On the legal position of the (putative) natural, but not legal, father – on the constitutionality of §§ 1600 and 1685 of the German Civil Code and § 1711 of the German Civil Code, old version.

“Biological father case”

HEADNOTES:

1. **Article 6.2 sentence 1 of the Basic Law (Grundgesetz – GG) protects the natural father who is not at the same time the legal father (known as the biological father) in his interest in taking the legal position of father. He must be given the possibility under procedural law of attaining the legal position of father if the protection of a family relationship between the child and its legal parents does not conflict with this.**
2. **The biological father, together with his child, is also a family of the kind protected by Article 6.1 of the Basic Law if there is a social and family relationship between him and the child. The protection of fundamental rights also includes the interest in preserving this relationship. It is a violation of Article 6.1 of the Basic Law if the biological father who has a relationship of this kind with his child is denied contact with the child even though the contact is in the interests of the child’s welfare.**
3. **On the constitutionality of §§ 1600 and 1685 of the German Civil Code and § 1711.2 of the German Civil Code (Bürgerliches Gesetzbuch – BGB), old version**

Order of the First Senate of 9 April 2003

– 1 BvR 1493/96, 1724/01 –</2>

in the proceedings on the constitutional complaints

1. of Mr. L.

…

against a) the order of the Cologne Higher Regional Court (Oberlandesgericht) of 14 June 1996 – 16 Wx 105/96 –,

b) the order of the Cologne Regional Court (Landgericht) of 5 September 1995 – 1 T 657/94 –,

c) the order of the Cologne Local Court (Amtsgericht) of 25 January 1994 – 52 X 138/93 – 1 BvR 1493/96,

2. of Mr. A-K.

…

against a) the judgment of the Cologne Higher Regional Court of 30 August 2001 – 14 UF 119/01 –,

b) the judgment of the Leverkusen Local Court of 28 February 2001 – 30 (33) F 223/00 – 1 BvR 1724/01 –.

RULING:

I. 1. § 1685 of the German Civil Code in the version of the Act on the Reform of Parent and Child Law (Gesetz zur Reform des Kindschaftsrechts, Kindschaftsrechtsreformgesetz – KindRG) of 16 December 1997 (Federal Law Gazette, Bundesgesetzblatt – BGBl I p. 2942) is incompatible with Article 6.1 of the Basic Law (Grundgesetz – GG) to the extent that it excludes from the group of persons permitted contact with the child the natural father who is not the legal father, even if there is or has been a social and family relationship between him and the child.

2. The legislature is instructed to pass a provision in conformity with the constitution by 30 April 2004. Legal proceedings are to be stayed until the statute is amended to the extent that the decision depends on the constitutionality of § 1685 of the Civil Code.

3. The order of the Cologne Higher Regional Court of 14 June 1996 – 16 Wx 105/96 –, the order of the Cologne Regional Court of 5 September 1995 – 1 T 657/94 – and the order of the Cologne Local Court of 25 January 1994 – 52 X 138/93 – violate the complainant’s fundamental right under Article 6.1 of the Basic Law. The orders are reversed. The matter is referred back to the Cologne Local Court.

4. The Federal Republic of Germany is ordered to reimburse the complainant his necessary expenses.

II. 1. § 1600 of the Civil Code (Bürgerliches Gesetzbuch – BGB) in the version as amended by the Act on the Reform of Parent and Child Law is incompatible with Article 6.2 sentence 1 of the Basic Law to the extent that without exception it excludes the natural father of a child who is not the legal father from challenging an acknowledgment of paternity.

2. The legislature is instructed to pass a provision in conformity with the constitution by 30 April 2004. Legal proceedings are to be stayed until the statute is amended to the extent that the decision depends on the constitutionality of § 1600 of the Civil Code.

2. The judgment of the Cologne Higher Regional Court of 30 August 2001 – 14 UF 119/01 – and the judgment of the Leverkusen Local Court of 28 February 2001 – 30 (33) F 223/00 – violate the complainant's fundamental right under Article 6.2 sentence 1 of the Basic Law. The judgments are reversed. The matter is referred back to the Leverkusen Local Court.

3. The Federal Republic of Germany is ordered to reimburse the complainant his necessary expenses.

GROUNDS:

A.

The constitutional complaints relate to the legal position of the (putative) natural father of a child who is not the legal father of the child (known as the biological father). In particular, they relate to the question as to whether such a father enjoys the protection of Article 6.2 sentence 1 and Article 6.1 of the Basic Law and whether it is possible to derive from this a right to challenge the legal paternity in order to determine that he himself is the father and to be granted contact with the child. 1

I.

1. Since the Act on the Reform of Parent and Child Law (*Gesetz zur Reform des Kindschaftsrechts, Kindschaftsrechtsreformgesetz – KindRG*) of 16 December 1997 (Federal Law Gazette I p. 2942) came into force on 1 July 1998, § 1592 of the Civil Code has provided that the father of a child is either the man who at the date of the birth was married to the child's mother (no. 1) or the man who acknowledged paternity (no. 2), and, finally, the man whose paternity is judicially established under § 1600.d of the Civil Code (no. 3). In this respect, there has been no material alteration of the legal position existing until then. Under the previous law too, the father of a child that was born to its mother after her marriage was her husband, if he had cohabited with her during the conception period (§ 1591.1 of the Civil Code, old version). In the case of illegitimate children, paternity was established by acknowledgment or by judicial decision (§ 1600.a of the Civil Code, old version). 2

The mother of a child is the woman who bears it (§ 1591 of the Civil Code). The acknowledgment of paternity now no longer requires the consent of the child or of its legal representative (§§ 1600.c and 1600.d of the Civil Code, old version), but in principle only the consent of the mother (§ 1595.1 of the Civil Code). The recognition is not effective as long as the paternity of another man exists (§ 1594.2 of the Civil Code). The paternity of the mother's husband and of the man who acknowledged the paternity can be challenged. § 1600.1 of the Civil Code, which governs this today, reads: 3

(1) Entitlement to challenge the paternity lies with the man whose paternity exists under § 1592 no. 1 and 1592 no. 2 ... above, the mother and the child. 4

If there is no paternity under § 1592 no. 1 and § 1592 no. 2 of the Civil Code, it is to be established by the Family Court upon an action by the man against the child or upon an action of the mother or of the child against the man (§ 1600.d.1 and § 1600.e.1 of the Civil Code). 5

If a man other than the man who was married to the mother at the date of the child's birth, or than the man who has recognised paternity, is the natural father of the child, or if someone claims to be the natural father of the child, then under law applicable today he can still neither challenge the existing legal paternity nor commence legal proceedings for a determination of his paternity. 6

The legislature justified its exclusion of the biological father from the right to challenge the paternity on the following grounds: it could not be denied that the biological father had an interest in the challenge, since his own paternity could only be determined after there had been a challenge. In view of the rights of challenge of the other persons involved, however, it considered that the natural father did not have a right of challenge of his own. If the other persons involved did not exercise their rights of challenge, this argued in favour of concluding that a challenge would be at odds with the welfare of the "social family". The natural father must be expected to respect the lack of a right to challenge (see *Bundestag* document, *Bundestagsdrucksache – BT-Drucks* 13/4899, pp. 57-58). 7

2. a) Until the Act on the Reform of Parent and Child Law entered into force, the parent of a legitimate child who did not have the care for the person of the child had a right of contact with the child (§ 1634 of the Civil Code, old version). But contact with the father of an illegitimate child was normally decided by the child's mother or another person with custody over the child (§ 1711.1 of the Civil Code, old version). However, the guardianship court was able to grant the father a right of contact under the aspect of the welfare of the child. 8

§ 1711 of the Civil Code, old version, read as follows: 9

(1) The person who is entitled to the care for the person of the child decides on the contact between the child and the child's father. … 10

(2) If personal contact with the father serves the welfare of the child, the guardian- 11

ship court may rule that the father has the right to personal contact. …

(3) and (4) … 12

b) With the Act on the Reform of Parent and Child Law, the legislature has given up the distinction between legitimate and illegitimate children in the right to contact as elsewhere and has newly structured the law of contact. Now the child, irrespective of its family status, under § 1684.1 of the Civil Code has a right to contact with each parent, and each parent in turn has the right and the duty to have contact with the child. In addition to the parents, § 1685 of the Civil Code also grants the grandparents, siblings, and the spouse or former spouse, or now also civil partners a right of contact with the child subject to specific requirements in each case. The statute contains no more extensive right of contact with the child. 13

§ 1685 of the Civil Code, in its present version, reads as follows: 14

(1) Grandparents, brothers and sisters have a right to contact with the child if this serves the welfare of the child. 15

(2) The same applies to the spouse or former spouse and the civil partner or former civil partner of a parent, where this person lived in domestic community with the child for a long period, and to persons with whom the child has spent a long period as a foster child. 16

(3) … 17

This extension of the right of contact to persons other than the parents was justified by the legislature on the grounds that, in view of the strengthening of the right of contact for the parents of illegitimate children, it seemed natural no longer to completely exclude other persons apart from the parents to whom the child related from the right of contact. However, the legislature stated that a great increase in contact disputes should be avoided. For this reason, the right of contact was being restricted to those persons to whom the child related who were normally particularly close to the child, and recognised only if the contact served the welfare of the child. In examining the question as to whether this was the case, the newly created § 1626.3 sentence 2 of the Civil Code, it stated, might be helpful; this provided that the welfare of the child normally also includes contact with persons to whom the child has ties, if it is advantageous for the development of the child to preserve these (see *Bundestag* document 13/4899, pp. 106-107). 18

II.

