlock from Article 6.5 of the Basic Law ap- 24

peared to be at least questionable. The ruling on this question in the legal aid proceedings was said to deny the plaintiff the possibility to put forward her own point of view in greater detail in the main case proceedings and, after exhausting the legal remedies, where appropriate to have § 1615 l.2 of the Civil Code indirectly reviewed for its constitutionality by lodging a constitutional complaint.

2. After granting legal aid, the Local Court rejected the action. It was stated that it was immaterial whether and to what degree, with regard to the childcare maintenance of the plaintiff, there was a part debtorship of her divorced husband or of the father of her other child born out of wedlock, in addition to the defendant, given that § 1615 l.2 sentence 3 of the Civil Code, which caused childcare maintenance to end three years after the birth of the child, was constitutional. The plaintiff was said not to have put forward any circumstances indicating that refusal of maintenance after three years was grossly inequitable. The plaintiff submitted an appeal on points of fact and law against this, which she reasoned by claiming that the time limit in § 1615 l.2 of the Civil Code was unconstitutional. 25

**III.**

By order of 16 August 2004, the Higher Regional Court suspended the proceedings and submitted the question for a ruling to the Federal Constitutional Court of whether § 1615 l.2 second half of sentence 3 of the Civil Code was incompatible with Article 6.5 of the Basic Law. 26

1. The ruling was said to depend on the validity of the provision. If it were constitutional, the appeal on points of fact and law would have to be rejected. Reasons for gross inequity within the meaning of this provision had not been put forward. If, by contrast, the provision was unconstitutional, the same standard would have to be applied to the question of the degree to which the plaintiff could be expected to engage in gainful employment as under § 1570 of the Civil Code. Given the age of her child born in 1997, this would give rise to a continuing maintenance claim. It would still be necessary to clarify the amount of this claim in such a case, considering any partial liability of the divorced husband and of the father of her other child born out of wedlock. The defendant would however definitely have to shoulder a share of the maintenance. 27

2. According to Article 6.5 of the Basic Law, the legislation was to create the same conditions for the intellectual and mental development and status in society for children born out of wedlock as for children born in wedlock. The reason for the claim under § 1570 of the Civil Code was said to be to ensure maintenance for a parent in order to enable him or her to take personal care of the child which the legislature, and with it the supreme court case-law, still regarded as the optimum form of care in the interest of the child, and hence as a rule granted a maintenance claim until the child's tenth birthday. By contrast, the maintenance claim was said to be time-limited to three years after the birth for the personal care of a child born out of wedlock by § 1615 l.2 28

sentence 3 of the Civil Code unless it would be grossly inequitable to refuse a maintenance claim, the burden of presentation and evidence for this lying with the maintenance beneficiary. Hence as a rule, a child born out of wedlock, in contradistinction to a child born in wedlock, was to accept third-party care from the age of three since the caring parent relied on taking up gainful employment because of not having a maintenance claim. The question of until when it was most beneficial for the healthy development of a child that personal care was undertaken by a parent could however only be answered in a uniform manner already from a scientific point of view, and certainly in the light of Article 6.5 of the Basic Law.

This unequal treatment of children who are born in and out of wedlock could also not be justified with the marital solidarity which survives marriage, which was said to be missing in the case of maintenance claims according to § 1615 l.2 of the Civil Code. Just as this provision, § 1570 of the Civil Code was also said to serve to facilitate the care of the child by a parent. From the point of view of the child, however, it was said to be immaterial to the question of the time until when a parent could care for him or her personally whether his or her parents had been married with one another or not. The unequal treatment was therefore said to be in breach of Article 6.5 of the Basic Law. 29

3. It was also said that § 1615 l.2 of the Civil Code could not be made to comply with this constitutional standard by interpreting it in conformity with the constitution. It was stated that this would only be possible if gross inequity within the meaning of this provision was presumed whenever and as long as a caring parent of a child born in wedlock was granted maintenance, given that this was the only way to guarantee the necessary equal treatment. However, such a far-reaching conclusion was said not to be drawn by the proponents of an interpretation of § 1615 l.2 of the Civil Code in conformity with the constitution. It was also said to go beyond an interpretation in conformity with the constitution, given that unlike the clearly expressed intention of the legislature the relationship between rule and exception stated in § 1615 l.2 of the Civil Code would be reversed. 30

