HEADNOTES:

Judgment of the First Senate of 19 April 2005

– 1 BvR 1644/00, 1 BvR 188/03 –

The minimum economic participation of the testator's children in his or her estate, which is in principle inalienable and non-means-tested, is guaranteed by the guarantee of the right of inheritance contained in Article 14.1 sentence 1 in conjunction with Article 6.1 of the Basic Law (Grundgesetz – GG).

The provisions regarding the right of the testator's children to a compulsory portion (§ 2303.1 of the Civil Code (Bürgerliches Gesetzbuch – BGB)), regarding the reasons for withdrawing the compulsory portion contained in § 2333 nos. 1 and 2 of the Civil Code, and regarding the reason for unworthiness to receive the compulsory portion contained in § 2345.2 and § 2339.1 no. 1 of the Civil Code are compatible with the Basic Law.

On the constitutional requirements as to the interpretation of § 2333 no. 1 of the Civil Code.

Judgment of the First Senate of 19 April 2005

– 1 BvR 1644/00, 1 BvR 188/03 –

in the proceedings regarding the constitutional complaints

I. of Mr. S.,

1. directly against a) the judgment of Cologne Higher Regional Court (Oberlandesgericht) of 30 March 2000 – 1 U 108/98 –,

   b) the final judgment of Cologne Regional Court (Landgericht) of 8 October 1998 – 15 O 411/95 –,

2. indirectly against §§ 829, 2303, 2333 nos. 1 and 2, §§ 2337, 2339.1 no. 1, §§ 2343 and 2345.2 of the Civil Code – 1 BvR 1644/00 –, II. of Ms. S..., –authorised representative: lawyer …, against 1. the judgment of the Court of Appeal (Kammergericht) of 2 December 2002 – 26 U 4/02 –, 2. the judgment of Berlin Regional Court of 27 November 2001 – 14 O 380/01 – 1 BvR 188/03 –

RULING:

1. The constitutional complaint proceedings are consolidated for a joint ruling.

2. The judgment of Cologne Higher Regional Court of 30 March 2000 – 1 U 108/98 – and the final judgment of Cologne Regional Court of 8 October 1998 – 15 O 411/95 – violate the fundamental right of the complainant re I. under Article 14.1 sentence 1 of the Basic Law. The judgment of the Higher Regional Court is rescinded. The case is referred back to the Higher Regional Court.

3. The constitutional complaint of the complainant re II. is rejected as unfounded.

GROUNDS:

A.

The constitutional complaints relate to questions of the right to a compulsory portion. 1

I.

1. In accordance with § 2303.1 of the Civil Code, a testator's child who is excluded from succession by last will can require the compulsory portion from the heir. The right to the compulsory portion arising on the death of the testator (§ 2317.1 of the Civil Code (*Bürgerliches Gesetzbuch – BGB*)) is a pecuniary claim amounting to half the value of the statutory share in the estate (§ 2303.1 sentence 2 of the Civil Code). The right to the compulsory portion is contingent on the prerequisite that the beneficiary would have been appointed as the statutory heir were the last will not to have been made. 2

2. The child may be deprived of the compulsory portion by the testator by means of a last will (§ 2336.1 of the Civil Code). Deprivation is only possible if one of the reasons named in § 2333 of the Civil Code applies. The reasons for withdrawing the compulsory portion applicable to both sets of constitutional complaint proceedings read as follows: 3

§ 2333 of the Civil Code 4

Deprivation of a descendant's compulsory portion 5

The testator can withdraw the compulsory portion from a descendant: 6

1. if the descendant attempts to kill the testator, the spouse or another descendant of the testator, 7

2. if the descendant is guilty of intentional physical mistreatment of the testator or of the testator's spouse, but in the event of mistreatment of the spouse only if the descendant is descended from him or her, 8

3. to 5. ... 9

The reason for withdrawing the compulsory portion must exist at the time of the drafting of the last will, and must be stated in the will (§ 2336.2 of the Civil Code). In accordance with the unanimous view taken in the case-law and literature, in all cases 10

falling under § 2333 of the Civil Code, deprivation of the compulsory portion is only possible if the descendant acted culpably (see Düsseldorf Higher Regional Court (*OLG*), *Neue Juristische Wochenschrift – NJW* 1968, pp. 944 (945); Hamburg Higher Regional Court, *NJW* 1988, pp. 977 (978); Staudinger/Olshausen, *BGB* (1998), *Vorbem zu §§ 2333 ff.* marginal no. 4; Soergel/Dieckmann, *BGB*, 13th ed., 2002, *Vor § 2333* marginal no. 6; MünchKommBGB/Lange, 4th ed., 2004, *§ 2333* marginal no. 3; Palandt/Edenhofer, *BGB*, 64th ed., 2005, *§ 2333* marginal no. 2; Erman/Schlüter, *BGB*, 11th ed., 2004, *§ 2333* marginal no. 2; *BGB-RGRK*, 12th ed., 1975, *§ 2333* marginal no. 3; Lange/Kuchinke, *Erbrecht*, 5th ed., 2001, *§ 37* XIII. 2. a). In accordance with the prevalent view, the reasons for withdrawing the compulsory portion are exhaustively listed in § 2333 of the Civil Code; corresponding application to other cases is hence ruled out (see Federal Court of Justice (*BGH*), *NJW* 1974, p. 1084 (1085); Staudinger/Olshausen, loc. cit., *Vorbem zu §§ 2333 ff.* marginal no. 3; Soergel/Dieckmann, loc. cit., *Vor § 2333* marginal no. 2). In accordance with § 2336.3 of the Civil Code, the burden of evidence for the existence of a reason for withdrawing the compulsory portion is incumbent on the party claiming the deprivation.

3. The Civil Code, furthermore, governs the legal institution of unworthiness to receive the compulsory portion. Accordingly, the beneficiary of the compulsory portion may lose his or her claim after the death of the testator by means of a challenge (§ 2345.2, § 2339.1 of the Civil Code). The challenge is to be affirmed by the party to benefit from its legal effects as against the beneficiary of the compulsory portion. Reasons for challenges are the elements listed in § 2339.1 of the Civil Code. The provisions relevant to a ruling on the constitutional complaints read as follows: 11

§ 2345 of the Civil Code 12

Unworthiness to be a legatee; unworthiness to receive the compulsory portion 13

(1) If a legatee has been guilty of the misconduct referred to in § 2339.1, the claim from the legacy shall be subject to challenge. The provisions contained in §§ 2082, 2083, 2339.2, as well as §§ 2341 and 2343 shall apply. 14

(2) The same shall apply to a right to the compulsory portion if the beneficiary of the compulsory portion has been guilty of such misconduct. 15

§ 2339 of the Civil Code 16

Reasons for unworthiness to inherit 17

(1) Anyone shall be unworthy to inherit: 18

1. who intentionally and unlawfully kills or tries to kill the testator or has placed him or her in a condition as a result of which the testator was incapable until his or her death to make or to rescind a last will, 19