1. a) According to a blood group test of the year 1990, the complainant in the proceedings 1 BvR 1493/96 is beyond all doubt the natural father of a child born legitimate in 1989, with whose married mother he had a relationship. Three to four months before the birth of the child, the complainant separated from the mother, but several months after the birth he resumed the relationship, which finally ended in 1992. During this period, the mother lived with the child apart from her husband in the marital 19

home, and in 1992 the husband returned there. The complainant had his own flat.

It remained disputed how intensive the contact was that existed between the complainant and the child during the time when the complainant had a relationship to the child's mother. While the complainant states that he looked after the child several times a week, and that therefore a close and intensive emotional relationship between him and the child developed, the child's mother submits that the complainant looked after the child only by the hour. Because the complainant was unreliable and behaved high-handedly, and because she wanted to live together with her husband again, she states that she then reduced the contact further. At no time, according to the child's mother, were there family relationships between her, the complainant and the child. 20

Since March 1993 the complainant has had no further relations with the child. He paid maintenance for the child and took out an insurance policy for the child. The mother states that this was done without her desire and was intended to induce her husband to contest the legitimacy of the child. 21

In 1994, the Local Court dismissed the complainant's application to be granted a right of contact with the child and ordered him not to remain in the immediate vicinity of the child's current home, to avoid all meetings with the child and not to lie in wait for the child. Because there was no legal connection between the complainant and the child, there was no right of contact under § 1634 of the Civil Code, old version. Since the complainant was not the father of an illegitimate child either, § 1711 of the Civil Code, old version, did not apply. It could not be found that there had been an abuse of the right of custody, and therefore § 1666 of the Civil Code also did not apply. It was problematical for a child to have to distinguish more than one mother and father when it was very young. The complainant was to keep away from the child, in order that the problems of identification were not aggravated for the child. 22

The complainant filed an immediate appeal against this decision, and the Regional Court dismissed this on the same grounds. The Higher Regional Court held that the complainant's further appeal was inadmissible. It stated that the complainant could not be permitted to have a more favourable procedural position than the father of a child born illegitimate, for whom a further appeal under § 63.a of the Act on Non-Contentious Matters (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit – FGG*), old version, was excluded in contact proceedings. This provision, the court held, was at present still constitutional and in the case of the complainant it applied by analogy. 23

b) The constitutional complaint is directed against the judicial decisions; in it, the complainant challenges a violation of Article 1, Article 2.1, Article 3.1 and 3.2, Article 6.1, 6.2 and 6.3, Article 19.4 and Article 20.3 of the Basic Law and Article 103.1 of the Basic Law in conjunction with Article 6, Article 8 and Article 14 of the European Convention on Human Rights. 24

A claim of the biological father to contact with his child followed, he submitted, both from Article 8.1 of the European Convention on Human Rights and from Article 6.2 of the Basic Law. He was a subject of parental rights, since this was a natural right and did not depend on recognition under civil law. The refusal of the right of contact was an encroachment upon his right under Article 6.2 of the Basic Law. When the welfare of the child and the positions under fundamental rights of the legal parents and of the biological father were weighed against each other, the interest of the child and of the biological father in contact carried greater weight, if it had been established that he was the father and there had been at least regular contact, as there had been in his own case. The claim to contact also rose from Article 6.1 of the Basic Law, since the concept of family also covered the relationship of the biological father to his natural child, and the relationship between himself and the child was close and intensive. 25

In order to assess whether the requirements of § 1666 of the Civil Code are satisfied, the opinion of a judicially appointed independent expert should have been obtained as requested in his application. There was a violation of the principle of proportionality, since the parties to the original proceedings were given no possibility of coming to an agreement. An expert could have been appointed in this connection too. In addition, neither the Youth Welfare Office (*Jugendamt*) nor the parents or the child had been heard. The child had not had separate representation and had therefore not been adequately represented. It was a violation of Article 6.1 and 6.2 of the Basic Law that the rejection of the application for contact had in particular been made without any time limitation. With regard to the prohibition of contact, the court had failed to establish that the welfare of the child was endangered. Finally, the Higher Regional Court ought not to have applied § 63.a of the Act on Non-Contentious Matters (old version) by analogy. 26

2. a) The complainant in the proceedings 1 BvR 1724/01, a Palestinian with Israeli nationality, first tried to acknowledge paternity of the child born in November 1998. He was informed that the mother of the child did not want a determination of paternity. Thereupon the complaint made an application to the Local Court for a declaration that he was the father of the child. 27

Presenting evidence, he submitted that since 1991 he had had a relationship with the child's mother and since 1997 had lived with her. He had been present when the child was born and had cut the umbilical cord. The child had been a planned child. With the mother, he had made all the preparations for the birth and, for example, furnished the nursery. The name of the child, an Arabic name, had also been chosen together with the mother. The mother of the child had never expressed doubts as to his paternity of the child. With his dark eyes and hair, his skin colour and his features, the child also looked like the complainant. In the first three to four months after the birth, he had looked after the child for the majority of the time, since the mother had worked in the mornings. After this, there had been tensions between them and then he had broken up with her. There had been arguments about, among other things, the fact that the mother had not named him as the father of the child at the registry office. 28

In the name of the defendant child, the mother pleaded lack of knowledge of all the submissions of the complainant and pointed out that meanwhile, in October 2000, another man had acknowledged the paternity. Hereupon, the complainant petitioned in the alternative for a declaration that this man was not the father of the child. 29

The Local Court dismissed the action. It stated that a determination of paternity was admissible under § 1600.d.1 only if there was no other paternity under § 1592 no. 1 or no. 2 of the Civil Code. But in the present case there now was another paternity, following the acknowledgment of paternity of another man with the consent of the mother. The determination of a different paternity was therefore barred. It was also inadmissible for the complainant to challenge the paternity of the person acknowledging paternity, since under § 1600 of the Civil Code only the man whose paternity exists under § 1592 nos. 1 and 2 and § 1593 of the Civil Code, the mother of the child and the child itself were entitled to challenge. In contrast, the legislature deliberately excluded the biological father from making a challenge. There were no constitutional objections to this provision. 30

The Higher Regional Court dismissed the complainant's appeal. Positive judicial determination of paternity was not admissible even if, as in the present case, acknowledgment was made by another man and the consent of the mother was given only in the course of the proceedings at first instance. Furthermore, the Federal Court of Justice (*Bundesgerichtshof* (*Zeitschrift für das gesamte Familienrecht – FamRZ*) 1999, p. 716) has already stated that the legislature deliberately restricted the positive determination of paternity to the cases in which there is no other paternity involved. The action of another man, even that of the biological father, as a general rule went directly against the welfare of the social family if the other persons involved did not exercise their rights of challenge. Admittedly, the biological father too was in principle a subject of the right of paternity under Article 6.2 of the Basic Law. But the interest of the biological father conflicted with the interest of the child, which was also constitutionally protected, in being able to grow up undisturbed in its familiar social connections, and the interest of the mother in keeping these social connections undisturbed in her own interest. 31