**IV.**

[…] 31-40

**B.**

The different regulation of maintenance claims for the care of children in § 1570 of the Civil Code, on the one hand, and in § 1615 l.2 sentence 3 of the Civil Code, on the other, is not compatible with the Basic Law. It is in breach of the principle contained in Article 6.5 of the Basic Law requiring the legislature to create for children born out of wedlock the same conditions for their physical and mental development as children born in wedlock. 41

**I.**

1. Article 6.5 of the Basic Law contains a constitutional mandate aiming to bring about equality and equal treatment of all children, regardless of their civil status, and which obliges the legislature to create for children born out of wedlock by means of positive regulations the same conditions for their physical and mental development as children born in wedlock. Here, the legislature may in principle not satisfy itself with merely bringing closer together the status of children born out of wedlock and that of children born in wedlock (see BVerfGE 85, 80 (88)). A child may not be placed at a disadvantage because of being born out of wedlock (see BVerfGE 25, 167 (190)). Article 6.5 of the Basic Law also prohibits children born out of wedlock being placed in an indirectly less favourable position as against children born in wedlock (see BVerfGE 88, 87 (96)). A differentiating regulation for children who are born out of wedlock is constitutionally only justified if it is absolutely necessary because of the different de facto circumstances in order to achieve the goal of the equality of children born out of wedlock with children born in wedlock. If there are no such absolute de facto reasons for the unequal treatment of children born out of wedlock, this can only be justified by colliding constitutional law, which is to be weighed up against Article 6.5 of the Basic Law (see BVerfGE 84, 168 (185), as well as re Article 3.3 of the Basic Law BVerfGE 85, 191 (209); 92, 91 (109)). 42

2. The legislature has acted in breach of this prohibition to place children born out of wedlock in a less favourable position as against children born in wedlock, which is contained in Article 6.5 of the Basic Law, by assessing differently the duration of the maintenance which a parent who takes care of a child may claim from another parent, in § 1570 of the Civil Code for the divorced spouse and in § 1615 l.2 sentence 3 of the Civil Code, for the parent of a child born out of wedlock. 43

a) § 1570 of the Civil Code and § 1615 l of the Civil Code however give rise to maintenance claims which are not for the child himself or herself, but for the parent caring for the child. Nonetheless, the question of how long this maintenance is to be paid to the carer relates to and affects the circumstances and care situation of the child. Childcare maintenance is granted for reasons of the child's best interests. It enables the parent to give personal attention to the child insofar as the child requires care or bringing up, and hence the carer cannot be expected to engage in gainful employment, as stated in identical wording in both provisions in this respect. Maintenance is hence orientated towards the child and his or her needs for personal care, and defines the circumstances in which he or she grows up (see BVerfGE 103, 89 (110)). The duration of the maintenance payment to the parent determines how long the child can be personally cared for by this parent. If it is expected, as it is in § 1615 l of the Civil Code, that the caring mother or the caring father should engage in gainful employment again after the child's third birthday, and if the maintenance claim hence ends, they are as a rule forced from this time to engage in employment in order to ensure their livelihood. The consequence of this is that they must entrust the child to third-party care at least for a time, and are only available to him or her for a restricted 44

period of time. If, by contrast, the maintenance of the mother or of the father is secured by maintenance payments which, as in § 1570 of the Civil Code, are orientated not only as to the reasons, but also in their duration towards the care interests of the child and in this respect reach – according to the case-law – far beyond the child's third birthday, the child may enjoy personal parental care for a considerably longer time. The circumstances of the children in question are hence heavily influenced by the maintenance arrangements.

b) The different assessment of childcare maintenance according to § 1570 of the Civil Code and § 1615 l.2 sentence 3 of the Civil Code, leading to different care situations of children who are born in wedlock and out of wedlock, is a direct consequence of the statutory regulation; it does not emerge solely from the interpretation of the provisions by the case-law. 45