2. to 4. ... 20

(2) ... 21

4. The right of the testator's children to a compulsory portion has been the subject of controversial debate in the legal reference material in recent years from a variety of points of view. In this debate, the criticisms were partly based on the view that circumstances within society have fundamentally changed since the creation of the Civil Code, and with them also the social function of the family and of family relationships. Hence, people's average life expectancy was said to have become much longer, and the social security systems had over the passage of time allegedly largely replaced the social net provided by family ties. In particular, children had as a rule made no contribution whatever today to the creation of the testator's assets. Furthermore, a solely biological link between the testator and his or her children was not said to justify participation in the estate against the will of the testator (see Dauner-Lieb, *Forum Familien- und Erbrecht* 2001, p. 78 (79-80); Schlüter, *Die Änderung der Rolle des Pflichtteilsrechts im sozialen Kontext*, in: *50 Jahre Bundesgerichtshof*, *Festgabe aus der Wissenschaft*, vol. I, *Bürgerliches Recht*, 2000, p. 1047 (1049-1050)). 22

Referring to the time of drafting of the Civil Code, the opposing view indicates that even at that time it had not been the function of the right to a compulsory portion to ensure maintenance and support of the testator's children. If one took as a basis the remaining life expectancy of those individuals who were already 25 around 1900, and if one took into account that people started work earlier because of shorter schooling and training periods, it could be ascertained that even at that time children had as a rule been economically independent at the time of the death of a parent. The right to a compulsory portion, rather, served to cement intrafamily relationships. Its removal would constitute further erosion of the family (see Otte, Das *Pflichtteilsrecht – Verfassungsrechtsprechung und Rechtspolitik*, (*Archiv für die civilistische Praxis – AcP*) 202 (2002), p. 317 (335-340, 353-355)). 23

The case-law of the Federal Court of Justice (*Bundesgerichtshof – BGH*) considers the right to a compulsory portion to be protected to a certain degree by Article 14 and Article 6.1 of the Basic Law (see Decisions of the Federal Court of Justice in Civil Cases (see *Entscheidungen des Bundesgerichtshofes in Zivilsachen* – BGHZ) 98, 226 (233); 109, 306 (313)). 24

II.

1. Proceedings 1 BvR 1644/00 25

With his constitutional complaint, the complainant objects to judgments of the civil courts in which he was sentenced to pay the compulsory portion to his brother (hereinafter: plaintiff) in his capacity as heir in succession from his mother. 26

a) The complainant is one of two sons of the testator, who died on 18 February 1994. In 1982 she made him her sole heir in a privately made will, and at the time of her death lived in a house together with the plaintiff, who suffers from a schizophrenic psychosis. In the last years before the death of the testator, during which the plaintiff lived reclusively in a room in the cellar of the house, the plaintiff committed repeated 27

serious physical attacks on the testator. After he committed another serious attack on the testator on 13 January 1994, the latter made another will on 20 January 1994. In this, she confirmed the establishment of the complainant as heir, and additionally ordered as follows:

"I disown my violent son … because he demonstrably frequently mistreats me (punches to the head) and thereby risks my possible sudden death." 28

On 18 February 1994, the plaintiff struck the testator dead out of fear of and fury against his immanent committal to the *Land* (state) [psychiatric] hospital, cut the body into pieces and hid the parts in the forest. After commissioning an expert report, in proceedings on preventive detention the Regional Court ordered the plaintiff to be accommodated in a psychiatric hospital because of this offence. The court held that the plaintiff had been able to see that his offence was wrong, but had not been able to act in accordance with this insight at the time of the offence because of his mental illness, and hence of a pathological mental disturbance. 29

b) The plaintiff, represented by his custodian, asserted his right to the compulsory portion against the complainant. He filed suit for information as to the amount of the estate. The complainant was initially sentenced by part-judgment to provide this information. Appeals against this were unsuccessful. After providing the information, and once the plaintiff had subsequently quantified the compulsory portion claim, the complainant was sentenced by final judgment of the Regional Court to pay an amount of DM 50,605.55. The Regional Court stated that it was of no interest whether the testator had intended by the will of 20 January 1994 to withdraw the compulsory portion. Such withdrawal would certainly not be effective since the serious and intentional criminal offences listed in § 2333 of the Civil Code relevant to the case at hand were contingent on culpable conduct, which did not apply in accordance with the findings made in the criminal proceedings. 30

c) The appeal on points of fact and law submitted by the complainant against this was only successful to a slight degree. After having commissioned a psychiatric expert report on the question of the plaintiff's ability to contract guilt in the mistreatment committed against the testator in the period 1993/1994, the Higher Regional Court altered the first instance judgment such that the complainant was sentenced to pay an amount of DM 47,630.55. The court held that the plaintiff had neither been effectively deprived of the right to the compulsory portion in accordance with § 2333 of the Civil Code, nor could he be regarded as unworthy of the compulsory portion in accordance with § 2339.1 no. 1, § 2345.2 of the Civil Code, as he had been in the condition of inability to contract guilt both in the act of killing and in mistreatment of the testator prior to this. 31

Two incidents from 1992 and 1994 specifically referred to by the testator could be considered as a reason for withdrawing the compulsory portion. As to the 1992 incident, one should however presume that the right of the testator to remove the compulsory portion had elapsed in accordance with § 2337 of the Civil Code by virtue of 32

forgiveness. She had continued to live in a house together with the plaintiff after this incident and to take care of him. The deprivation of the compulsory portion had not taken place until the January 1994 incident.

It was allegedly recognisable that the testator had not only wished to deprive the plaintiff of the share in the estate by means of the will of 20 January 1994, but also of the compulsory portion. In the will she had also given a reason for withdrawing within the meaning of § 2333 nos. 1 and 2 of the Civil Code by ascribing the deprival of the compulsory portion to the physical mistreatment consisting of punches to the head, as well as to the fear of being killed thereby. 33

Therefore in objective terms there had allegedly been a reason to withdraw the compulsory portion. In accordance with the result of the expert report, it is however said to be determined that the plaintiff had been incapable of contracting guilt when committing the acts of bodily harm, and when killing the testator. The effective deprivation of the compulsory portion was however dependent on culpable conduct on the part of the beneficiary of the compulsory portion. The compulsory portion could only be withdrawn in the event of grievous culpable misconduct because this would otherwise destroy the basis for the family ties. Such an interpretation was alleged to be constitutional. Since the right to the compulsory portion could allegedly definitely be derived from the right to maintenance, hence taking on amongst other things a certain care function, a restriction of the freedom to make a will had to be accepted in favour of aforesaid care function. 34

d) With the constitutional complaint, the complainant objects to the final judgment of the Regional Court and to the judgment on the appeal on points of fact and law handed down by the Higher Regional Court, as well as indirectly to the provisions contained in §§ 829, 2303, 2333 nos. 1 and 2, §§ 2337, 2339.1 no. 1, §§ 2343 and 2345.2 of the Civil Code. He essentially asserts an infringement of his fundamental rights under Article 14.1 and Article 6.1 of the Basic Law. 35

The justification of the right to a compulsory portion is said to be based on the special protection of the family. The precondition of a restriction of the freedom to make a will, as protected by Article 14.1 of the Basic Law, was not met, however, in the event of there being no family tie between the testator and the beneficiary of the compulsory portion. Deprivation of the compulsory portion in accordance with § 2333 nos. 1 and 2 of the Civil Code was not likely to be contingent on culpability if – as in the case at hand – the beneficiary of the compulsory portion had committed serious misconduct against the testator over a period of many years, and had thereby destroyed the family ties. If one permitted the element of culpability to apply, which was not required by the wording of § 2333 no. 1 of the Civil Code, there would be no restriction of acceptability and fairness. If no practical criterion other than the requirement of culpability as set out in § 2333 nos. 1 and 2, § 2345.2 and § 2339.1 no. 1 of the Civil Code were to exist leading to denial of the right to the compulsory portion in the concrete case, the only remaining possibility would be to do away with the right to a compulsory portion 36

altogether.

