Headnote

to the Judgment of the First Senate of 12 February 2003

– 1 BvR 624/01 –

§ 10.3 of the Fifth Book of the Code of Social Law (*Fünftes Buch Sozialgesetzbuch* – SGB V) does not violate Article 3.1 in conjunction with Article 6.1 of the Basic Law (*Grundgesetz* – GG) insofar as it treats marriages and non-marital communities differently with regard to the exclusion of children from family insurance.

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 624/01 –

Pronounced
on 12 February 2003
Mr Kehrwecker
Amtsinspektor
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

I. of the minor S(…), represented by the complainant re II and by Mr S(…),

II. of Ms G(...),

– authorised representative: Rechtsanwalt […] –

1. directly against

a) the order of the Federal Social Court (*Bundessozialgericht*) of 25 January 2001 […] –,

b) the judgments of the Bavarian Regional Social Court (*Bayerisches Landessozialgericht*) of 9 December 1999 – […] – and of 8 June 1995 – […],

c) the judgment of the Augsburg Social Court (*Sozialgericht*) of 26 October 1993 – […],

d) the notices of the Barmer Ersatzkasse [a substitute social health insurance fund] of 17 July 1992 and 30 June 1997 in the version of the notices ruling on objection of 11 November 1992 – […] – and of 12 August 1997 – […] –,

2. indirectly against § 10.3 of the Fifth Book of the Code of Social Law (*Fünftes Buch Sozialgesetzbuch* – SGB V),

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 20 November 2003:

Judgment:

The constitutional complaint is rejected as unfounded.

R e a s o n s :

A.

The constitutional complaint relates to the contribution-free co-insurance of family members, and in particular of children, in statutory health insurance in accordance with § 10 of the Fifth Book of the Code of Social Law, so-called family insurance. 1

I.

Since the Act on Structural Reform in the Healthcare System (Health Reform Act) (*Gesetz zur Strukturreform im Gesundheitswesen – Gesundheits-Reformgesetz* – GRG) of 20 December 1988 (Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I p. 2477) came into force on 1 January 1989, family insurance has been governed by § 10 of the Fifth Book of the Code of Social Law. Today's regulation, insofar as its fundamental concept is concerned, is part of a long tradition under social insurance law (for more details see Gerlach/Epping, *Die Familienversicherung*, 4th ed. 1994, pp. 10 et seq.). The Reich Insurance Code (*Reichsversicherungsordnung* – RVO) already provided under certain preconditions for benefits to be provided to family members (family assistance). In contradistinction to family assistance, family insurance as set out in the Fifth Book of the Code of Social Law gives rise to independent benefit rights 2

of the co-insured family member. Their status as insured parties is however accessory to the membership of the main insured party. § 10 of the Fifth Book of the Code of Social Law in the version of Article 1 of the Health Reform Act, in so far as it is of significance to the case at hand, reads as follows:

§ 10

Family insurance

(1) Insurance shall cover the spouse and the children of members if such family members

1. have their place of residence or habitual residence within the area of application of this Code,

2. are not insured in accordance with § 5.1 nos. 1 to 8, 11 or 12, or are not voluntarily insured,

3. are not exempt from insurance or are not exempt from obligatory insurance; exemption from insurance in accordance with § 7 shall not be considered here,

4. are not self-employed on a full-time basis, and

5. do not have a joint monthly income regularly in excess of one-seventh of the monthly reference value in accordance with § 18 of the Fourth Book; with pensions, the payment amount shall be authoritative.

(2) Children shall be insured

1. until reaching the age of eighteen,

2. until reaching the age of twenty-three if they are not in gainful employment,

3. until reaching the age of twenty-five if they are in school or vocational training or are rendering a voluntary social year within the meaning of the Act to Promote a Voluntary Social Year (*Gesetz zur Förderung eines freiwilligen sozialen Jahres*); if the school or vocational training is interrupted or delayed by the child fulfilling a statutory duty to render a service , insurance shall also exist for a period corresponding to the duration of this service over and above the age of twenty-five,

4. without an age limit if they are unable to maintain themselves because of physical, mental or psychological disability; the prerequisite shall be that the disability existed at a time when the child was insured in accordance with no. 1, 2 or 3.