In enacting § 1570 of the Civil Code, the legislature explicitly omitted to impose a time limit on childcare maintenance or indeed to provide aids for interpretation for the case-law as to the duration of the claim because it considered this incorrect given the diversity of circumstances (see *Bundestag* printed paper 7/650, pp. 122-123). Rather, through the utilisation of the undefined legal term "as long as", and relating the latter to the reason for the claim – because of the care and bringing up of the child –, it tied the duration of the claim to the child's need for care, and hence deliberately permitted the case-law to deal with the special circumstances of the individual case and to develop standards for a uniform case determining a child's need for care according to his or her age phases. Hence, at the same time the parent's obligation to engage in employment is lent concrete form, and the duration of maintenance is determined on that basis. The guidelines of the Higher Regional Courts set out age grades according to which personal full-time care of the child is considered to be necessary until the child reaches the age of between eight and ten, and hence it is presumed that the caring parent is not obliged to enter gainful employment. The full amount of childcare maintenance is therefore payable until then. Thereafter, only partial gainful employment is expected, the income from which is to be counted against maintenance. Only when the child reaches the age of sixteen does the obligation to take up gainful employment apply in full, and the right to childcare maintenance cease to apply as a rule. This concrete form given by the case-law in the shape of an age phase model is based on the openness of the provision, and has also not been corrected by the legislature by making the provision more precise. By contrast, considering this interpretation of § 1570 of the Civil Code by the case-law, the legislature has generally restricted maintenance to allow care for a child born out of wedlock in § 1615 l.2 sentence 3 of the Civil Code to three years, and has permitted an extension of the claim over and above this only in exceptional cases, namely if refusal would be grossly inequitable after this time has expired, in particular taking the child's interests into account. It considered this time limit to be suitable because it was said to ensure full care of the child by a parent until kindergarten age, after which there was a possibility of third-party care which was not detrimental to the child, but which on the contrary promoted his or 46

her development. It hence facilitated and approved the granting of different durations of childcare maintenance for the care of children who are born out of wedlock and in wedlock.

c) The legislature places children who are born out of wedlock at a disadvantage as against children born in wedlock by providing unequal security of personal care by a parent under maintenance law. 47

It is irrelevant here how long it is most beneficial in pedagogical and psychological terms for a child and his or her physical and mental development to be comprehensively and continually cared for by a parent. The Federal Constitutional Court does not have to find on whether or from what age onwards one must presume that a child does not incur damage if he or she is at least cared for during a certain period by other persons than his or her parents, or whether he or she does not indeed receive additional promotion by virtue of third-party care, for instance in kindergarten, and hence by being together with other children. The specialist scientists continue to discuss these questions controversially, and do not give unambiguous answers to it. It is a matter for the legislature to decide whether it intends to financially safeguard the personal care of a child by a parent, which benefits the child, through maintenance claims, it lying in the legislature's assessment prerogative as to how long it considers it suitable, weighing up the child's best interests with the interests of the, in this respect, beneficiary and debtor, to grant such a maintenance claim. If it however considers it to be necessary and beneficial to the child's best interests to maintain for the child the possibility, at least for a certain time, to experience the full attention of a parent, and thus grants to the caring parent a maintenance claim against the other parent, Article 6.5 of the Basic Law prohibits measuring with two standards and considering much longer personal care to be indicated with children born in wedlock than with children born out of wedlock. How much personal parental care and attention a child needs is not determined by whether he or she was born in or out of wedlock. 48

If, by contrast, the legislature considers it to be non-detrimental, or indeed beneficial, to the child's development for children to attend kindergarten from the age of three, and if as in § 1615 l of the Civil Code it limits the maintenance claim of the caring parent for this reason, so that this parent once more must ensure his or her maintenance through gainful employment, it may equally not apply this point of view to children born out of wedlock only. Rather, in its assessment of how long a child needs the personal care of a parent the legislature must select the same standard for children who are born out of wedlock and in wedlock and measure the duration of the maintenance claims thereby. 49

It places children who are born out of wedlock in a less favourable position if the caring parent of a child born in wedlock is as a rule granted the possibility on the basis of the statutory decision to give full personal attention to him or her at least until his or her eighth birthday with the aid of a maintenance claim granted until then, whilst the legislature considers it to be sufficient that a child born out of wedlock only receives 50

such personal care in the first three years of life, and hence restricts the maintenance claim of his or her caring parent to this period in a standard case. Hence, the legislature deprives a parent of a child born out of wedlock, in contradistinction to a parent of a child born in wedlock, from this point in time onwards, of the financial basis for the freedom to decide between personal care and third-party care of the child, and hence of necessity places a child who is born out of wedlock in the situation of being cared for elsewhere earlier than children who are born in wedlock. Even if this does not cause detriment to a child in general, a disadvantage is constituted by virtue of the fact that a child who is born out of wedlock is placed in a disadvantageous position as against a child born in wedlock because of being denied the possibility of being at the centre of parental care just as long as a child born in wedlock.