This also applied if the mother did not live with the man who had acknowledged the paternity. The legal system was permitted to protect social connections instead of taking a purely biological standpoint. If a man wanted to be a father, he could marry the woman first or, at times of agreement, make a formal acknowledgment of paternity, to which the woman would then consent. This adequately protected his rights. The child's fundamental rights too were protected. The child, represented by its mother or, after reaching the age of majority, itself could challenge the paternity and thereafter file an action for a positive declaratory judgment. It followed from this that the restriction of the persons entitled to file a challenge in § 1600 of the Civil Code was unobjectionable even if the putative biological father wanted to satisfy the requirements for a positive determination of paternity in this way. 32

b) In his constitutional complaint, the complainant challenges a violation of his fundamental right under Article 6.2 of the Basic Law. 33

It follows from parental rights, he submits, that the biological father of a child must as a matter of principle be accorded the possibility of challenging the paternity of an ostensible father and having his own paternity determined. This applied at least if there was a personal relationship between him and the child and in contrast there was no personal relationship between the ostensible father and the child or there were no family bonds. In this case, a challenge of paternity and a subsequent acknowledgment by the biological father could not adversely affect the welfare of the child. § 1600 of the Civil Code and § 1600.d.1 of the Civil Code were unconstitutional in that they did not permit, as an exception, for cases with a particular constellation, the fundamental rights of the biological father to be weighed against those of the child. This reduced the scope of protection under Article 6.2 of the Basic Law and prevented the biological father from enjoying his fundamental right at all. The encroachment upon his parental rights as the biological father was justified neither by the welfare of the child nor by the protection of the family as a social institution. Unlike in the case decided by the Federal Court of Justice, in the present case there was neither a marriage relationship between the mother of his child and the person acknowledging paternity, nor a long-term relationship between the child and its legal father. Acknowledgment by another man was not in itself an indication that a social relationship existed. It was constitutionally unacceptable that the parental rights of the biological father depended without exception on the favour of the mother, who was able by consenting to a third party's acknowledgment of paternity to remove the ground from under the parental rights of the biological father. 34

III.

The Federal Court of Justice, the Academic Association for Family Law (*Wissenschaftliche Vereinigung für Familienrecht*), the German Women Lawyers Association (*Deutscher Juristinnenbund*), the German Institute for Youth Welfare Services and Family Law (*Deutsches Institut für Jugendhilfe und Familienrecht*), the Association of Single Parents (*Verband alleinerziehender Mütter und Väter*), the German Society for the Protection of Children (*Deutscher Kinderschutzbund*) and the Fathers for Children Association (*Verein Väter für Kinder*) have made use of the possibility given in the proceedings of stating an opinion. 35

1. With regard to a right of challenge of the biological father, the Federal Court of Justice referred to its judgment of 20 January 1999 (*Zeitschrift für das gesamte Familienrecht* 1999, p. 716). In this decision, the court did not see it as an infringement of the constitution that the law does not recognise any right of challenge for the natural father of the child. Admittedly, the natural father had a justified interest, which was at least related to his right of personality, in enforcing his own paternity and demonstrating it outwardly. But against this was the interest of the child, which was also constitutionally protected, in growing up undisturbed in the social bonds of a family communi- 36

ty, and in addition the particular protection of marriage and family, guaranteed by Article 6.1 of the Basic Law, if the mother was married to the man who was to be regarded as the father of the child. The decision of the legislature to grant no separate right of appeal to the true father of the child was at all events within the scope of the legislature in drafting when conflicting constitutionally protected interests were weighed against each other.

In addition, the presiding judge of the Twelfth Civil Senate of the Federal Court of Justice had stated that at least in the case where the man who had acknowledged paternity was married to the mother of the child, it intended to maintain this line of case-law, and also in situations in which the man was deemed under § 1592 of the Civil Code to be the father of the child. In contrast, the exclusion of the putative father from every possibility of appeal in the cases in which the person who had acknowledged paternity had no relevant relationship either to the mother or to the child was possibly to be assessed differently. The welfare of the “social family”, which the legislature cited to justify the exclusion of a right to appeal, did not apply in this case. But it was necessary to ask whether cases of abuse could be countered only by granting a right of appeal or whether solutions that were able to exclude false acknowledgments of paternity were adequate. 37

With regard to the right of contact of the biological father, the Federal Court of Justice stated that the competent civil senate had not dealt with this matter in its case-law to date. 38

2. The Academic Association for Family Law was of the opinion that the biological father too was covered both by the concept of family of Article 6.1 of the Basic Law and by the concept of parents of Article 6.2 of the Basic Law. The natural parents, it stated, had a fundamental claim to the position of parents and the rights of parents, at least in the sense that they had a prior right to be allocated these. The exclusion of natural parents from the legal position of parents needed to be justified. The legislature had a duty to reflect the natural parents as faithfully as possible in the concept of parenthood in civil law. 39

Article 1 in conjunction with Article 2.1 of the Basic Law gave rise to a right of the child that its natural parents should be given priority when legally responsible parents were allocated to it. If it was not possible to realise this right, as a result of other constitutionally protected interests and objects, there might still be certain “remaining rights” with regard to the child’s natural parentage, for example the right to personal relationships. 40

It was not necessary for the father to be almost totally without rights as against the established paternity of another person, and this violated the principle of proportionality. The burden on the family did not justify excluding the right of contact. Conflicts on contact with the child between the members of a newly established family and other natural or legal parents who had been left behind outside the family unit were a burden typical of the changing family structures of the modern age. Nor had it been the 41

aim of the legislature that after a change in the actual family structures the new family should be cut off from the past, but that the interest of the child in the preservation of emotional and social relationships that had developed previously should be given priority over the interest in an untroubled new start of the adults involved. This complied with the constitutional priority of the welfare of the child. In the justified attempt to protect the new family, the legislature had chosen a means that was not balanced and not necessary, that is, the complete exclusion of the father from all rights. But it had to be the task and duty of the members of the new family unit to accept the world in which the child had previously lived as a biographical, emotional and social fact and to integrate it positively into the new structure of the child's life. Today it was not a rare exception for a child to have more than one father, but almost normal. Children were certainly able to cope with differentiated relationships to several adults. It was therefore incompatible with the Basic Law not to grant the natural father of a child a right of contact even if, as a result of that father's having lived the role of a father, an emotional and social relationship had come into existence between the two and the burdens of the married family in which the child was now growing up were not greater than the burdens that existed and had to be accepted in every new family constellation.

3. The German Women Lawyers Association expressed the opinion that the scope of protection of Article 6.1 and 6.2 of the Basic Law did not cover the biological father of a child that had a different legal father. The father could not be granted a right of contact, since denying this right served the protection of the child and thus was a legitimate encroachment. The right of personality of the complainant in the proceedings 1 BvR 1493/96 had not been violated, since the constitutionally protected interest of the child, which had now once more been living for several years with its legal parents, to grow up undisturbed in this family community, conflicted with the granting of the right of contact to the natural father. 42

4. The German Institute for Youth Welfare Services and Family Law stated that when the constitutionality of the current provisions of the law of parentage was considered, the interaction of the fundamental rights involved must be examined. Thus, the scope of protection of the fundamental right of parents covered not only the legal but also the biological father. If the biological father were to be granted the right to displace the legal father from his role as father, this would encroach on the legal father's rights as a parent under Article 6.2 of the Basic Law and his fundamental right to the protection of the family under Article 6.1 of the Basic Law. In this way, the legal father would lose not only his right of custody, but in the present legal situation also a right of contact with the child. At the same time, a challenge by the biological father of the legal fatherhood would be a massive encroachment on the fundamental rights of the mother and the child to protection of the family under Article 6.1 of the Basic Law. Nor did the previous exclusion of the right of challenge violate the child's right to knowledge of its parentage; it could, instead, be given this knowledge independently of the biological father's possibility of enforcing his right to be recognised as legal as well as 43

natural father. Here, for example, a note in the register of civil status recording biological and genetic parentage would suffice. Nor could the decision as to whether paternity should be granted to the legal or the biological father be left to the judge, who would then have to choose the father who was ostensibly better.