2. Proceedings 1 BvR 188/03 37

The complainant objects with her constitutional complaint to civil court judgments which oblige her as the heiress to provide information to the testator's son on the amount of the estate (hereinafter: plaintiff). 38

a) The testator, who died on 15 November 2000 at the age of 85, suffered prior to his death from a pulmonary disease and disturbance of cardiac rhythm. He was placed in in-patient treatment for this at times. In the last years before the death of the testator there had been differences of opinion and conflicts between him and the plaintiff regarding contact with and access to a grandchild, the plaintiff's son. Amongst other things, these differences of opinion were the subject-matter of correspondence between the testator and the plaintiff. The plaintiff rejected the testator's wish to correspond with and have personal access to his grandchild. By notary will of 16 April 1999, in which he quantified the value of his assets at DM 500,000, the testator then appointed the complainant, his wife, as sole prior heir and deprived the plaintiff – as well as four other children – of the compulsory portion. He stated the following in the will, amongst other things: 39

"My son T. is also not to receive a compulsory portion. He has denied me any direct contact with his children for a year, and has said to me in person that he rejects having any contact with me. This talk took place although he knew that I had only recently been released from hospital after a very serious illness. When my grandson, ..., wrote me a short letter at Christmas and I answered him lovingly, he sent the letter back to me, expressly 'prohibiting' me to contact his children again. When I did not keep to this 'instruction' and tried to correspond with my grandchildren once more, he again sent the letter back to me." 40

b) After the death of the testator, the plaintiff claimed the right to the compulsory portion. He filed an action by stages, initially requesting information on the amount of the estate. The complainant responded by claiming that effective deprivation of the compulsory portion had taken place. By his conduct, the plaintiff had allegedly risked having a serious disadvantageous effect on the testator's state of health. Amongst other things, the complainant offered evidence for the claim that the testator's doctors had advised him to avoid any excitement. This was allegedly what the testator had been referring to by stating in the will that the plaintiff had known, "that I had only recently been released from hospital after a very serious illness." 41

c) The Regional Court sentenced the complainant to provide information on the amount of the estate (§§ 2303 and 2314 of the Civil Code). The deprivation of the compulsory portion was alleged not to have been effective because there was no reason justifying it. The complainant – who in accordance with § 2336.3 of the Civil Code was said to bear the burden of evidence for the existence of the reasons for withdrawing the compulsory portion – had already not sufficiently substantiated that the plain- 42

tiff had allegedly deliberately physically mistreated the testator.

d) The complainant filed an appeal on points of fact and law against this. She claimed that the Regional Court had wrongly weighed up to the disadvantage of the testator the relationship between the freedom to make a will on the one hand and the current law on the sequence of succession between relatives on the other, a final constitutional clarification of which had not yet been carried out. It was said not to have deliberated on the evidentiary facts submitted which had allegedly served to document inherent facts giving rise to the facts of the case which had not been the subject-matter of personal perceptions. Also her substantiated submission on the existence of a restricted intention on the part of the plaintiff to commit bodily harm had allegedly not been fully evaluated. 43

The Court of Appeal rejected the appeal on points of fact and law. The fact that the plaintiff had denied him direct access to and contact with the grandchild did not constitute physical mistreatment of the testator. It was recognised that a disturbance of physical well-being caused mentally was sufficient to presume bodily harm. Conduct which however only caused anger, sorrow and desperation to the testator could not justify deprivation of the compulsory portion as long as it did not impact physical well-being. Even if, however, the testator's physical well-being had also been impaired thereby, § 2333 no. 2 of the Civil Code was said to be contingent on conduct that was at least restrictedly intentional. Sufficient indications of this had neither been submitted by the complainant, who in accordance with § 2336.3 of the Civil Code was obliged to explain and provide evidence, nor had any such evidence been taken. Intent in particular did not emerge from the letters written by the plaintiff to the testator, and was also not indicated by the complete discontinuation of contact – in order to avoid further conflict. 44

e) With her constitutional complaint, the complainant objects to the judgments of the Regional Court and of the Court of Appeal. She complains of a violation of her constitutional rights under Article 14.1, Article 3.1 and Article 103.1 of the Basic Law. The courts had allegedly overstated the requirements as to the explanation of intentional bodily harm, and had not taken circumstantial evidence necessary therefor. Because the fact to be proven was outside her own sphere of perception, she had only been able to collect evidential facts. The courts had allegedly prevented the taking of such evidence. This was alleged to constitute a breach of the principle of the equality of means in civil proceedings and of the freedom to make a will. The required interpretation of §§ 2333 and 2336.3 of the Civil Code in conformity with the constitution had allegedly not been carried out. 45

III.

The Federal Court of Justice, the President of the Federal Chamber of Notaries (*Bundesnotarkammer*) and the Federal Bar (*Bundesrechtsanwaltskammer*) have made statements re constitutional complaint 1 BvR 1644/00. The Federal Ministry of Justice has made a statement in the name of the Federal Government re constitution- 46

al complaint 1 BvR 188/03.

1. Constitutional complaint proceedings 1 BvR 1644/00 47

a) The President of the Federal Court of Justice transmitted a statement of the Chairman of the Fourth Civil Senate. The President takes the view that deprivation of the compulsory portion and unworthiness to receive the compulsory portion are contingent on culpability, and in particular on the soundness of mind of the beneficiary of the compulsory portion. This was said to be generally put forward in the case-law and the literature. The list of the reasons for withdrawing the compulsory portion was said to be exhaustive. It was possible to consider examining over and above the concept contained in § 162.2 of the Civil Code whether the claim of inheritance rights in the case at hand was to be evaluated as an unauthorised exercise of rights, or indeed as contrary to public policy. However, the Higher Regional Court had been correct to allow that the right to a compulsory portion was intended to help ensure that maintenance was provided to the beneficiary. In this instance, the right to the compulsory portion was likely in the final analysis to benefit the social assistance agencies. Apart from the lack of culpability of the plaintiff, which stood in the way of effective deprivation of the compulsory portion, it was hence also questionable whether the complainant was able to call on the fact of the plaintiff having caused the testator's death in breach of fidelity in accordance with §§ 138 and 242 of the Civil Code. 48

b) The President of the Federal Chamber of Notaries takes the view that, with the current arrangement regarding the right to a compulsory portion, the legislature had not overstepped the constitutional boundaries for determining the content and the limits [of the right of inheritance] in accordance with Article 14.1 sentence 2 of the Basic Law. The narrow definition of the reasons for withdrawing the compulsory portion was in principle within the framework which the Basic Law set for the legislature's freedom to draft legislation. It was said that it would be objectionable to link deprivation of the compulsory portion only to the collapse of the family relationship because the right to a compulsory portion by its nature applied in particular outside intact family relationships. The tie between the deprivation of the compulsory portion and the requirement of culpable conduct by the beneficiary of the compulsory portion was said to be justified as a rule. In the framework of the complex web of relationships between close relatives, culpable conduct was alleged to be an authoritative criterion for the decision to burden the beneficiary of the compulsory portion with the legal consequences of a conflict situation as one-sidedly as was the case with effective deprivation of the compulsory portion. Having said that, in exceptional cases such as the one at hand, culpability on the part of the beneficiary of the compulsory portion was not necessary in order to be able to clearly trace intrafamily alienation as originating in his or her sphere of influence. Then, despite a lack of culpability on the part of the beneficiary of the compulsory portion, a preponderance of the maintenance of the freedom to make a will could arise which would result in the grant of the compulsory portion appearing similarly grossly unfair as in the standardised case groups set out in § 2333 of the Civil Code. Hence, even in the case of (albeit not culpable) misconduct, 49

an extensive process of weighing up was necessary as to whether reasons existed for the deprivation of the compulsory portion the content of which was equivalent to the cases already provided for in § 2333 of the Civil Code.