3. The unequal duration of the maintenance claims under § 1570 of the Civil Code and § 1615 l.2 of the Civil Code, which leads to children born out of wedlock being placed in a less favourable position as against children born in wedlock, is justified neither by different social situations in which the children are found, nor by differences consisting in the relationships between their parents, or by marital solidarity continuing to apply to divorced spouses, in contradistinction to parents not married to one another, which may give rise to claims to which the unmarried are not entitled. 51

a) The de facto circumstances of the children of divorced parents born in wedlock and of children born out of wedlock are fundamentally only slightly different. They live either in a family situation which the caring parent has created after divorce by virtue of a new partnership or which he or she continues in a non-marital community, or they grow up with only the caring parent. In both family constellations, the caring parent relies on his or her maintenance being safeguarded if he or she wishes to care for the child personally, whether born in or out of wedlock, and hence not to engage in gainful employment. Therefore, children who are born in wedlock and out of wedlock are equally affected if the caring parent is no longer able to claim maintenance from the other parent, and hence must take up gainful employment. They must equally forgo personal care by a parent unless the divorced spouse, the new partner or the other parent is willing to pay for the maintenance of the caring parent with no legal foundation. 52

b) Also the broad range of different living arrangements mentioned in the legislative procedure which is stated to be found with unmarried parents in contrast to married parents is unable to justify the unequal duration of the maintenance claims of parents caring for children. It is correct to state that the variance of the parental relationships from which a child born out of wedlock arises ranges from a fleeting affair to a lasting community, whilst marriage in which children are born is always planned to last, even if it may fail later. A maintenance claim which is granted because of the care or bringing up of a child is however not determined by this difference. The party obliged to provide maintenance is claimed against by law not for the sake of the other parent, but because of the child so that he or she can be cared for personally by a parent. The diversity of non-marital relationships also does not lead to different parental re- 53

sponsibility towards the child. Each legally identified parent is entitled to the parental right entrenched in Article 6.2 of the Basic Law, which also imposes on him or her the comprehensive responsibility for the living and development conditions of the child, regardless of whether the child was born in or out of wedlock or whether he or she is the product of a fleeting or established tie between his or her parents. This responsibility also includes ensuring care for the child, in a manner serving the child's best interests, by paying maintenance to the caring parent. Article 6.5 of the Basic Law prohibits making a distinction here according to the nature of the parental relationship (see BVerfGE 84, 168 (185)), given that it intends precisely to bring about the equality of children whose parents have not undertaken responsibility for one another with those children whose parents take care of one another and of their child by being married.

c) Post-marital solidarity cannot justify that, according to § 1615 l.2 sentence 3 of the Civil Code, the parent of a child born out of wedlock is only entitled to childcare maintenance until his or her third birthday, whilst according to § 1570 of the Civil Code the parent of a child born in wedlock is granted a much longer childcare maintenance claim, assessed according to age phases of the child. 54

aa) As a value-deciding fundamental provision, Article 6.1 of the Basic Law gives rise to the obligation of the state to protect and promote marriage (see BVerfGE 108, 351 (363)). This protection is enjoyed not only by the existing marriage, but also covers the consequential effects of a dissolved marriage (see BVerfGE 53, 257 (296)) and continues to impact the relationships between the divorced spouses under maintenance law (see BVerfGE 66, 84 (94)). Post-marital solidarity applies in particular where a divorced spouse cannot be expected to rely on his or her fundamental independent economic responsibility after divorce because he or she is unable to ensure his or her own livelihood through reintegration into employment due to the tasks which he or she assumed in marriage (see BVerfGE 57, 361 (379)). This in particular also applies to cases in which the divorced spouse takes care of a joint child. For this reason, in addition to safeguarding divorced spouses under maintenance law in the event that they cannot be expected to engage in gainful employment because of their age (§ 1571 of the Civil Code) or because of illness (§ 1572 of the Civil Code) or if they do not find suitable gainful employment (§§ 1573 and 1574 of the Civil Code), the legislature ensures with § 1570 of the Civil Code that a divorced spouse can claim maintenance as long as and insofar as he or she cannot be expected to engage in gainful employment because of care or bringing up of the joint child. 55