On the other hand, the biological father and his child, if he had lived with the child for some time, were also covered by the protection of the family as a fundamental right under Article 6.1 of the Basic Law. However, this protection did not necessarily require him to be granted the status of legal father, but could also be guaranteed by appropriate rulings on contact and custody. Whether a potential biological father is to have the possibility of challenging a paternity that already exists in law was therefore a decision for the legislature as to which direction to take. There were no constitutional objections to the provisions it had made, since the parental right of the biological father should not be given stronger protection than that of the legal father and the fundamental rights of the mother and the child. 44

However, the question of the right of contact had been unsatisfactorily provided for. In particular if a biological father had already lived together with his child for some time, it had to be possible to examine whether the biological father, after his separation from the mother, ought not to be granted at least a right of contact with the child, since he had also been a father to the child in the social sense. The scope of protection of Article 6.1 of the Basic Law also covered the relationship of the biological father to his child if this relationship had existed in real life. For this reason, it was a violation of Article 6.1 of the Basic Law if the biological father was generally refused a right of contact with his child. 45

5. The Association of Single Parents stated that it was correct that the legislature had given the protection of the fundamental rights of the mother and the child priority over those of the putative biological father, and had therefore refused the latter a right of challenge. The lack of social ties of the mother to the man who had acknowledged paternity could not be the decisive factor. In contrast, the conclusive criterion for a right of contact of the biological father to his child was an existing social relationship between himself and the child. An existing social relationship of the child to its biological father must be preserved, for considerations of the welfare of the child. At all events, the biological father ought not to be generally excluded from contact with his child, since, depending on its development, the child developed an interest in its parentage and should have the possibility of coming to terms with its biological father. 46

6. The German Society for the Protection of Children stated the opinion that if the legislature had to date, by reason of the constitutional prohibition of harming marriage and the family, granted the biological father no right of challenge, this was acceptable if the family peace and thus the development of the child would otherwise be irresponsibly disturbed. But this was not automatically so in the cases in which the biological father and the child had met each other and had lived together for a time. 47

Here, it could not be excluded that a formative relationship had developed between the child and its natural father. It was a central right of the child to have contact with persons in its immediate surroundings who had had a positive formative effect on the child's development. The complete exclusion of the biological father from the circle of those potentially entitled to contact was therefore not justified.

7. The Fathers for Children Association stated that the protection of a relationship that had arisen between the child and its biological father in the first years of its life was more important than the general protection of marriage. If a married person lived together with another partner, gave life to a child and brought it up together with the partner, it should not be allowed to result in disadvantages for the child if the married parent thereafter decided to continue the marriage. There might admittedly be problems if the legal parents met the biological father again as the result of a right of contact being given to the latter. But this was the price that the legal system must claim of the adults in the interest of the welfare of the child. It was not true that it was difficult for children to have relationships with other persons in addition to the people to whom they related most closely. 48

B.

The constitutional complaints are admissible. The fact that the procedural challenges made in the constitutional complaint 1 BvR 1493/96 are inadmissible because they are not sufficiently substantiated does not alter this fact. 49

This constitutional complaint was filed in good time (§ 93.1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*)). The Higher Regional Court did admittedly, applying § 63.a of the Act on Non-Contentious Matters, old version, dismiss as inadmissible the further appeal of the complainant against the decision of the Regional Court refusing him a right of contact with his child. But the decision of the Higher Regional Court started the one-month period for filing the constitutional complaint running again, for the appeal was not manifestly inadmissible. According to current case-law and doctrine at the time when the appeal was filed, the complainant was not obliged to assume that the appeal was inadmissible (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 28, 1 (6)). The opinion of the Higher Regional Court that the complainant, as biological father, might not be treated more favourably than the father of an illegitimate child, for whom, in the contact proceedings, further appeal under § 63.a of the Act on Non-Contentious Matters, old version, was excluded, was not based on established case-law. For example, other courts had examined contact rights asserted by grandparents, which at that time were also not envisaged, by the standard of § 1666 of the Civil Code, on which the complainant had relied, and had held that further appeal was admissible (see Higher Regional Court Braunschweig, *Zeitschrift für das gesamte Familienrecht* 1973, p. 268; Bavarian Higher Regional Court (*Bayerisches Oberstes Landesgericht*), *Der Amtsvormund – DAVorm* 1982, pp. 600-601). In view of these facts, the complainant could have no certainty as to the ad- 50

missibility of the appeal he filed.

C.

The constitutional complaints are well-founded. 51

§ 1600 of the Civil Code is incompatible with Article 6.2 sentence 1 of the Basic Law insofar as it excludes the natural father of a child without exception from challenging the paternity of his child acknowledged by a person who thereby was granted paternity himself (I.). 52

The contact provision in § 1711.2 of the Civil Code, old version, was compatible with the Basic Law (II.), but in the decisions challenged it was not applied in conformity with Article 6.1 of the Basic Law (III. 1). 53

In contrast, § 1685 of the Civil Code is not in conformity with Article 6.1 of the Basic Law to the extent that it excludes the natural father of a child who has a social and family relationship to his child from contact with the child even if that contact is in the interest of the welfare of the child (IV.). 54

I.

1. The natural father of a child who is not the legal father is also protected by Article 6.2 sentence 1 of the Basic Law. However, merely being the natural father of a child does not make him the subject of the parental right under Article 6.2 sentence 1 of the Basic Law. But this provision containing a fundamental right protects the natural father in his interest in taking the legal position of father of the child. This protection gives him no right to be granted the position of father with higher priority than the legal father in every case. However, the legislature must give him the opportunity to attain the position of legal father if the protection of a family relationship between the child and its legal parents does not conflict with this and it is established that he is the natural father of the child. 55

a) Under Article 6.2 sentence 1 of the Basic Law, the care for and upbringing of the child are the right and duty of the parents. The concept of parents, by its usage, also includes the natural parents of a child, regardless of the parents' marital status and the closeness of the relationship between them and the child (see BVerfGE 92, 158 (177-178)). When Article 6.2 sentence 1 of the Basic Law speaks of the natural right of the parents, this expresses on the one hand that this right is not granted by the state, but is recognised by the state as pre-existing (see BVerfGE 59, 360 (376)). On the other hand this makes it clear that the persons who give life to a child are by nature fundamentally prepared and called upon to take on responsibility for its care and upbringing (see BVerfGE 24, 119 (150)). The legislature is therefore required to orient its allocation of the legal position of parents to the child's parentage (see BVerfGE 79, 256 (267)). 56

b) However, the legislature is not under a duty to make legal recognition of parentage always dependent on an examination of the parentage of the child in the individ- 57

ual case. With regard to the protection of family social relationships under Article 6.1 of the Basic Law and the protection of privacy under Article 2.1 of the Basic Law, it is sufficient to conclude what the parentage of a child is from particular facts and circumstances and social situations and to allocate the legal positions of parents on the basis of this presumption, if this as a general rule means that natural and legal parenthood coincide (see BVerfGE 79, 256 (267)). Thus it has always been presumed, not only in our legal culture, on the basis of the relationship entered into on marriage, that the mother's husband is also the natural father of her child, and the legal paternity of the husband is based on this. The same applies if a man, in declared agreement with the mother of an illegitimate child, acknowledges paternity and through this expresses with binding legal effect that he is prepared to take on the responsibility of a parent. The consequence of these statutory provisions on presumption, which are constitutionally unobjectionable, is that in the individual case, contrary to the statutory presumption, legal and natural paternity may be separate. The child then has two fathers, both of whom may rely on their parental rights protected by Article 6.2 sentence 1 of the Basic Law.

2. The protection of Article 6.2 sentence 1 of the Basic Law does not require legal parenthood. The man who fathers a child is the father of the child, even if the legal system does not recognise him as such. Article 6.2 sentence 1 of the Basic Law does not require more than this parenthood based on parentage to include parents in its scope of protection. However, this alone does not make the biological father the subject of parental rights under Article 6.2 sentence 1 of the Basic Law together with the legal father. 58

a) The subjects of parental rights for a child under Article 6.2 sentence 1 of the Basic Law may only be one mother and one father. 59

aa) Article 6.2 sentence 1 of the Basic Law allocates the child to the parents. Here, the very fact that a child can have only two parents leads to the conclusion that the legislature creating the constitution intended to give the parental rights for a child only to two parents. The parental right is based on this allocation, which at the same time determines its orientation: it is a right that belongs to each parent but corresponds to the right of the other parent, which is of equal value (see BVerfGE 99, 145 (164)), and that relates to the child, for whose welfare it is to be exercised (see BVerfGE 75, 201 (218-219)). The responsibility for the child, which Article 6.2 sentence 1 of the Basic Law in this way both grants to the parents and imposes on them, in turn also requires a clear allocation of the parental role, which must be filled in order for the responsibility to be exercised in the child's interest. It is true that the family relationships into which a child is born, and therefore also the female and male persons with whom the child has close relationships, may change in the course of time. But for the development of the child, in addition to its parentage and the quality of its relationship to the persons to whom it relates most closely at any given time, another factor of decisive importance is the knowledge and certainty of who it belongs to, to what family it is allocated and who is responsible for it as mother or father. Only this creates personal 60

and legal certainty for the child, which the provision on the fundamental right of parenthood is intended to convey to it.