There were however said to be doubts as to whether the wording of the statute and the will of the historical legislature permitted a constitutional interpretation of the existing provisions on deprivation of the compulsory portion and unworthiness to receive the compulsory portion such that it was possible to forgo the prerequisite of culpable conduct. Deprivation of the compulsory portion was to be contingent on a preponderant position of the testator in order to compensate for a lack of culpability on the part of the beneficiary of the compulsory portion. Only if one denied this to be the case was the current structure of the reasons for withdrawing the compulsory portion – to this degree – incompatible with the Basic Law. Resolution of this defect, for instance by creating a catch-all clause similar to § 1579 no. 7 of the Civil Code, was a matter for the legislature. 50

c) The Federal Bar considers the constitutional complaint to be unfounded. The interpretation of § 2333 no. 1 of the Civil Code on which the impugned decisions were based, including a requirement of culpability, and the provision contained in § 2333 no. 2 of the Civil Code, in accordance with which culpability on the part of the beneficiary of the compulsory portion was already required in accordance with the wording of the statute, were compatible with Article 14.1 of the Basic Law. The guarantee of the right of inheritance contained in Article 14.1 of the Basic Law was said to protect both the freedom to make a will and the statutory succession of the closer family, which was also required by Article 6.1 of the Basic Law. It hardly appeared to be possible to derive concrete standards from the guarantee of the right of inheritance or from Article 6.1 of the Basic Law for the question of whether or not the act to which the deprivation of the compulsory portion is likely to refer must have been committed culpably. Rather, it was at the discretion of the legislature whether or not to require a culpability characteristic. 51

2. Constitutional complaint proceedings 1 BvR 188/03 52

The Federal Ministry of Justice puts forward in its statement that the provisions of the Civil Code on a descendant’s right to a compulsory portion are compatible with Article 14.1 and Article 6.1 of the Basic Law. The fundamental content of the guarantee of the right of inheritance is also said to encompass the principle of relatives’ right to inherit. The conflict between this principle governing statutory succession and the freedom of the testator to make a will was said to be resolved in the Civil Code by the institution of the right to a compulsory portion. This substantive restriction of the freedom to make a will was said to be permissible as minimum participation of the closer family in the estate of the testator, as also required by Article 6.1 of the Basic Law. The right to a compulsory portion appeared as a continuation of the former duty of maintenance of the testator towards the beneficiary of the compulsory portion – identified here in the abstract and irrespective of means testing and ability to pay – as well 53

as a form of counterpayment by the testator for the former maintenance duty incumbent on the beneficiary of the compulsory portion towards him or her.

It had allegedly also not lost its justification through changes in societal or social circumstances. It is true that today, the beneficiaries of the compulsory portion are as a rule already economically independent at the time of the testator's death. However, this situation had also generally pertained in former times. Today's longer life expectancy and – linked to this – the higher age of the beneficiary of the compulsory portion at the time of the testator's death had been compared with shorter training periods and hence earlier economic independence at the time when the Civil Code entered into force. Finally, abolition of the right to a compulsory portion would particularly affect children born out of wedlock, whose equal rights had only just been achieved by the Succession Law Equality Act (*Erbrechtsgleichstellungsgesetz*) in 1997. Further, the current arrangement concerning the right to a compulsory portion and the reasons for withdrawing the compulsory portion were constitutionally unobjectionable. The legal position of the descendant protected by Article 6.1 of the Basic Law required that such a serious encroachment as the deprivation of the compulsory portion may take place only subject to particularly narrow criteria. 54

B.

The constitutional complaints are admissible. 55

I.

Not only the testator may call on the inheritance law situation as constitutionally guaranteed by the guarantee of the right of inheritance. Both the complainants, as heirs favoured by this guarantee, also enjoy the protection of the fundamental right contained in Article 14.1 of the Basic Law and can claim it, certainly from the time of the testator's death. Otherwise, the protection of the fundamental right would expire on the testator's death, and hence become largely valueless (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 91, 346 (360); 99, 341 (349)). 56

II.

In proceedings 1 BvR 188/03, the principle of subsidiarity does not stand in the way of the admissibility of the constitutional complaint (§ 90.2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*)) although the constitutional complaint impugns court rulings which in the context of an action by stages sentenced the complainant within the meaning of § 254 of the Code of Civil Procedure (*Zivilprozessordnung – ZPO*) to provide information, but not to pay a certain amount of money. It is true that the principle of subsidiarity requires that in the initial proceedings – in the context of what is reasonable (see BVerfGE 56, 363 (380); 69, 188 (202)) – the complainant should exhaust all procedural possibilities not to let a constitutional violation arise, or to resolve a violation of fundamental rights once it has taken 57

place (see BVerfGE 73, 322 (325); 81, 97 (102-103); 84, 203 (208); 95, 96 (127)). The complainant is however not guilty of any such omissions. She cannot be instructed to assert her constitutional objections in the proceedings for the payment of a specific amount of money which are to follow the impugned rulings. Admittedly, the claim to information in accordance with § 2314 of the Civil Code has a merely ancillary character to quantify the amount of payment (see Palandt/Edenhofer, loc. cit., § 2314 marginal no. 1). However, the question as to whether the plaintiff is entitled to the compulsory portion or whether he has been effectively deprived of the compulsory portion is a preliminary question both to the right to information in accordance with § 2314 of the Civil Code, and to the subsequent assertion of the monetary claim (see Staudinger/Olshausen, loc. cit., *Vorbem zu §§ 2333 ff.* marginal no. 30; Soergel/Dieckmann, loc. cit., *Vor § 2333* marginal no. 5). This is why it is permissible to reject the entire action by stages immediately if the lack of a right to the compulsory portion rules out a right to information in the same way as a right to payment (see BGH, *Monatsschrift für Deutsches Recht – MDR* 1964, p. 665). Since otherwise contradictory rulings would be handed down (see on this *MünchKommZPO-Lüke*, 2nd ed., 2000, § 254 marginal no. 22), it is also to be expected in the converse case, in which the court – as here – affirms a right to information on the basis of a right to the compulsory portion, that its view on the right to the compulsory portion is not renounced in the ruling on the payment claim.

Since on the basis of the value of the estate as quantified by the testator, one would have to expect the complainant to be sentenced to pay a specific amount of compulsory portion also in the ensuing proceedings on the specific amount of the right to the compulsory portion, a grievance relevant to fundamental rights already emerges from the impugned rulings. It is therefore not reasonable for the complainant to have to initially assert her constitutional objections in the proceedings on the concrete amount of the right to the compulsory portion in order to defend the fundamental rights the violation of which is impugned. 58

C.