bb) That the maintenance of a divorced spouse for the care of a joint child is included in the protection provided by Article 6.1 of the Basic Law and is a result of post-marital solidarity is not a justifying reason why the duration of the maintenance orientated in line with the age of the children provides different age categories for the care of children who are born out of wedlock and in wedlock, leading to children who are born out of wedlock and in wedlock being personally cared for by a parent for different lengths of time. 56

(1) Article 6.5 of the Basic Law demands that the same living conditions are to be created for children born out of wedlock as for children born in wedlock. Hence, the constitutional provision at the same time prohibits giving privileges to children who are born in wedlock which is reasoned by invoking the protection of marriage under Article 6.1 of the Basic Law because this would particularly run counter to the equality principle. 57

This however does not rule out placing a divorced parent in a more beneficial position under maintenance law than an unmarried parent because of the protection which is enjoyed by virtue of the marital tie through Article 6.1 of the Basic Law, which indirectly may also impact the circumstances of the children living with these parents (see also Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG), Judgment of 28 February 2007 – 1 BvL 5/03 –, FamRZ 2007, p. 529). Thus, a divorced parent has a maintenance claim against the other parent regardless of the age of the child of whom he or she is taking care if he or she does not find suitable gainful employment, whilst a non-married parent has no maintenance claim against the other parent in the event of unemployment. This may also lead to different social situations for the children affected. The legislature may grant to the divorced spouse with post-marital spousal maintenance claims indirectly also benefiting the child for whom he or she cares, whilst children who are born out of wedlock are unable to benefit from such claims because their parents do not owe one another such maintenance. The legislature may also take into account here the fact that the division of tasks which the spouses agreed and practiced with one another during the marriage may cause difficulties to one of the spouses when it comes to reintegrating into working life after divorce, and may use this as a reason to grant to the spouse affected by this a maintenance claim for a certain period. 58

If however the legislature grants a maintenance claim to the divorced spouse solely because of the personal care of the joint child, Article 6.5 of the Basic Law prohibits it from making a different assessment of the duration of the personal care considered necessary for a child born in wedlock than for a child born out of wedlock. How long a child is to receive personal care from a parent is not determined by marital solidarity, but by the needs of children, which in principle do not differ for children who are born in wedlock and out of wedlock. 59

(2) It is not the case that the claim from § 1570 of the Civil Code has not been granted solely because of childcare, but rather, over and above this, it is to enable the divorced spouses not to be exposed to an obligation to take up gainful employment for a longer period in order hence to find a later and easier transition and re-entry into working life because of post-marital solidarity on assumption of childcare. The different duration of the maintenance claim granted according to § 1570 of the Civil Code in relation to the duration of the claim according to § 1615 l.2 sentence 3 of the Civil Code can hence not be justified with this. 60

(a) Such an orientation, over and above childcare, of the maintenance claim which it 61

contains can be derived neither from the wording of § 1570 of the Civil Code, nor from its history.

The wording of the provision states care or bringing up of a joint child as the only reason for granting maintenance. Also the question of the duration of the claim relates solely to this reason. The title to the provision also stresses that maintenance is granted particularly because of care of a child. The ongoing joint responsibility of the spouses for one another has also been cited in the reasoning for the Act as a reason why, despite termination of the economic relationship between the spouses by virtue of divorce, a divorced spouse can nonetheless be granted maintenance claims against the other spouse in certain cases of need. However, exclusively childcare is named in § 1570 of the Civil Code as such a case of need, and hence as a reason for derogating from the general self-responsibility of the divorced spouses, and the duration of the claim made to depend solely on how long the child requires care. For the first time in the material relating to the Act Reforming the Law on Marriage and Family Law of 16 December 1997 (Federal Law Gazette I p. 2942), the view was taken with the amendment of § 1615 l.2 sentence 3 of the Civil Code carried out therein that childcare maintenance according to § 1570 of the Civil Code was also reasoned by the additional protection purpose of post-marital solidarity, which is said to justify its more detailed elaboration as against § 1615 l.2 sentence 3 of the Civil Code (see *Bundestag* printed paper 13/8511, p. 71). 62