(3) Children shall not be insured if the spouse of the member related to the children is not a member of a health insurance fund and his or her total income per month regularly exceeds one-twelfth of the annual remuneration threshold and is regularly higher than the total income of the member; with pensions, the payment amount shall be authoritative. 16

(4) [to] (5) […] 17-18

§ 3 sentence 3 of the Fifth Book of the Code of Social Law provides that no contributions are to be levied for insured family members. § 243.2 sentence 2 of the Fifth Book of the Code of Social Law stipulates that contributions graduated by marital status or by the number of the family members who are covered by family insurance in accordance with § 10 of the Fifth Book of the Code of Social Law are not permissible. If a child is excluded from family insurance on the basis of § 10.3 of the Fifth Book of the Code of Social Law, § 9.1 no. 2 of the Fifth Book of the Code of Social Law opens the possibility to take up statutory health insurance. This right to take up cover has been linked since 1 January 2000 to the prerequisite of a prior insurance period. Family insurance benefits 14.6 million children and roughly 7 million spouses. The total annual benefit expenditure paid out by the health insurance funds for family insurance is stated at Euro 15 billion and more (Ruland, *Neue Juristische Wochenschrift* – NJW 2001, p. 1673 (1678 marginal no. 35)). § 10 of the Fifth Book of the Code of Social Law has undergone several amendments since coming into force. The Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*) of 16 February 2001 (Federal Law Gazette I p. 266) gave § 10.3 of the Fifth Book of the Code of Social Law the following version: 19

Children shall not be insured if the spouse or civil partner of the member related to the children is not a member of a health insurance fund and his or her total income per month regularly exceeds one-twelfth of the annual remuneration threshold and is regularly higher than the total income of the member; with pensions, the payment amount shall be authoritative. 20

II.

The complainant re I is the son, born in 1992, of the complainant re II, who is married to the father of the complainant re I. The parents live in a domestic community with the son. 21

Since the birth of the complainant re I, the complainant re II, apart from an interruption of roughly 1 1/2 years, has been subject to obligatory insurance with the defendant in the original proceedings, a substitute social health insurance fund. Her regular monthly total income was roughly DM 3,400 at the time of filing the constitutional complaint. Her husband is a civil servant, has private health insurance and is entitled to government aid for civil servants for the complainant re I at a rate of 80 %. The par- 22

ents have concluded private health insurance for the complainant re I. in respect of the cost of illness not covered by the government aid […]. The father of the complainant re I had a monthly total income of between DM 6,375 and DM 7,887 during the period from 1992 to 1999.

The defendant in the original proceedings refused to provide contribution-free family insurance for the complainant re I for the periods in which the complainant re II was an obligatory member, referring to § 10.3 of the Fifth Book of the Code of Social Law. The appeals against this were unsuccessful. The Federal Social Court considers the exclusion regulation of § 10.3 of the Fifth Book of the Code of Social Law to be constitutional. […] 23

III.

With their constitutional complaint the complainants challenge § 10.3 of the Fifth Book of the Code of Social Law and the administrative and court rulings based thereon. The regulation is said to violate Article 3.1 in conjunction with Article 6.1 of the Basic Law because it allegedly does not apply to children whose parents are not married with one another. There are said to be no reasons justifying the unequal treatment constituted thereby. […] 24

IV.

[…] 25-29

V.

[…] 30

B.

The constitutional complaint is unfounded. 31

I.

§ 10.3 of the Fifth Book of the Code of Social Law is compatible with Article 6.1 and Article 3.1 of the Basic Law insofar as it excludes from contribution-free family insurance children of parents who are married with one another if the total income of the parent who is not a member of a statutory health insurance fund is higher than that of the member and than income thresholds established by the law. 32

1. § 10.3 of the Fifth Book of the Code of Social Law is not in contradiction with Article 6.1 of the Basic Law. 33

a) Article 6.1 of the Basic Law requires as an binding value determination for the entire area of private and public law relating to marriage and the family special protection through the state system (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 105, 313 (346); estab- 34

lished case-law). As a fundamental provision, a general duty can be derived therefrom obliging the state to promote the family by means of suitable measures (see BVerfGE 103, 242 (259)). The legislature however has latitude in deciding on the manner in which it intends to implement the protection which it is obliged to provide. The general duty incumbent on the state can be derived from Article 6.1 of the Basic Law in conjunction with the social welfare state principle to provide compensation for family burdens, but not the decision on the degree to and the manner in which such social compensation is to be effected. Concrete claims in respect of specific state benefits cannot be derived from the promotion requirement of Article 6.1 of the Basic Law (see BVerfGE 82, 60 (81)). This also applies to the design of the statutory health insurance system.