bb) Article 6.2 sentence 1 of the Basic Law excludes a person from enjoying parental rights without at the same time having duties towards the child. From the outset, the parental right is connected with the duty to care for and bring up the child, as the element that determines its nature (see BVerfGE 24, 119 (143); 52, 223 (235); 61, 358 (372)). Those who claim the parental right for themselves may not merely demand rights for themselves, but must also bear duties. Thus the right of contact is also part of parental responsibility. But if the parental right under Article 6.2 sentence 1 of the Basic Law conveys rights only together with duties, the subject of this right may be only a person who at the same time bears the parental responsibility, regardless of whether the parenthood is based only on descent or on the allocation of a right (see BVerfGE 56, 363 (381 ff.); 75, 201 (218-219); 79, 203 (210); 80, 286 (295)). 61

cc) Having two fathers at the same time, each of whom together with the mother bears the same constitutionally allocated parental responsibility for the child, does not correspond to the idea of parental responsibility that is the basis of Article 6.2 sentence 1 of the Basic Law. Nor does the change of family life circumstances require that a child should be subjected to the parental responsibility of two fathers at the same time. It is not a new phenomenon, attributable to the change in family structures, that legal and natural paternity may not coincide. Instead, its cause lies in the legal tradition of presuming paternity on the basis of particular social facts and circumstances, basing the legal allocation of the child on this and then in the individual case establishing natural paternity as the basis for legal paternity only when the statutory presumption does not lead to the desired result. Even if it should appear that natural fathers, where legal and natural paternity do not coincide, increasingly wish to acknowledge their paternity and have a relationship to their children, such a development would not in itself be a reason to recognise the natural father in addition to the legal father as the subject of the parental right under Article 6.2 sentence 1 of the Basic Law. 62

If Article 6.2 sentence 1 of the Basic Law in the first instance gives the parents the responsibility for the child, this is based on the consideration that, as a general rule, in joint exercise of this responsibility, they usually observe their child’s interests best (see BVerfGE 103, 89 (108)). But such a consideration cannot relate to a community consisting of two fathers and one mother; in this case the presumption that the joint exercise of parental responsibility serves the child’s welfare best is unreliable. Instead, such a constellation would, so to speak, contain the seeds of role conflicts and disputes as to competence between the parents, and this might have a negative influence on the development of the child. At all events, there would be no guarantee that parental responsibility would be effectively observed in the interests of the child. At the same time, it would become more difficult to attach parental responsibility to persons in order to fulfil the duty of the state community of watching over the exercise of parental rights in order to safeguard the welfare of the child. In this way, the content of 63

the parental right limits those who bear it.

b) The legal father of a child who accepts parental responsibility for the child is the subject of the parental rights under Article 6.2 sentence 1 of the Basic Law and does not lose this right and the position as father connected with it merely by virtue of the fact that another man is shown to be the natural father of the child (see BVerfGE 24, 119 (136)). The statutory establishment of paternity creates the possibility for a person to be able as a parent to actually take comprehensive care of the child. It opens the way for parental responsibility and is the requirement for the safeguarding of the constitutionally protected position as a parent. Only the termination of the position as legal father releases the legal father from his position as a subject of parental rights and from his responsibility for the child. 64

c) Natural paternity also needs to be recognised legally in order that parental rights may be asserted on the basis of it. If it corresponds to the statutory presumption, this gives it its legally binding nature. If this is not the case, then it is usually not automatically apparent who is the natural father of the child in place of the legal father. If the natural father has no interest in accepting parental responsibility for the child, and only then, the circumstance that the child is his natural child and not that of the legal father becomes apparent to outside observers, and this fact becomes important if the legal paternity is challenged by one of the persons entitled to do so and if as a consequence of this determinations are made as to the paternity. But even if a man acknowledges that he, in addition to the legal father, is the natural father of a child, this alone neither establishes that this is actually the case, nor can it be concluded from this that the natural father is also prepared to take on parental responsibility for the child in place of the legal father. But a person may not be the subject of a fundamental right entailing rights and duties relating to a child may not exist on the basis of such uncertainties. Being able to take this position as a natural father in place of the legal father therefore requires the challenger’s natural paternity to be established or confirmed with the intention that he takes on parental responsibility with legally binding effect. 65

3. Article 6.2 sentence 1 of the Basic Law protects the interests of the natural father of a child in also taking the legal position of father. 66

a) The statutory fleshing out of the justification and content of family legal relationships must be oriented to the fact that as a general rule the natural parents of a child must also be granted the legal position of parents. If in the individual case the natural and legal paternity of a child do not coincide, the natural father is in the first instance prevented from bearing responsibility for his child. However, this does not leave him unprotected as a parent. 67

The precept contained in Article 6.2 sentence 1 of the Basic Law that if possible natural and legal parenthood should coincide requires that in such cases too, where there are doubts as to the paternity, proceedings should be commenced in which the parentage is examined and the parental rights, if necessary, are legally adjusted. To 68

this extent, Article 6.2 sentence 1 of the Basic Law in principle grants the biological father too the possibility of obtaining parental rights by legal proceedings.

b) This also applies to a person who can assume by reason of particular facts and evidence that he is the natural father of a child, but who has not yet been able to prove this because the mother has not cooperated. If he were refused the possibility of having his natural paternity examined and confirmed as the requirement for obtaining legal paternity, he would be barred from acquiring his fundamental rights, even if he were indeed the natural father of the child. This would be contrary to the intention of Article 6.2 sentence 1 of the Basic Law to create possibilities for the natural father to take on the position of the legal father in addition. Examining and establishing paternity is therefore part of the procedural guarantee under Article 6.2 sentence 1 of the Basic Law. 69

c) However, this protection granted to the biological father by Article 6.2 sentence 1 of the Basic Law covers only the possibility of commencing proceedings to be recognised as the legal father too. The desire to obtain merely knowledge and certainty as to the parentage of a child cannot be based on Article 6.2 sentence 1 of the Basic Law, because it has no connection to parental responsibility. Just as the right of the child to know its own parentage arises from its right of personality (see BVerfGE 79, 256 (268 ff.)), the desire of a man for mere knowledge as to whether a child is his affects his self-image and the possibility of placing himself as an individual in a relationship to others, not only socially, but also genealogically, and therefore it relates to his right protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law. It need not be decided here whether his right of personality gives rise to a claim for him to have the parentage of a child judicially resolved, since such a resolution is not the subject of either of the cases to be decided. The right of personality does not give rise to a claim for recognition of legal paternity. 70

4. It cannot be inferred from Article 6.2 sentence 1 of the Basic Law that natural paternity must always be preferred to legal paternity. This provision containing a fundamental right gives no right for the natural father to be granted the position of father in every case with priority over the legal father and therefore to displace the latter from his position as father. 71

Article 6.2 sentence 1 of the Basic Law admittedly proceeds on the assumption of natural paternity following from procreation, but it then goes beyond this allocation and protects the parent-child relationship as a comprehensive relationship of responsibility of parents towards their children, who need care and upbringing. The requirement for being able to bear responsibility for the child as part of the right of paternity in this connection is that parents and child are socially connected (see BVerfGE 56, 363 (382); 61, 358 (372); 103, 89 (107)). Parentage and a social and family community of responsibility can be said to be the content of Article 6.2 sentence 1 of the Basic Law. The legislature should endeavour to bring these two elements together. But if they do not coincide in reality, the provision containing the fundamental right does not lay 72

down a rigid weighting as to which of the two characteristics that are to constitute parenthood should be given priority, and it therefore does not create an order of priority between biological and social parenthood. Instead, the legislature, when deciding to whom the child should be allocated in such a case, must take account of both interests and weigh them against each other. Here it may attach importance not only to parentage, but also to legal and social circumstances (see BVerfGE 92, 158 (178)).