The constitutional complaint in the proceedings 1 BvR 1644/00 is successful to the extent that it challenges the judicial rulings. In its part complaining indirectly about the right to a compulsory portion of the children in accordance with § 2303.1 of the Civil Code, as well as against the reasons for withdrawing the compulsory portion of § 2333 nos. 1 and 2 of the Civil Code and the reason for unworthiness to receive the compulsory portion of § 2345.2, § 2339.1 no. 1 of the Civil Code, it is unfounded. 59

The constitutional complaint in the proceedings 1 BvR 188/03 is unfounded. 60

I.

The minimum economic participation of the testator’s children in his or her estate, which is in principle inalienable and non-means-tested, is guaranteed by the guarantee of the right of inheritance contained in Article 14.1 sentence 1 in conjunction with 61

Article 6.1 of the Basic Law. The provisions regarding the right of the testator's children to a compulsory portion (§ 2303.1 of the Civil Code), regarding the reasons for withdrawing the compulsory portion contained in § 2333 nos. 1 and 2 of the Civil Code, and regarding the reason for unworthiness to receive the compulsory portion contained in § 2345.2, § 2339.1 no. 1 of the Civil Code are compatible with the Basic Law.

1. a) In accordance with the established case-law of the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*), the guarantee of the right of inheritance contained in Article 14.1 sentence 1 of the Basic Law guarantees the right of inheritance as a legal institution and as an individual right. Its function is to prevent private property, as the basis of a self-determined lifestyle, coming to an end on the death of the owner, and to ensure its continuation by means of legal succession. The guarantee of the right of inheritance supplements the guarantee of property to this degree, and forms together with the latter the basis of the property system stipulated in the Basic Law (see BVerfGE 91, 346 (358)). Article 14.1 sentence 2 of the Basic Law leaves it up to the legislature to determine the content and boundaries of the right of inheritance. When providing greater detail, the legislature must ensure the fundamental content of the constitutional guarantee contained in Article 14.1 of the Basic Law, keep in line with all other constitutional provisions, and must in particular adhere to the principles of proportionality and equality (see BVerfGE 67, 329 (340); 105, 313 (355)). Even if the guarantee of property and the right of inheritance are interconnected, the guarantee of the right of inheritance does not guarantee the (unconditional) right to transfer the given assets *ex causa mortis* to third parties unreduced; because they are linked to a transfer of assets, the possibilities open to the legislature to restrict the right of inheritance go further than those to restrict property (see BVerfGE 93, 165 (174)). 62

b) A characteristic element of the guarantee of the right of inheritance is freedom to make a will. Just as the fundamental right to property and the principle of freedom of action entrenched in Article 2.1 of the Basic Law, it serves the self-determination of the individual in legal transactions (see BVerfGE 91, 346 (358); 99, 341 (350)). The freedom to make a will as an element of the guarantee of the right of inheritance includes the right of the testator in his or her lifetime to order a transfer of his or her assets after his or her death differing from the statutory succession to one or several legal successors, in particular to exclude a statutory heir from participation in the estate and to restrict his or her inheritance to the [monetary] value of the statutory compulsory portion (see BVerfGE 58, 377 (398)). The testator is thereby afforded the possibility to arrange the terms of the succession him or herself by last will largely in accordance with his or her personal wishes and ideas (see BVerfGE 58, 377 (398); 99, 341 (350-351)). In particular, the testator is constitutionally not forced to treat his or her descendants equally (see BVerfGE 67, 329 (345)). 63

c) The right of the testator to leave assets, which is protected by the freedom to make a will, corresponds to the right of the heir to inherit by means of succession. The 64

right of the heir to acquire property by virtue of statutory or voluntary succession is also an inalienable element of the guarantee of the right of inheritance (see BVerfGE 91, 346 (360); 93, 165 (174); 99, 341 (349)).

2. Also the minimum economic participation of the children in the estate, which is in principle inalienable and non-means-tested, is protected by the guarantee of the right of inheritance contained in Article 14.1 sentence 1 of the Basic Law as the central structural principle of the applicable right to a compulsory portion. 65

a) Its characteristics are elements of the institutionally guaranteed content of the guarantee of the right of inheritance contained in Article 14.1 sentence 1 of the Basic Law, as traditional core elements of the German law of inheritance, in addition to the right to make a will and the right of the heir to inherit. By specially mentioning the right of inheritance in addition to the protection of property in Article 14.1 sentence 1 of the Basic Law, the Basic Law expresses that the guarantee of the right of inheritance takes on separate significance over and above guaranteeing the right of the testator to make a will. Because the freedom of the testator to leave assets could already be regarded as an expression of the freedom of ownership. The institutional guarantee under the law on inheritance provides further fundamental content-related statements on a constitutionally guaranteed distribution of the estate. The traditional core elements of the German law on inheritance also include the right of the testator's children to fundamentally inalienable participation in the estate with no means testing. 66

b) This participation of the children in the estate of the testator has a long tradition. The concept of the right to a compulsory portion within the meaning of a restriction of the will of the testator originates in Roman law. Germanic law in most instances had no concept of freedom of will on the part of the testator; the estate was only inherited within the family. It was only through the reception of Roman law that significance became attached to the freedom to make a will, and hence also to the principle of participation by the children against the will of the testator at least in the monetary value of the estate. All systems of regional by-laws applicable prior to the coming into force of the Civil Code in Germany conceived of obligatory participation of the children of the testator in the estate – structured as a substantive compulsory right of inheritance or as recognition of a monetary claim – (see *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich*, vol. V., *Erbrecht*, 2nd ed., 1896, pp. 382-383; Staudinger/Haas, loc. cit., *Vorbem zu § 2303 ff.* marginal nos. 6-9; Lange/Kuchinke, loc. cit., § 37 I. 1.). 67

The First Commission to Create a Civil Code for the German *Reich* unanimously decided as early as in 1875 to recognise in principle the right to a compulsory portion and to guarantee the children of the testator a right to a compulsory portion. It was vital to this decision above all that the concept of a restriction of the testator by a right to a compulsory portion or compulsory right of inheritance had been in existence in almost all periods and among all peoples. It was presumed in the deliberations on the Civil Code that a legal obligation of the testator existed not to misuse the right to make 68

a will granted to him or her. The right of the children to the compulsory portion was regarded as the other side of this legal duty (see *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich*, loc. cit., pp. 384, 387). At the same time, the possibility to withdraw a minimum participation of the testator's children in the estate in the event of serious misconduct towards the testator was also recognised in most legal orders applicable in the German *Reich* prior to the entry into force of the Civil Code, and was taken up in the context of the deliberations to create a Civil Code for the German *Reich* (see *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich*, loc. cit., pp. 428-432).