(b) Also taking account of this reason added subsequently by the legislature, the indication of post-marital solidarity is unable to justify the different durations of the two maintenance claims in light of Article 6.5 of the Basic Law. The decade-long interpretation and application of § 1570 of the Civil Code in case-law established by the legislature through the openness of the provision and accepted by the legislature does not provide any indication that, with the time assessment of this maintenance claim additionally over and above the need for care of the child, the circumstance is taken into account in time terms that a child-caring spouse has permanently adjusted to the jointly agreed division of tasks in marriage and that he or she is hence to be granted a longer period to reintegrate into working life. Rather, the duration of the maintenance claim from § 1570 of the Civil Code which is orientated and assessed exclusively in line with the child's age stands in opposition to the presumption and consideration of such a further reason determining the duration of the claim, and confirms that the different duration of this claim as against the claim from § 1615 l.2 sentence 3 of the Civil Code is based on a different assessment of the need for care of children who are born out of wedlock and in wedlock. This is however prohibited by Article 6.5 of the Basic Law. 63

(aa) It should now be asked here whether § 1570 of the Civil Code, in the event of its also covering maintenance owed in terms of marital solidarity over and above the child's need for care, sufficiently clearly expressed what orientation the duration of this claim stems from, over and above the period of childcare, enabling him or her to remain in the exclusive role of the caring parent. As a standard of the duration, § 1570 64

of the Civil Code only names the need for childcare. If the legislature is however additionally pursuing a further purpose with the maintenance claim, it not only must make this purpose clear in the provision, but must also state how the scope of this part of the maintenance claim is to be assessed, as the legislature should also state this if it were to create a separate maintenance claim for this purpose. § 1570 of the Civil Code does not do so.

(bb) Certainly, a considerably longer duration of the claim from § 1570 of the Civil Code, exclusively assessed in line with the age of the children, as against the claim under § 1615 l.2 sentence 3 of the Civil Code, cannot be justified with an additional purpose emerging from post-marital solidarity. The age of children is certainly a suitable link in order to determine the need of a child to be provided with personal care by a parent. This is precisely the orientation of the case-law when it assesses the existence and scope of an obligation to take up gainful employment of the caring parent by the age phases of the children and accordingly determines the duration of the maintenance claim under § 1570 of the Civil Code. According to this case-law, it should be possible as a rule for a parent to care for a child personally into primary school years, and then for the child to be under parental care for at least large stretches of the day and not to need any more care during the day from the age of sixteen. This schematic orientation by the age of the children does not permit one to recognise that the case-law grants the maintenance claim under § 1570 of the Civil Code, as against the claim under § 1615 l.2 sentence 3 of the Civil Code, for a longer period for reasons of a special needs situation of the caring parent. The age of a child is not a viable measure for determining how long a parent should be granted maintenance not because of childcare, but because of his or her trust in the role assumed during marriage in caring for the child. This would be assessable more in line with the duration of marriage or with the duration of the interruption of employment because of childcare. 65

(cc) In its ruling of 5 July 2006 (loc. cit.), the Federal Court of Justice used post-marital solidarity as a reason for the longer claim duration of § 1570 of the Civil Code, and stated that for this reason the provision also granted maintenance to the divorced parent for his or her sake. However, it did not answer the question as to why case-law, also that of the Federal Court of Justice, orientates the maintenance duration exclusively in line with the age of the children. It also left open whether it hence agrees that the three-year period for the necessary personal care of the child by his or her parent which is considered sufficient in § 1615 l.2 sentence 3 of the Civil Code and is also used as a basis there is also the timeframe in which the claim is granted for the care of the child in § 1570 of the Civil Code, whilst granting maintenance for the time far beyond this then rightly served to safeguard for the divorced parent his or her maintenance “for his or her own sake”, even though this time is also measured in line with the child’s age. 66

Taking account of this duration of the maintenance claim according to § 1570 of the Civil Code assessed by the case-law exclusively in line with the child’s age, the argument of post-marital solidarity put forward by the Federal Court of Justice proves not 67

to be able to justify the different duration of the maintenance claims according to § 1570 of the Civil Code and § 1615 l.2 sentence 3 of the Civil Code. Article 6.5 of the Basic Law particularly prohibits solely referring to marriage, and hence also to post-marital solidarity, to treat children who are born out of wedlock differently than children who are born in wedlock. If a maintenance claim is granted because of childcare and its duration is exclusively assessed in line with the child's age, and hence by how long a child requires personal care from a parent, it violates Article 6.5 of the Basic Law to categorise the need for care of children who are born out of wedlock as being shorter than for children who are born in wedlock.