5. In principle, it is constitutionally unobjectionable that the legislature has granted priority to the interests of the child and its legal parents in maintaining an existing social family organisation as against the interest of the natural father to also be recognised legally as the father, and in this connection, in § 1600 of the Civil Code, has excluded the natural father from challenging the legal paternity. 73

If the natural and legal paternity do not coincide, it must be decided which of the two is to be allocated the parental rights for the child. This decision affects not only the interest of the natural father, but also the interests of the legal parents and in particular the interest of the child. 74

a) The legislature, as grounds for the access to legal paternity being barred to the natural father in this case and for his having no right of challenge, emphasised in particular the protection of the social family (see *Bundestag* document 13/4899, p. 58). Article 6.1 of the Basic Law too extends its protection to the social family as a long-term community of responsibility of parents and children (see BVerfGE 80, 81 (90); 99, 216 (231-232)). The social structure and continuation of the family relationship between the legal parents and the child may be adversely affected by the fact that another man claims legal paternity for himself. Protecting it against this adverse effect is a good reason, against which the exclusion of the biological father from challenging the existing legal paternity under § 1600 is to be measured (see BVerfGE 38, 241 (255)). 75

At the same time, the interests of the individual members of the family organisation must be taken into account. Since the parental rights are allocated to the parents jointly, the right of the mother corresponds to that of the father. If, against her will, there is a change in the position of that right, the mother must now, outside the existing social family organisation, share the parental rights with a man as the father of her child where she is not (no longer) in a social connection with that man. For the legal father, a change of legal paternity would mean the loss of his legal position with regard to the child protected by Article 6.2 sentence 1 of the Basic Law, although he has taken responsibility for the child and in living together with the mother and the child continues to take care of it in practice, but may no longer take part in making decisions as to its fate. Finally, the child loses its previous father and must adapt to a new one, even if it remains in the existing family organisation. The legal change would ensure that natural and legal parenthood coincide, but at the same time it would mean that legal and social paternity would be separated and it could also lead to loss of the status as a legitimate child. This requires a new orientation from the child, and this 76

may involve the child in conflicts. It is true that a child must also cope with such a change if its mother or its previous legal father challenges the paternity. But in this case there is not only a change on the legal plane in the social parent-child relationship, but the cohesion of the social family is endangered from within itself rather than by the person who claims paternity for himself.

Nor is this change comparable to the cases in which the child, after the separation and divorce of its legal parents, moves to family constellations in which it must live together with new (step-) parents. Here, admittedly, the child has to adapt to a new social context. But it still has the allocation to its legal parents as a security and a constant. In contrast, if the legal paternity were successfully challenged by the natural father, the allocation of the child would change, even if the previous social family organisation was not endangered from inside itself, but might be exposed to a danger only through the challenge. 77

However, there may also be an interest of the child not only in knowing its natural father, but also in being allocated him as legal father. This interest is served by the child's own right of challenge. It need not be decided here whether the fleshing out of this right takes sufficient account of the constitutionally protected position of the child (see Wanitzek, FPR (*Familie, Partnerschaft, Recht*) 2002, p. 390 (392)), for this is not relevant to a right of challenge for the natural father. Conflicts of interest between the child and its legal parents, who have custody, as to a challenge of the legal paternity cannot be solved by granting the biological parent the right to undertake the challenge on behalf of the interests of the child. Instead, the child must be put in the position to formulate its own interests and to convert them into legal acts, if necessary with the help of third parties (see BVerfGE 72, 122 (134); 99, 145 (157)). 78

b) Against this is the justified interest of the biological father not only in knowing that he is the natural father, but also in being legally recognised as the father and having a legal relationship to his child. But a new legal allocation of the child would not lead to the creation of a new social family as the basis for a beneficial cooperation of parents in exercising their responsibility to the child in the child's interest. Instead, the cohesion of the previous family unit in which the child lives would be adversely affected by the dissolution of the legal relationships of its members. The divergence of legal allocation and social and family relationship might give rise to conflicts that on the one hand would endanger the child being brought up in a way conducive to its welfare and on the other hand might make it more difficult for the child to orient itself as to who it belonged to. This justifies the legislature in § 1600 of the Civil Code having in principle granted the natural father no possibility of challenging legal paternity, in the interest of preserving an existing family cohesion between the child and its legal parents. 79

6. However, § 1600 of the Civil Code is incompatible with Article 6.2 sentence 1 of the Basic Law insofar as it refuses the biological father the right to challenge the legal paternity even if the legal parents do not form a social family together with the child that needs protection under Article 6.1 of the Basic Law. 80

a) If a man, without being the natural father of the child, has acknowledged paternity but does not live together with the mother and the child, and is merely a “paying father”, there is no sufficient reason to refuse the natural father the right to be recognised as the legal father too and to take on the associated duty. Nor do the interests of the mother and the child prevent this. 81

If there is no social and family relationship to the legal father, the preservation of which might be the basis of the mother’s interest, her only remaining interest is not wanting to share the parental rights with the natural father. But this interest is not protected by Article 6.2 sentence 1 of the Basic Law, which makes the position of parent dependent not on the will of the other parent, but solely on the circumstance of presumed or real parenthood. For the child, the challenge by the natural father would mean a change in its allocation to the father, but a change which would not materially affect the welfare of the child if there is no relationship between the child and the legal father that developed while the child was living with the latter and that could be adversely affected. On the other hand, the child would now be allocated legally in a way that would not give it a family life together with both parents, but that would now ensure that the legal paternity coincided with the child’s parentage. 82

b) A change in the legal position of the paternity even conforms with the interest of the child in maintaining personal relationships if it has been able in fact to build up a father-child relationship precisely with its natural father, who also wants to be its legal father, while it does not live in a family community with its legal father and its mother. In these circumstances, no good reason justifies refusing to a biological father who is prepared to take on parental responsibility for his child the possibility of also taking on the legal position of parent, and such a refusal injures the biological father’s right under Article 6.2 sentence 1 of the Basic Law to be given a possibility through legal action of enjoying the fundamental right of parenthood. 83

c) Nor can the exclusion of the biological father from the possibility of finding access to the legal position of father in the case where there are no family relations between the legal father and the child be justified by reference to the existence of a social relationship that deserves protection and that would be endangered. 84

If a marriage exists, it may be concluded in a process of categorisation that the married parents live together as a family with their child, but it may not be concluded from an acknowledgment of paternity that occurs with the consent of the mother that the mother, the child and the legal father live together as a family. 85

Statistics show that children who were born illegitimate still far more often live with only one parent (usually the mother) and not with both parents together. Thus, for example, in the year 2001, 821,000 minor children lived in a community with their parents as against 2.12 m children who lived with only one parent (see Statistisches Bundesamt 2002, *Leben und Arbeiten in Deutschland, Ergebnisse des Mikrozensus 2001*, pp. 29, 65). In only 36% of the cases investigated by Vaskovics and others was there a long-term relationship between the parents after the birth of an illegitimate 86

child, whereas in far more than 80% of the cases there was a voluntary acknowledgment of paternity, that is, not to a court finding as to the natural and therefore legal paternity (see Vaskovics/Rost/Rupp, *Lebenslage nichtehelicher Kinder, Rechtstatsächliche Untersuchung zu Lebenslagen und Entwicklungsverläufen nichtehelicher Kinder*, 1997, pp. 62, 160). This means than in over half of the cases an acknowledgment of paternity was made where the parents of the child did not live together. These figures give no basis to make an assumption by categorisation that where there is an acknowledgment of paternity, there is usually also a social relationship worthy of protection between father, mother and child.

In general, an acknowledgment of paternity is not made lightly, for it means that the person making the acknowledgment will at minimum be obliged to share responsibility for the maintenance of the child and will be treated in property law and the law of succession as the father of the child. And despite the lack of a family connection to mother and child, there may also be reasons to acknowledge the paternity of a child, even if the person acknowledging is not certain that he is the father of the child. If, in such cases, an acknowledgment of paternity is made, it is possible to counter the danger that mother and child are bombarded with challenge proceedings with less oppressive means than the complete exclusion of challenge by the natural father. Thus, for example, prima facie evidence that the challenger is the natural father may be required in advance, and this evidence may be linked to particular requirements. Time limits for challenge also help contain this risk. 87

II.