The fundamental question of whether to retain or abolish the right to a compulsory portion was no longer on the table when it came to the deliberations of the Second Commission. There were also only isolated voices in the *Reichstag* deliberations against a right to a compulsory portion (see Mertens, *Die Entstehung der Vorschriften des BGB über die gesetzliche Erbfolge und das Pflichtteilsrecht*, 1970, pp. 81-89; Mugdan, *Die gesammelten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, Vol. 5, *Erbrecht*, 1899, pp. 903-905). By means of the guarantee contained in Article 14.1 sentence 1 of the Basic Law, the legislature creating the Basic Law followed on from this traditional interpretation of the right of inheritance by recognising in principle the children's right to a compulsory portion. 69

c) The right of the testator's children to a compulsory portion applicable in Germany corresponds in principle to the right integrated into inheritance systems of other European states which are also influenced by Roman law. These also provide for a right to a compulsory portion or a compulsory right of inheritance of the testator's children with no means testing applied, the details being different in individual cases. Thus, for instance in Austria – as in Germany – the children have a right under the law of obligations to a compulsory portion in the amount of half their statutory share in the estate (see §§ 762 et seq. of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*)). A similar right to the compulsory portion is provided for by the Polish law of inheritance, the portion being increased from half the statutory share in the estate to two-thirds if the child is a minor (see Article 991 of the Civil Code (*Kodeks Cywilny*)). In Italy, as "obligatory heirs" the children are granted a right to a compulsory portion (to be asserted by means of an action in abatement). With one child, the testator may dispose freely of half of his or her assets, with several of one-third (see Article 536 et seq. of the Civil Code (*Codice Civile*)). Similar restrictions on the freedom to make a will exist in France, where Article 913 et seq. of the Civil Code (*Code Civil*) provide a compulsory right of inheritance for the children in the form of a substantive reserved inheritance. The part of the testator's assets not affected by this is half with one child, with two children one-third and with three or more children one-quarter (see on the overall topic Martiny, in: *Verhandlungen des 64. Deutschen Juristentages*, vol. I, *Gutachten*, 2002, A 76-77, A 81 et seq. with many more examples). 70

3. The right to a compulsory portion over and above this is closely linked to the protection of the relationship between the testator and his or her children guaranteed by 71

Article 6.1 of the Basic Law (see BVerfGE 57, 170 (178)).

a) Article 6.1 of the Basic Law contains a value-defining fundamental provision for the entire private law relating to the family (see BVerfGE 6, 55 (71-72)). The constitution obliges the state to respect and promote the family community consisting of parents and children both in the intangible-personal and in the tangible-economic area as independent and self-responsible (see BVerfGE 24, 119 (135); 33, 236 (238)). Constitutional protection is enjoyed in this respect by the responsibility of family members for one another which is characterised by the mutual obligation of parents and children to help and consider one another, as also provided by the legislature as a model for parent-child relationships in § 1618 a of the Civil Code (see BVerfGE 57, 170 (178)). In the deliberations in the Policy Committee (*Grundsatzausschuss*) of the Parliamentary Council, the question as to whether the right of inheritance was to be included in the list of fundamental rights was also based on the idea that the right of inheritance amongst other things served to preserve the family (see *Der Parlamentarische Rat* 1948-1949, *Akten und Protokolle*, vol. 5/I, 1993, *Ausschuss für Grundsatzfragen*, revised by Pikart/Werner, pp. 147-148). 72

b) The structural characteristics of children's participation in the estate are an expression of family solidarity, which exists fundamentally and indissolvably between the testator and his or her children. Article 6.1 of the Basic Law protects this relationship between the testator and his or her children as a life-long community within which both parents and children are not only entitled, but indeed obliged, to take on both substantive and personal responsibility for one another. The right to a compulsory portion – like the right to maintenance – is linked to the family-law relationships between the testator and his or her children, and transfers this solidarity between the generations, which as a rule is founded on descent and in most cases cemented by family co-habitation, into the area of the law of inheritance. The freedom of the testator to make a will is hence in principle also subject constitutionally to the family law ties that are founded on descent. This obligation to comprehensively care for one another justifies ensuring to the child with the right to a compulsory portion an economic basis from the assets of the deceased parent even following the death of the testator. In the family community, the acquisition and preservation of assets is based typically on conceptual or economic contributions both by the testator and by his or her children (bringing up, financial support, helping, consumption conduct, care); also the use of the family assets largely takes place jointly by the testator and his or her children. Linking to this, the right to a compulsory portion has the function to facilitate the continuation of the conceptual and economic connection between assets and family – irrespective of a concrete need of the child – beyond the death of the owner of the assets (see Staudinger/Otte, *BGB* (2000), *Einl zu §§ 1922 ff.* marginal no. 51; Boehmer, *Erbrecht*, in: Neumann/Nipperdey/Scheuner, *Die Grundrechte*, 2nd vol., 1954, p. 401 (414, 416)). 73

c) Particularly in cases of alienation between the testator and his or her children, or indeed the breakdown of this relationship, the right to a compulsory portion imposes 74

boundaries on the freedom of the testator to make a will, and the possibility thereby opened to him or her to “punish” a child through disowning. It restricts the freedom of the testator to decide on the degree to which and the nature in which he or she intends to have his or her children participate in his or her estate. The right to a compulsory portion thus does not rule out unequal treatment of children by the testator in this way, but it restricts this possibility. At the same time, a disproportionate disadvantage of the children under the law on inheritance by establishing the spouse or a person outside the family as heir or legatee is avoided. The right to a compulsory portion contained in the Civil Code is hence in principle suited and necessary to protect the testator’s children against the family relationships being reflected not at all or insufficiently in the distribution of the estate (see Martiny, loc. cit., A 70-71).

d) This function of the right to a compulsory portion, which on the one hand restricts freedom and on the other hand protects the family, takes on particular significance if there are children of the testator from an earlier marriage or relationship who without a right to a compulsory portion frequently would not participate in the testator’s assets. This applies particularly to children of the father born out of wedlock. For a child born out of wedlock, the right to a compulsory portion is a manifestation of the protective task of the legislature under ordinary law in the area of the law of inheritance that is entrenched in Article 6.5 of the Basic Law. This constitutional provision makes it possible to allot to children born out of wedlock suitable participation in the father’s estate in the shape of a right of inheritance, or at least of a monetary claim (see BVerfGE 25, 167 (174); 44, 1 (17-18)). 75

4. The right of the testator’s children to a compulsory portion also meets the constitutional requirements in the specific structure it has been given in § 2303.1 of the Civil Code. The provision contained in § 2303.1 of the Civil Code in turn ensures the children of the testator a suitable participation in the estate in the shape of a monetary claim against the estate, which is in principle inalienable. The share granted to the children in the estate on the other hand permits the testator sufficient asset discretion to enable him or her to implement his or her ideas as to the distribution of assets after death. Hence, this provision is within the discretion open to the legislature. 76

The task of civil law is primarily to properly resolve conflicts of interest between legally equal subjects (see BVerfGE 30, 173 (199); 52, 131 (153)). The duty to provide a legal framework for participation in the estate by the testator’s children which is in principle obligatory is set against the freedom of the testator to make a will, which is also protected under fundamental rights. The solution to this conflict is a matter for the legislature. It must implement the content of the structure-forming characteristics both of the freedom to make a will and of the right to a compulsory portion of the children in a differentiated fashion in concrete legal provisions that are directly binding on those involved. In doing so, it must see the colliding fundamental right positions in their interaction, and must limit them in each case such that they remain as effective as possible, both for the testator and for his or her children. The legislature has broad scope for discretion when it comes to filling out the concrete details under ordinary 77

law (see BVerfGE 67, 329 (340-341)). It is hence, for instance, likely to introduce instead of a right to a compulsory portion in the structure of a monetary claim, the participation of the disowned child in the community of heirs. Further, the amount of the compulsory portion is not strictly defined in the constitution; it is only necessary to guarantee inalienable suitable participation by the children in the testator's estate. There is certainly no obligation incumbent on the legislature over and above the current provisions to ensure the children an inalienable share in the estate (see BVerfGE 91, 346 (360)).