4. The violation of Article 6.5 of the Basic Law caused by placing children born out of wedlock in a less favourable position as against children born in wedlock through the different duration of granting maintenance for childcare according to § 1570 of the Civil Code and § 1615 l.2 sentence 3 of the Civil Code cannot be remedied by an interpretation of § 1615 l.2 sentence 3 of the Civil Code in conformity with the constitution. 68

a) The interpretation of § 1615 l.2 sentence 3 of the Civil Code carried out by the Federal Court of Justice does not remedy the unequal treatment of children born out of wedlock in violation of Article 6.5 of the Basic Law. A broad interpretation of "gross inequity", which opens the possibility to exceptionally grant childcare maintenance beyond the child's third birthday according to § 1615 l.2 sentence 3 of the Civil Code on the assumption of its application, can lead to a situation in which greater consideration can be given to the special circumstances of the individual case with regard to the specific development of the child or to the parental situation in quite a few cases and lead to extended childcare maintenance being granted. However, the possibility remains that maintenance is restricted to three years for children born out of wedlock whose development does not show any special reasons why they need longer care, or whose parents have not lived in a trust-forming community which, in the view of the Federal Court of Justice, could also justify maintenance payment for only three years to be grossly inequitable, in contradistinction to children born in wedlock, who because of the granting of maintenance according to § 1570 of the Civil Code may experience personal care by a parent for a considerably longer period without special reasons applying. This difference, which also continues to apply with a broad interpretation of the exceptional arrangement contained in § 1615 l.2 sentence 3 of the Civil Code, does not stand up to Article 6.5 of the Basic Law since the constitutional provision also prohibits discrimination against individual groups of children born out of wedlock as against children born in wedlock (see BVerfGE 17, 148 (153-154)). 69

b) An interpretation of § 1615 l.2 sentence 3 of the Civil Code which made an exception of the restriction of the maintenance claim to three years the rule in order to do justice to Article 6.5 of the Basic Law, and which in general terms adjusted the period covered by childcare maintenance to the duration of the maintenance granted according to § 1570 of the Civil Code, would however overstep the limits of an interpretation in conformity with the constitution. 70

Such an interpretation would violate, firstly, the will of the legislature which has been expressed clearly and unequivocally to restrict the maintenance claim of a parent caring for a child born out of wedlock to three years in a standard case and only to grant a claim over and above this in exceptional cases (see BVerfGE 90, 263 (275)). Moreover, however, by these means the duration of the claim to bring about equal treatment of children who are born out of wedlock and in wedlock could only be increased to the duration of the claim granted according to § 1570 of the Civil Code. However, it lies within the sole competence of the legislature as to how to avoid a less beneficial status for children born out of wedlock as against children born in wedlock and how long it considers it to be necessary for it to be possible for children who are born out of wedlock and in wedlock to be equally cared for personally by a parent in order to orientate in line with this the length of time for which it grants a maintenance claim to the caring parent. 71

**II.**

1. § 1615 l.2 sentence 3 of the Civil Code, by contrast, does not violate the parental right protected by Article 6.2 of the Basic Law. 72