b) In line with these principles, § 10.3 of the Fifth Book of the Code of Social Law is in compliance with Article 6.1 of the Basic Law. The contribution-free insurance of children of the member of a statutory health insurance fund in accordance with § 10.1, 10.2 and 10.4 of the Fifth Book of the Code of Social Law is a measure of social compensation which is intended to relieve the burden on the family. Article 6.1 of the Basic Law does not demand in the design of the family insurance system that its benefits must be provided regardless of the income circumstances of parents who are married with one another. In determining the group of individuals which it includes in family insurance, and in deciding on the preconditions under which it excludes children from it, the legislature may take as a basis the economic ability to pay of those concerned, and in particular of the parents, and hence apply the point of view of the need for social protection. Article 6.1 of the Basic Law does not prohibit it from making the advantages of contribution-free health insurance of the children conditional on such an examination. 35

2. The characteristics used as a basis by the legislature in § 10.3 of the Fifth Book of the Code of Social Law for the exclusion of children from family insurance meet the requirements of the general principle of equality of Article 3.1 of the Basic Law. 36

a) Article 3.1 of the Basic Law requires that all people are treated equally before the law. This does not however prohibit the legislature all differentiation. But the legislature violates the fundamental right if it treats one group of persons addressed by a provision differently in comparison to another although there are no differences between the two groups of such a nature and weight that they could justify the unequal treatment (see BVerfGE 104, 126 (144-145); established case-law). 37

b) § 10.3 of the Fifth Book of the Code of Social Law places married individuals at a disadvantage insofar as their children are excluded from family insurance in accordance with this provision, in contradistinction to those married individuals to whom the preconditions for exclusion do not apply and whose children are hence co-insured contribution-free. Those children who meet the preconditions of § 10.1, 10.2 and 10.4 of the Fifth Book of the Code of Social Law for a right to co-insurance, but – like the complainant re I – fall under the exclusion provision of § 10.3 of the Fifth Book of the 38

Code of Social Law, are also placed at a disadvantage.

c) These disadvantages are however sufficiently justified. In § 10.3 of the Fifth Book of the Code of Social Law, the legislature uses income-related characteristics in the application of which typically the need for social protection of the married parents and their children can be negated. It is expedient to exclude children from contribution-free family insurance if the total income of the parent who is not a member of a health insurance fund exceeds the annual remuneration threshold within the meaning of § 6.1 no. 1 of the Fifth Book of the Code of Social Law. This value corresponds to the amount of the earnings – even if not of the total earnings – upwards of which an employee is no longer subject to obligatory insurance in the statutory health insurance fund because the legislature no longer regards him or her as being in need of protection (§ 5.1 no. 1 in conjunction with § 6.1 no. 1 of the Fifth Book of the Code of Social Law; see BVerfGE 102, 68 (89)). 39

The link to income in § 10.3 of the Fifth Book of the Code of Social Law is however also expedient insofar as children remain in family insurance if the total income of the member is not less than that of the non-member, regardless of the ratio of the income of the non-member to the annual remuneration threshold. Exclusion from family insurance accordingly takes place only if the parent who does not have statutory health insurance can be made primarily responsible for insuring his or her children against the risk of illness because his or her higher total income exceeds the annual remuneration threshold. If, by contrast, the parent with statutory insurance has a higher income, and the family insurance of the children is therefore retained, this is justified because the member pays correspondingly high contributions up to the assessment limit (§ 223.3 of the Fifth Book of the Code of Social Law) to the community based on solidarity, and at the same time makes a material contribution to the family income. 40

II.

§ 10.3 of the Fifth Book of the Code of Social Law does not violate Article 3.1 in conjunction with Article 6.1 of the Basic Law insofar as it relates to the different treatment of marriages and non-marital communities with regard to the family insurance of children. 41

1. Constitutional standard for the unequal treatment of marriages and non-marital communities by the provision contained in § 10.3 of the Fifth Book of the Code of Social Law is Article 3.1 in conjunction with Article 6.1 of the Basic Law (see BVerfGE 67, 186 (195)). It is a matter of the question of placing marriage at a disadvantage in comparison with non-marital communities with regard to the family insurance of the children in statutory health insurance, for whose benefits the community of insured parties must pay. It should be taken into account in this examination of equality that Article 6.1 of the Basic Law imposes limits on the freedom of the legislature as to which circumstances it treats equally and which unequally (see BVerfGE 103, 242 (258)). The legislature is prohibited from discriminating against marriage in compari- 42

son with other communities (see BVerfGE 69, 188 (205-206); 75, 382 (393)), in particular against married people as against unmarried people, in granting legal advantages (see BVerfGE 67, 168 (195-196); 75, 382 (393)). A statutory disadvantage is however to be accepted in some aspects where the general trend of the law aims to compensate for family burdens, and in doing so partly favours married individuals whilst partly placing them at a disadvantage, but in an overall view the statutory provision does not however place married couples at a disadvantage.