5. The provisions contained in § 2333 nos. 1 and 2 of the Civil Code and § 2345.2, § 2339.1 no. 1 of the Civil Code regarding deprivation of the compulsory portion and reasons for unworthiness to receive the compulsory portion also meet the constitutional requirements. 78

a) There are case constellations in which it is not possible to apply equally both the principle of the freedom to make a will and the principle of the children's inalienable participation in the estate. For example, following particularly grievous misconduct on the part of the child, it may be simply unreasonable for the testator to have to accept participation in the estate by this child. Such misconduct on the part of the child can however only justify unrestricted priority of the freedom to make a will if it clearly goes beyond disturbing the family relationship which normally exists if the testator excludes his or her children from succession by last will. Not any misconduct on the part of the child leading to alienation or a breakdown of relations with the testator justifies the priority of the freedom to make a will since otherwise the right of the children to a compulsory portion would be defeated, and would be bereft of all practical meaning. 79

b) For such exceptions, the legislature is constitutionally bound to provide for arrangements which enable the testator to withdraw or restrict the child's participation in the estate. Because of the diversity and divergence of possible family conflict situations, in the framework of its discretion the legislature may use generalising and categorising provisions here. It may hence also link deprivation of the compulsory portion to elements the existence of which it is relatively easy to prove in subsequent court proceedings. It is also within the framework of the discretion of the legislature to demand of a testator when drawing up a last will containing deprivation of the compulsory portion to state sufficiently clearly the reason for the deprivation. 80

c) As stated, from the death of the testator the heir can also call on the guarantee of the right of inheritance contained in Article 14.1 sentence 1 of the Basic Law (see above at B. I.). The legislature is hence obliged to also afford him or her the legal possibility to avert the right to the compulsory portion of a testator's child addressed against him or her on grounds that it had precisely been particularly grievous misconduct on the part of the child towards the testator that had led to the latter no longer having been able to deprive his or her child of the compulsory portion. 81

d) In specifying the elements justifying deprivation or restriction of the children's participation in the estate for gross misconduct, the legislature is to adhere, in the scope 82

of its discretion, in particular to the principles of the clarity of law, justiciability and legal certainty (see BVerfGE 63, 312 (323-324)). These constitutional aspects speak against general breakdown or alienation clauses, which have been variously proposed in the legal policy discussion (see the references in S. Herzog, *Die Pflichtteilsentziehung – ein vernachlässigtes Institut*, 2003, pp. 387-395). Further, the legislative mandate to the legislature contained in Article 6.5 of the Basic Law (see BVerfGE 58, 377 (389-390)) can oppose the creation of such a clause. It would increase the risk that children born out of wedlock are more frequently affected by deprivation of the compulsory portion than those born in wedlock. The legislature is furthermore not constitutionally obliged to supplement the list of reasons for withdrawing the compulsory portion contained in § 2333 of the Civil Code to include a catch-all clause generally referring to grievous reasons, such as is considered in some cases in the legal policy discussion (see Schlüter, loc. cit., p. 1071).

e) The reasons for withdrawing the compulsory portion contained in § 2333 nos. 1 and 2 of the Civil Code solely to be examined here correspond in principle to the constitutional requirements. They are conditional on misconduct on the part of the beneficiary of the compulsory portion which is sufficiently grievous to be able to presume that it would be unreasonable for the testator to be obliged to accept participation in the estate by the child against his or her will. Also in the interest of the clarity of law and justiciability, these statutory arrangements describe the misconduct of the child towards the testator in a sufficiently clear manner. At least in the interpretation contained in the case-law and in teaching, they also provide an element which as a rule ensures sufficiently well that misconduct on the part of a child only justifies the testator in deprivation of the compulsory portion in extreme exceptions, namely by imposing the prerequisite of culpable conduct on the part of the child. 83

In the context of the complex relationship between the testator and his or her children, in addition to other aspects, the requirement of culpable conduct on the part of the beneficiary of the compulsory portion is in principle an authoritative and suitable criterion for distinction for the decision as to whether the constitutionally protected right of the child to inalienable participation in the estate must be subordinate to the freedom of the testator to make a will because of being unreasonable towards him or her. 84

f) Finally, also the reason for unworthiness to receive the compulsory portion stipulated in § 2345.2 and § 2339.1 no. 1 of the Civil Code meets the constitutional requirements for the same reasons. It too links denial of the child's right to the compulsory portion to extraordinarily grievous misconduct towards the testator. 85

II.

1. The court rulings impugned with constitutional complaint 1 BvR 1644/00 are however based on an interpretation and application of § 2333 no. 1 of the Civil Code which does not sufficiently accommodate the radiating effect of the fundamental right of the freedom of the testator to make a will under Article 14.1 sentence 1 of the Basic 86

Law.

a) The interpretation and application of constitutional provisions of civil law is a matter for the ordinary courts. In so doing, they must however accommodate the significance and scope of the fundamental rights affected by their rulings in their interpretation so that their value-defining significance also is retained at the level of the application of the law (see BVerfGE 7, 198 (205 et seq.); established case-law). To this end, a process of weighing up must be carried out in the context of the elements of the civil law provisions, which can and must be interpreted, between the conflicting protected fundamental rights; this process must accommodate the special circumstances of the case (see BVerfGE 99, 185 (196); established case-law). Since the legal dispute however remains private-law in nature and finds its solution in private law which is interpreted in terms of fundamental rights, the Federal Constitutional Court is restricted to examining whether the civil courts have sufficiently accommodated the influence of the fundamental rights (see BVerfGE 18, 85 (92-93)). By contrast, it is not for the Federal Constitutional Court to instruct the civil courts on how they are to rule in the result of the case at issue (see BVerfGE 94, 1 (9-10)). A breach of fundamental rights which leads to an objection against the impugned rulings however exists if it has been overlooked that fundamental rights should have been accommodated in interpreting and applying private law if the scope of protection incorrectly or incompletely defines the fundamental rights to be accommodated, or if their significance has been incorrectly assessed, so that in this the balancing out of the respective legal positions in the context of the private-law arrangement suffers, and if the ruling is based on this error (see BVerfGE 95, 28 (37); 97, 391 (401)). 87

b) Accordingly, the impugned rulings do not hold. They presume in a constitutionally unobjectionable manner that effective deprivation of the compulsory portion in accordance with § 2333 no. 1 of the Civil Code is contingent in principle on culpable misconduct on the part of the child. If this criterion used by the civil courts is however strictly understood in the criminal-law sense, in individual cases this may counter the constitutional requirement of an adequate balancing of the opposing fundamental rights positions. Such a situation exists if the child was incapable of contracting guilt within the meaning of criminal law, but knowingly and willingly implemented the objective element of wrongdoing. The courts have not taken this into account in their rulings. 88

The facts which the courts had to evaluate differed widely from the case constellations on which, as a rule, disowning or deprivation of the compulsory portion are based. The courts have identified the objective preconditions of the reason for withdrawing contained in § 2333 no. 1 of the Civil Code, but have not included the special circumstances in their considerations. It is a matter for the courts to prevent disproportionate subordination of the fundamental right of freedom to make a will to the right of the child to sufficient participation in the estate. 89