Article 6.2 of the Basic Law gives rise for parents in equal measure to the right and the obligation to care for and bring up their children. This responsibility for their child is allocated to the parents first and foremost and has to serve the child's best interests. The parental right is in this respect a right serving the interest of the child (see BVerfGE 75, 201 (218)). The maintenance arrangement carried out in § 1615 l.2 sentence 3 of the Civil Code, which grants to the parent of a child born out of wedlock a childcare maintenance claim which as a rule is restricted to three years, does not breach this right. The legislature has ensured with this arrangement that the parent caring for the child does not have to engage in gainful employment during the first three years of the child's life, but can devote himself or herself to the child and hence carry out his or her parental responsibility. The time limit of three years placed as a rule on the maintenance claim is not objectionable in light of Article 6.2 of the Basic Law. It is, firstly, within the legislature's competence of assessment as to how long it considers it to be necessary in terms of the child's best interests and reasonable for the parent obliged to provide maintenance to facilitate the personal care of the child by a parent by granting a maintenance claim to this parent. Secondly, it has granted to each child a right to a kindergarten place from the age of three. It has hence ensured that a child as a rule can experience external care from this age whilst his or her parent engages in gainful employment. It is a justifiable assessment of the legislature if it hence does not consider it to be necessary to release the caring parent from his or her obligation to take up gainful employment for a longer period, and has rather presumed by evaluating scientific studies that care of the child in kindergarten is not detrimental to him or her, but that it promotes important skills on the part of the child. This does not constitute neglect of the parental right. Rather, with the arrangement the legislature has taken into consideration the interests both of the caring parent and 73

of the parent obliged to provide maintenance, as well as those of the child, and has balanced them out. In particular, however, it has created via the equity clause contained in § 1615 l.2 sentence 3 of the Civil Code the possibility to examine in individual cases whether the cessation of the maintenance payment to the caring parent could impair the child's best interests, and for such a case has provided for an extension of the granting of maintenance. This sufficiently takes account of the parental right of the caring parent.

2. Given that the different duration arrangement of the maintenance claims according to § 1615 l.2 sentence 3 of the Civil Code and in § 1570 of the Civil Code violates Article 6.5 of the Basic Law, there is no longer scope for the review as to whether it also violates Article 3.1 of the Basic Law because it treats caring parents of children who are born in wedlock and out of wedlock unequally. Article 6.5 of the Basic Law is the material fundamental rights provision here, to which a violation of the general principle of equality is subordinated. 74

## C.

### I.

Since the violation of Article 6.5 of the Basic Law is constituted by the different arrangement of the maintenance claims because of the care of children in § 1570 of the Civil Code, on the one hand, and § 1615 l.2 sentence 3 of the Civil Code, on the other, it is not possible to hand down a nullity declaration of § 1615 l.2 sentence 3 of the Civil Code, or to hand down a declaration of the incompatibility of this provision with Article 6.5 of the Basic Law (see BVerfGE 84, 168 (186-187)). The legislature has several possibilities at its disposal to remedy the unconstitutional situation. For instance, it may bring about equal treatment of the elements regulated on by amending § 1615 l of the Civil Code, by amending § 1570 of the Civil Code or also by a new regulation on both elements. Here, it must only use as a basis an identical standard in each case as to the duration of the maintenance claim granted for childcare with children who are born out of wedlock and in wedlock. 75

The legislature is obliged to bring a constitutional transitional arrangement into being by 31 December 2008 which satisfies Article 6.5 of the Basic Law. 76

### II.

The unconstitutional situation is to be accepted until the new regulation comes into being. No order is to be handed down suspending the proceedings in which childcare maintenance is claimed according to § 1615 l of the Civil Code or according to § 1570 of the Civil Code because the legislature is not to be influenced in its decision as to how it wishes to carry out the adjustment required by Article 6.5 of the Basic Law. Suspension of all proceedings based on a claim of childcare maintenance according to § 1570 of the Civil Code and § 1615 l of the Civil Code would also lead to a tempo- 77

rary cessation of the granting of rights, a bottleneck of rulings in the family courts and after entry into force of the new regulation to a delay in processing the suspended proceedings. In light of this, it is suitable that the existing regulations continue to apply until the new regulation comes into force. The disadvantage incurred by the parents and their children born out of wedlock as against children born in wedlock until the new regulation is acceptable since the duration of the maintenance claim because of the care of a child born out of wedlock according to § 1615 l.2 sentence 3 of the Civil Code per se does not violate the child's best interests.

This decision was passed by seven votes to one. 78

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| Papier | Steiner | Hohmann-Dennhardt |
| Hoffmann-Riem | Bryde | Gaier |
| Eichberger | | Schluckebier |

**Bundesverfassungsgericht, Beschluss des Ersten Senats vom 28. Februar 2007 - 1 BvL 9/04**

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