§ 1711.2 of the German Civil Code, old version, which provided that the guardianship court could grant the father personal contact with the child if such contact served the welfare of the child, did not violate Article 6.1 of the Basic Law. 88

1. The natural father who is not the legal father of a child also forms a family together with the child which is protected by Article 6.1 of the Basic Law if there is a social relationship between him and the child that arises from the fact that at least for a period of time he did in fact have responsibility for the child. Article 6.1 of the Basic Law protects the natural father and the child in their interest that this social and family relationship is preserved, and therefore in their contact with each other. It is a violation of Article 6.1 of the Basic Law if the biological father who has a relationship of this kind with his child is denied contact with the child even though the contact is in the interests of the child's welfare. 89

a) Article 6.1 of the Basic Law protects the family as a community of parents with children. In this connection it is not significant whether the children are the children by birth of the parents and whether they are legitimate or illegitimate (see BVerfGE 10, 59 (66); 18, 97 (105-106); 79, 256 (267)). Family is the actual long-term and upbringing relationship between children and parents who are responsible for the children. If the child lives together with both parents, they form a family together. If this is not the case, but both parents in fact bear responsibility for the child, the child has two fami- 90

lies, which are protected by Article 6.1 of the Basic Law: the family with the mother and the family with the father (see BVerfGE 45, 104 (123)).

b) If the natural father who is not the legal father has actual responsibility for his child, and if a social relationship between him and the child develops from this, the two form a family which is covered by the protection of Article 6.1 of the Basic Law, despite the lack of a legal status as father and despite other family relationships of the child. 91

Admittedly, the basis may be removed from such a family at any time because of the lack of a legal relationship between the father and the child. While the legal father, even if he does not live (or no longer lives) together with the child and has no right of custody, may nevertheless bear responsibility for the child both legally and in fact, the family relationship between the natural father and his child is based only on his preparedness to take responsibility for the child and on the factual possibility of doing this, which comes to an end if the parents who have custody no longer permit it. 92

c) When it becomes impossible for the biological father to continue to act with actual responsibility for the child, the protection of Article 6.1 of the Basic Law does not end for the family that has come into existence between the biological father and his child. 93

It is true that neither Article 6.2 sentence 1 of the Basic Law nor Article 6.1 of the Basic Law gives the natural father who is not the legal father a claim to continue to act with responsibility for the child. But even when this possibility ends, the personal connection that has developed between the biological father and his child continues in existence; it is also still kept in existence by the blood connection between father and child. The interest of the biological father, who has till now been connected in a family with the child, and the interest of his child in the continuation of this relation to each other is protected by Article 6.1 of the Basic Law as an after-effect of the protection that previously covered their family community of responsibility. 94

d) This protection, which continues to have an effect, gives rise to a right of the biological father to contact with his child, at least if this contact serves the welfare of the child. 95

aa) In order to maintain an existing relationship, the persons between whom the relationship exists must have the possibility of having personal contact and communicating with each other. This applies in particular to the parent-child relationship. The separation of a child from a parent with whom it has previously had a close relationship deprives the child of an important element of orientation and affects its self-assurance and inner sense of security (see Goldstein/Freud/Solnit, *Jenseits des Kindeswohls*, 1974/1991, pp. 33 ff.; BVerfGE 75, 201 (219)). Because of the particular way in which a child experiences time, such a separation soon appears to the child to be final, for it learns only gradually that people who go away may return (see Heilmann, *Kindliches Zeitempfinden und Verfahrensrecht*, 1998, p. 26). In order to discover here that the existing relationship did not end as a result of the separation, that 96

is, that the parent did not turn away from the child, the child needs personal contact with the parent, that is, contact, at fairly regular intervals.

bb) On the other hand, as a result of the new family context in which it is placed, the child may find itself in conflict between the old and the new relationship. Here, continuing contact might have the effect that the child is once more exposed to orientation problems that endanger rather than encourage its development (see Klußmann/ Stötzel, *Das Kind im Rechtsstreit der Erwachsenen*, 1995, p. 223). 97

cc) Article 6.1 of the Basic Law protects the relationship between the child and its parent, not the individual family member taken alone (see BVerfGE 78, 38 (49)). The provision containing the fundamental right can therefore give the individual only a right that corresponds to the interest of the other family member who is connected with him or her and that serves the protection of the family relationship. A right of the biological father to contact with his child to maintain the social relationship that exists between them therefore exists only to the extent that this serves the welfare of the child. 98

2. Judged by these standards, § 1711 of the Civil Code, old version, was compatible with Article 6.1 of the Basic Law. 99

Taking into account the protection that this provision containing a fundamental right also accords to the family relationship between the biological father and his child, it was possible to interpret § 1711.2 of the Civil Code, old version, in conformity with the constitution to mean that the natural father who was not the legal father who has or has had a social and family relationship to his child was able to obtain permission for contact with his child by a judicial decision if this contact serves the welfare of the child. 100

a) It is admittedly necessary to proceed on the assumption that when the legislature created § 1711 of the Civil Code, old version, it used the concept of father to mean the legal father of an illegitimate child. But this does not exclude a more extensive interpretation to include the natural father. It seems likely that at that time the legislature did not contemplate the constellation where a natural father who is not the legal father has a relationship to the child and seeks to maintain this relationship, for it was assumed that the natural father of an illegitimate child often had no interest of his own in his child (see BVerfGE 38, 241 (252) on the challenge of legitimacy). It may therefore not be imputed to the legislature that in § 1711.2 of the Civil Code, old version, it intended expressly to exclude the natural father, as opposed to the legal father, of an illegitimate child from the judicial examination of a right of contact with his child. The text and parliamentary history of the provision therefore do not prevent it from being interpreted in conformity with the constitution. 101

b) Nor do the meaning and purpose of that statutory provision prevent it being interpreted in conformity with the constitution. § 1711.2 of the Civil Code, old version, tied the contact of the father of an illegitimate child to the requirement that this served the 102

welfare of the child. But if the welfare of the child was the conclusive yardstick for opening the possibility of contact, the legal status of the relationship of the father to his child moved into the background. For in order to assess whether contact serves the welfare of the child, what is important is not the legal relationship of the child to its father, but the actual relationship. Nor, if the biological father is included in the concept of father of § 1711.2 of the Civil Code, old version, is this open to the objection that the legislature intended to exclude the biological father from contact in order to ensure that the child was clearly allocated to one father. Because the section created a judicial examination of the individual case by the standard of the welfare of the child, all social and family circumstances and ties of the child affected had to be taken into account in every individual case when the decision was made. Here too, however, it was not the legal status of the father, but the concrete social network of relationships in which the child was involved, that was decisive.

III.

The judicial decisions based on § 1600 of the Civil Code and § 1711.2 of the Civil Code, old version, are incompatible with the Basic Law. 103

1. The complainant in the proceedings 1 BvR 1493/96 suffered no violation of his right under Article 6.2 sentence 1 of the Basic Law as a result of the decisions challenged. But the decisions violate his right to the protection of his social and family relationship to his child under Article 6.1 of the Basic Law. 104

a) The complainant, who is the natural father of a child, does not wish also to be determined to be the legal father of the child, but to be granted contact with his child. Natural paternity does not have the effect that the complainant is the subject of the parental rights under Article 6.2 sentence 1 of the Basic Law alongside the legal father of the child. Therefore this provision containing a fundamental right cannot give him a right to contact with his child. The parental right of contact is part of parental responsibility and is due only to the person who bears this responsibility with its rights and duties. 105

b) However, Article 6.1 of the Basic Law has not been adequately taken into account. § 1711.2 of the Civil Code, old version, on which the courts based their challenged decisions, was admittedly compatible with the Basic Law if it was interpreted in conformity with the constitution. But in their decisions, the courts failed to see the protection of the complainant under Article 6.1 of the Basic Law. They attached no importance to the fact that the complainant, as the natural father of the child, for a long period of time also took on the role of father for his child and built up a relationship with the child, and therefore they did not examine whether § 1711.2 of the Civil Code, old version, can be interpreted as being in conformity with the constitution. Since the courts declared that this provision cannot be applied to the complainant, there was no examination as to whether giving the complainant contact with his child would serve the welfare of the child. In this respect, the courts in their decision did not do justice to the protection that is enjoyed even by an existing family relationship of the natural fa- 106

ther to his child under Article 6.1 of the Basic Law.