The testator had already been grievously physically mistreated and threatened by 90

the plaintiff several times prior to being killed. In this respect, she had lived in constant fear of further mistreatment and killing by him. This danger, which was certainly concrete and which later became real when the testator was killed, had constituted a reason for her to want to deprive the plaintiff of the compulsory portion. In accordance with the expert report consulted in the criminal court proceedings, the plaintiff was incapable of contracting guilt in the criminal-law sense when killing the testator, but was nonetheless able to see that his offence was wrong. This should have led the civil courts to examine in the initial proceedings whether in the previous mistreatments the plaintiff had also acted intentionally at least in a natural sense and had committed the offence of trying to kill her in accordance with § 2333 no. 1 of the Civil Code. The courts have not taken account of these special circumstances, and have not included them in the consideration of the opposing fundamental right positions on the provision of the acceptability limit, but only based their deliberations on the fact that the plaintiff had not allegedly acted culpably when attacking the testator. This does not satisfy the problem of the initial case, and falls short of the fundamental rights-related guarantee of the freedom to make a will.

c) The provision contained in § 2333 no. 1 of the Civil Code could have been interpreted and applied by the courts in the sense that it is not a matter of the culpability of the plaintiff in the criminal-law sense. 91

aa) The wording of the provision does not oppose such an interpretation since the element of culpable conduct on the part of the beneficiary of the compulsory portion was not included by the legislature in no. 1 of § 2333 of the Civil Code. In accordance with the definition of the decision, anyone tries to kill someone else who attempts to bring about their death by their actions, who has set themselves the “goal” of the death of the other (see *Entscheidungen des Reichsgerichts in Zivilsachen* – RGZ 100, 114 (115) re § 1566 of the Civil Code, old version). The wording of the statute hence does not rule out that a mentally ill person acting with “natural” intention can also carry out such a targeted act. Also systematic reasons do not oppose such an interpretation. A comparison between the reason for withdrawing the compulsory portion in § 2333 no. 1 of the Civil Code on the one hand and the reasons on which culpability is contingent on the other in § 2333 nos. 2 and 3 of the Civil Code permits one to conclude that attempting to kill another person must be regarded as independent grievous misconduct of the beneficiary of the compulsory portion, which is why it is not included in the list of serious minor and major crimes, but has been placed right at the beginning of the list of the reasons declared to be relevant. 92

bb) Finally, the origins of § 2333 no. 1 of the Civil Code also do not disfavour such an interpretation. It cannot be clearly derived from legislative material that it was the purpose of the legislature also to require culpable conduct on the part of the beneficiary of the compulsory portion with the reason for withdrawing the compulsory portion of § 2333 no. 1 of the Civil Code. Hence, whilst the individual reasons for withdrawing the compulsory portion in the deliberations to create a Civil Code were referred to as a “kind of punishment” for the beneficiary of the compulsory portion, 93

and the competent editor's sub-draft on the law of inheritance provided that the beneficiary of the compulsory portion had to attempt to kill another "by a criminally prosecutable act". In the further course of the deliberations, however, this wording was taken up neither by the First Commission nor by the Second Commission. Even the draft of the First Commission provided for attempting to kill another as a separate reason for disinheriting (see Jakobs/Schubert (eds.), *Die Beratung des Bürgerlichen Gesetzbuchs, Erbrecht*, 2nd sub-volume, 2002, pp. 1999-2013). The materials speak in this context only of "authorship of the act referred to" in the person of the beneficiary of the compulsory portion (see *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich*, loc. cit., p. 431). The aspect was named in the *Denkschrift des Reichsjustizamtes zum Bürgerlichen Gesetzbuch* as a commonly held fundamental concept of the reasons for withdrawing the compulsory portion that deprivation was only to take place if the beneficiary of the compulsory portion had committed conduct which constituted a gross violation of the tie existing between the testator and the beneficiary of the compulsory portion (see Mugdan, loc. cit., p. 876). In view of such sources, it cannot be ascertained that § 2333 no. 1 of the Civil Code is to be a civil law sanction acting to the detriment of the beneficiary of the compulsory portion, and that culpable conduct within the meaning of criminal law is necessary in each case.

d) The judgment of the Regional Court and the judgment of the Higher Regional Court are based on the unconstitutional interpretation and application of § 2333 no. 1 of the Civil Code. They violate the complainant re I. in his fundamental right under Article 14.1 sentence 1 of the Basic Law. The case is referred back to the Higher Regional Court for a fresh ruling in accordance with § 95.2 of the Federal Constitutional Court Act. 94

e) Other constitutional issues, in particular regarding whether a corresponding interpretation is required in the concrete case for constitutional reasons, and whether such interpretation comes into question at all, also in relation to the reason for withdrawing the compulsory portion contained in § 2333 no. 2 of the Civil Code and the reason for unworthiness to receive the compulsory portion of § 2345.2, § 2339.1 no. 1 of the Civil Code, do not require further examination. 95

f) The cost ruling is based on § 34 a.2 and § 34 a.3 of the Federal Constitutional Court Act. It is fair to order the full refunding of expenses because the complainant has achieved his main objective in the proceedings, namely the re-examination of the effectiveness of the deprivation of the compulsory portion by the nonconstitutional courts. 96

2. The impugned rulings in proceedings 1 BvR 188/03 do not violate the complainant's constitutional rights. They do not lead one to recognise a violation of Article 14.1 sentence 1, Article 3.1 and Article 103.1 of the Basic Law. 97

In contradistinction to constitutional complaint proceedings 1 BvR 1644/00, the deprivation of the compulsory portion here was based on a family conflict situation of a 98

kind that is characteristic for disinheritance, and in which precisely the right to a compulsory portion carries out its function. Alienation and a breakdown of relations had taken place between the testator and the plaintiff with regard to the question of access to and contact with a grandchild which the testator had used as an occasion to deprive the plaintiff of the compulsory portion also. In application of § 2336.3 of the Civil Code, and in a constitutionally unobjectionable manner, the courts have imposed the prerequisite that the complainant should sufficiently substantiate intentional bodily harm on the part of the plaintiff. It is not constitutionally objectionable that the courts do not regard the submission of the complainant to be sufficiently substantiated, and have hence not taken the evidence offered. They have discussed the content of the question as to whether the complainant has submitted a corresponding submission as to the existence of an intention to commit bodily harm, and have valued the statement of the complainant from this point of view. Their arguments are sufficiently well based in the civil procedure requirements as to sufficient certainty of an application to take evidence (see BGH, *NJW-RR* (*Neue Juristische Wochenschrift – Rechtsprechungs-Report Zivilrecht*) 1993, pp. 443-444; Stein/Jonas/Leipold, *ZPO*, 21st ed., 1997, § 284 marginal nos. 42-44, 73-74). That the courts in doing so had missed the constitutional guarantee of the freedom to make a will and the principles of fair proceedings and of a legal hearing is not visible. The legal view of the courts that it could in any case not be concluded from the external course of events as portrayed by the complainant that the plaintiff acted with limited intent to cause bodily harm in breaking off contact with the seriously ill testator, may not be imperative in ordinary-law terms. It does however at least suggest itself if one considers the overall family circumstances giving rise to the deprivation of the compulsory portion, and is certainly not constitutionally objectionable.

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

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 19. April 2005 - 1 BvR 1644/00

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 19. April 2005 - 1 BvR 1644/00 - Rn. (1 - 98), http://www.bverfg.de/e/rs20050419_1bvr164400en.html

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