2. Accordingly, § 10.3 of the Fifth Book of the Code of Social Law is not objectionable. 43

a) Insofar as its preconditions are met, the regulation does initially place members of statutory health insurance who are married to the other parent of the joint children at a disadvantage by virtue of the exclusion of the children from family insurance, if the income-related preconditions of § 10.3 of the Fifth Book of the Code of Social Law apply, in comparison to unmarried members with regard to whom such exclusion does not take place. If in a non-marital community the total income of the parent who is not a member of the health insurance fund exceeds the income threshold of § 10.3 of the Fifth Book of the Code of Social Law, this does not – in contradistinction to the situation pertinent to married parents – oppose co-insurance of the child with the parent who has statutory insurance. 44

b) This different treatment does not however place married people at a disadvantage in an overall view. 45

aa) The provisions on family insurance contained in § 10 of the Fifth Book of the Code of Social Law provide for legal advantages which apply only in the event of marriage. For instance, in accordance with § 10.1 of the Fifth Book of the Code of Social Law, the spouse who is a member of statutory health insurance can confer contribution-free insurance cover in statutory health insurance on the other spouse who is not himself or herself a member of statutory health insurance. Such a possibility is not open to partners in a non-marital community. Roughly 7 million spouses are co-insured on the basis of this provision. What is more, in accordance with § 10.4 of the Fifth Book of the Code of Social Law, step-children of the spouses who have statutory insurance are also included in family insurance. 46

bb) The exclusion of the marital child of parents who are married with one another from family insurance under the preconditions of § 10.3 of the Fifth Book of the Code of Social Law in relation to non-marital children is however also justified from the point of view that more effective protection is provided in a marriage for the health insurance cover of a child outside family insurance on the basis of the mutual obligations under maintenance law which arise thereby than is the case in a non-marital community. At the same time, maintenance law as it now stands in principle places marital and non-marital children on an equal footing (§§ 1601 et seq. of the Civil Code (*Bürgerliches Gesetzbuch* – BGB)). Also the maintenance right of the non-marital child includes the cost of suitable health insurance protection […] However, the partners of a 47

non-marital community do not owe statutory maintenance to one another, in contradistinction to spouses, (see also BVerfGE 75, 382 (395)). The law as it stands only provides for an obligation to furnish family maintenance between spouses (§ 1360 of the Civil Code). This maintenance is owed to the other spouse, but is also orientated towards the needs of the joint children, who are entitled to maintenance […], particularly also in making provision against illness.

The right under § 1615 l of the Civil Code to care maintenance, which also benefits children, cannot compensate for the fact that parents who are not married to one another do not have a right to family maintenance. Care maintenance is time-limited. It is to be provided to the mother in principle only for the period from six weeks before until eight weeks after birth of the child against his or her father (§ 1615 l.1 of the Civil Code). Insofar as § 1615 l.2 of the Civil Code grants to the mother a maintenance right against the father of the child over and above this for up to three years, and also beyond this period in cases in which such a time limitation would be grossly unfair, this is contingent on the mother being unable for specific reasons to engage in gainful employment, or it being unreasonable to expect her to do so. The degree of maintenance is in line with the circumstances of the mother only (§ 1610.1 of the Civil Code). The spouse and minor unmarried children of the father precede the mother in application of § 1609 of the Civil Code (§ 1615 l.3 2nd half of sentence 3 of the Civil Code). 48

III.

[…] 49

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

Bundesverfassungsgericht, Urteil des Ersten Senats vom 12. Februar 2003 - 1 BvR 624/01

Zitiervorschlag BVerfG, Urteil des Ersten Senats vom 12. Februar 2003 - 1 BvR 624/01 - Rn. (1 - 49), http://www.bverfg.de/e/rs20030212_1bvr062401en.html

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