2. In the proceedings 1 BvR 1724/01, the decisions challenged by the constitutional complaint violate the complainant's right under Article 6.2 sentence 1 of the Basic Law. They are based on § 1600 of the Civil Code, which unconstitutionally excludes the natural father who is not the legal father of a child from challenging paternity, with no exceptions. 107

a) It is true that the decisions were made in proceedings for the determination of paternity and therefore they are based on § 1600.d.1 of the Civil Code, which excludes a determination of paternity as long as another man is deemed to be the father of the child. But in their decisions, the courts also examined whether the complainant may challenge paternity that has been acknowledged by another man, and with reference to § 1600 of the Civil Code they answered this question in the negative, assuming that § 1600 was constitutional. 108

b) The complainant petitions for his paternity to be determined, so that he can take the position of legal father for the child born in 1998. There are sufficient indications that he may be the natural father of the child. The child has an Arabic name. According to information from the complainant, the complainant chose the child's name together with the mother, also lived together with her in the first months of the child's life and jointly with her cared for the child. The child is said to be similar to the complainant in appearance. The mother denies these statements solely on the basis of lack of knowledge. During the proceedings for the determination of paternity, another man made an acknowledgment of paternity with the consent of the mother, and consequently the complainant is prevented by § 1600 of the Civil Code from challenging the legal paternity in order to be recognised as the father of the child himself, although the man who is deemed to be the father of the child as a result of the acknowledgment does not live together with the child and the mother. The complainant's exclusion from the possibility of challenge under § 1600 of the Civil Code is therefore not justified by the protection of the family under Article 6.1 of the Basic Law and violates the complainant's right under Article 6.2 sentence 1 of the Basic Law to have his paternity established legally too as the natural father. 109

IV.

§ 1685 of the Civil Code is incompatible with Article 6.1 of the Basic Law to the extent that it does not include in the group of persons entitled to contact the natural father of a child who is not the legal father, if there is or has been a social and family relationship between him and the child. 110

1. The fact that § 1711.2 of the Civil Code, old version, has been repealed by the Act on the Reform of Parent and Child Law makes it necessary for the Federal Constitutional Court to subject the new law on contact with a child that is to be applied by the courts to a constitutional examination too. Otherwise it could not be ensured that the courts in the proceedings 1 BvR 1493/96 can make decisions on rights of contact that 111

are in conformity with the constitution.

a) If judicial decisions are challenged by a constitutional complaint and if the Federal Constitutional Court comes to the conclusion that the decisions violate a fundamental right of the complainant, they are to be reversed under § 95.2 of the Federal Constitutional Court Act. If the provision on which the decisions are based has already been repealed, in general it is sufficient to make a declaration that the decisions violated a particular fundamental right of the complainant. But this is out of the question if this does not completely deal with the relief sought in the original proceedings. Then the matter must be referred back to the competent court for a new decision. However, this requires that the court to which the matter is referred back is able to make a new decision while preserving the fundamental rights of the complainant. This is not possible if the courts, with regard to the claim asserted by the complainant, cannot create a situation that is in conformity with the constitution. That is the case here. 112

b) § 1711.2 of the Civil Code, old version, in interpreting which the courts in the decisions challenged in the proceedings 1 BvR 1493/96 failed to appreciate the protection of the complainant under Article 6.1 of the Basic Law, was repealed by the Act on the Reform of Parent and Child Law. If these decisions are reversed by the Federal Constitutional Court and the matter is referred back to the competent court, this provision can no longer be used as a basis when the right of contact desired by the complainant is examined. The claim asserted judicially by the complainant to contact with his child has not, however, been rendered invalid by the passage of time. The contact that has been missed to date cannot be replaced, of course, but it could be granted for the future. The child, which was born in 1989, is also still far from the age of majority, and therefore the right of contact cannot be terminated by the child becoming of full age. The courts, in applying the new law, would therefore have to examine whether the complainant should be granted a right of contact with his child. 113

c) For this, it is crucial whether the new law grants a right of contact with their children to natural fathers who are not legal fathers or continues to refuse it. In the first case, the Federal Constitutional Court would merely have to make a declaration that the decisions challenged were unconstitutional in that they failed to appreciate the protection of the complainant's fundamental right under Article 6.1 of the Basic Law when they interpreted § 1711.2 of the Civil Code, old version. But if a right of contact of the natural father is unconstitutionally still excluded, such a declaration does not suffice to give the complainant a way to enforce his rights. Even the reversal of the decisions does not go far enough if the courts, which when making their new decision now have to apply the new law, would be prevented by this law from making a decision in conformity with the constitution. They would then immediately have to submit the matter, which had only just been referred back to them, to the Federal Constitutional Court again for a decision on the constitutionality of the new statutory arrangements. In order on the one hand to be able to determine the scope of the decision to be made, and on the other hand to avoid an unconstitutional state being perpetuated solely as a result of procedural details, the Federal Constitutional Court must in such 114

a case also examine the constitutionality of the new law to be applied by the courts.

2. § 1685 of the Civil Code is not completely compatible with Article 6.1 of the Basic Law. 115

a) The Act on the Reform of Parent and Child Law fundamentally changed the right of contact. In the case of the right of contact of a parent, which is governed by § 1684 of the Civil Code, a distinction is no longer made between legitimate and illegitimate children. In addition, § 1685 of the Civil Code also opens up the possibility of a right of contact with other persons to whom the child relates. Both sections do not expressly include the natural father of a child in the group of persons entitled to contact. 116

b) Neither § 1684 of the Civil Code nor § 1685 of the Civil Code can be interpreted to the effect that the natural father of a child is also granted a right of contact. 117

aa) Under § 1684.1 of the Civil Code, each parent has a right but also a duty to have contact with the child. This provision refers to parental responsibility and defines this for contact with the child as a right entailing duties. But the only person who can be given the duty of contact with the child is the one who has parental responsibility. Someone who has this status is both entitled and obliged to have contact with the child. This excludes the possibility of subsuming the biological father of a child, who by definition does not have the position of legal father, under the definition of parent of § 1684.1 of the Civil Code. 118

bb) In § 1685 of the Civil Code, the legislature has now in certain circumstances granted a right of contact with the child to grandparents, siblings, stepparents and foster parents. The ground for granting it here is the relationship of these persons to the child, which gives rise to a right of contact if this serves the welfare of the child (see *Bundestag* document 13/4899, pp. 106-107). The requirements contained in § 1685 of the Civil Code of those who are granted the possibility of a right of contact may also be fulfilled by the natural father who is not the legal father of the child, if the child has a personal relationship to him. In addition, like grandparents and siblings, he has connection to the child by descent. 119

Nevertheless, it is not permitted to interpret § 1685 of the Civil Code to mean that the biological father too is included in the groups of persons named in subsection 1 or subsection 2 of the provision. Apart from the fact that he is not expressly listed, the legislature clearly expressed that the right of contact was to be restricted to those persons to whom the child has a relationship who are expressly named in the section and of whom the legislature assumes that they are normally very close to the child. It justified this restriction on the basis of the need to prevent disputes on contact being greatly increased (see *Bundestag* document 13/4899, loc. cit.). This prohibits increasing the groups of persons named in § 1685 of the Civil Code by adding the natural father as a result of interpreting the Article in conformity with the constitution. 120

D. – I.

1. § 1685 of the Civil Code is to be declared incompatible with Article 6.1 of the Basic Law to this extent. 121

It cannot be annulled, because it is not the content of the provision, but the failure to include the biological father who has a social relationship to his child in the group of the persons entitled to contact named in this provision that violates Article 6.1 of the Basic Law (see BVerfGE 90, 263 (276)). 122

The legislature is required to put the legal situation into conformity with the constitution by 30 April 2004. The provision may no longer by applied by the courts to the extent that it is incompatible (see BVerfGE 82, 126 (155); 84, 168 (187)). 123

2. The violation of Article 6.2 sentence 1 of the Basic Law that has been determined makes it necessary to declare that § 1600 of the Civil Code is incompatible with this fundamental right to the extent that it is unconstitutional. There can be no annulment here either, because the violation of the constitution lies in the failure of the legislature to include the biological father in the group of persons entitled to challenge subject to the requirements named. The legislature is required to put the legal situation into conformity with the constitution by 30 April 2004. In doing this, when setting time limits for the exercise of the right of challenge, it must ensure that the biological fathers for whom challenge has been impossible until now are also put in a position to rely on the right of challenge. 124

II.

The decisions challenged are to be reversed (§ 95.2 of the Federal Constitutional Court Act). The matters are referred back to the Local Courts. The proceedings are to be stayed until the legislature amends the law. 125

III.

The decisions on costs are based on § 34.a.2 of the Federal Constitutional Court Act. 126

Judges: Papier, Jaeger, Haas, Hömig, Steiner, Hohmann-Dennhardt, Hoffmann-Riem, Bryde

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 9. April 2003 - 1 BvR 1493/96

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 9. April 2003 - 1 BvR 1493/96 - Rn. (1 - 126), http://www.bverfg.de/e/rs20030409_1bvr149396en.html

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