

Headnotes

to the judgment of the First Senate of 1 April 2008

- 1 BvR 1620/04 -

1. The duty to care for and bring up their child which is imposed on parents by Article 6.2 sentence 1 of the Basic Law (*Grundgesetz-GG*) is not owed exclusively to the state but also to the child. The child's right to parental care and upbringing in Article 6.2 sentence 1 of the Basic law corresponds with this parental duty. It is for the legislature to elaborate the right and duty.
2. The encroachment on the fundamental right to protection of personality contained in Article 2.1 in conjunction with Article 1.1 of the Basic Law, which is associated with the imposition of an obligation on a parent to have contact with his or her child, is justified by the responsibility for his or her child imposed on the parent by Article 6.2 sentence 1 of the Basic Law and the child's right to parental care and upbringing. It is reasonable to oblige a parent to have contact with his or her child if this is in the child's best interests.
3. If coercive measures are necessary to force an unwilling parent to have contact with a child, this contact is not usually in the best interests of the child. The encroachment on the parent's fundamental right to protection of his or her right of personality which results from the threat to apply coercive measures is not justified in this context unless there are sufficient indications which suggest that enforced contact will be in the child's best interests in an individual case.

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 1620/04 –

Pronounced
on 1 April 2008
Andrick
Government Official
as Registrar
of the Court Registry



IN THE NAME OF THE PEOPLE

**In the proceedings
on
the constitutional complaint**

of Mr B(...)

– authorised representatives: Rechtsanwälte Hase & Manczak,
Nicolaiplatz 18, 14770 Brandenburg

1. directly against the order of the Brandenburg Higher Regional Court (*Oberlandesgericht*) of 21 January 2004 – 15 UF 233/00 –,
2. indirectly against § 33.1 sentence 1 and § 33.3 of the Act on Matters of Non-contentious Jurisdiction (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit* – FGG) –

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Papier,
Hohmann-Dennhardt,
Hoffmann-Riem,
Bryde,
Gaier,
Eichberger,

Schluckebier,

Kirchhof

held on the basis of the oral hearing of 21 November 2007:

Judgment:

1. **§ 33.1 sentence 1 and § 33.3 of the Act on Matters of Non-contentious Jurisdiction are to be interpreted in conformity with the constitution as meaning that compulsory enforcement of the duty of contact of a parent who refuses to have contact with his or her child must be avoided unless there are sufficient indications in a specific case that enforced contact would be in the child's best interests.**
2. **The order of the Brandenburg Higher Regional Court of 21 January 2004 – 15 UF 233/00 – violates the complainant's right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law (*Grundgesetz* – GG) to the extent that it threatens to fine the complainant. To this extent the order is overturned and the matter is referred back to the Brandenburg Higher Regional Court for a new decision.**
3. **The *Land* Brandenburg is ordered to reimburse the complainant for his necessary expenses in the proceedings on the constitutional complaint.**

Reasons:

A.

[...]

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I.

1. a) The Act Reforming the Law of Parent and Child (*Gesetz zur Reform des Kindschaftsrechts (Kindschaftsrechtsreformgesetz – KindRG)*) of 16 December 1997 (Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I p. 2942), which entered into force on 1 July 1998, amended § 1684.1 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) to allow children their own right to have contact with their parents. At the same time this provision stipulates that parents do not simply have a right to have contact with their child, but also have an obligation to have such contact. Family courts are required to decide on the scope of the right of contact, how it should be exercised, how it should be restricted and when it may be excluded pursuant to § 1684.3 and § 1684.4 of the Civil Code. The provisions of § 1684 of the Civil Code which are relevant here state:

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(1) A child has the right to have contact with each of its parents; each parent is obliged and entitled to have contact with his or her child. 3

(3) The Family Court may determine the scope of the right of contact and elaborate the details of how it should be exercised, including in relation to third parties. (...) 4

(4) The Family Court may restrict or exclude the right of contact or the enforcement of earlier decisions on the right of contact to the extent the child's best interests make this necessary. It may only issue a decision restricting or excluding the right of contact or its enforcement over an extended period or permanently if failure to do so on its part would endanger the child's best interests. The Family Court may in particular order that contact may only take place when a third party who is willing to assist with it is present. The third party may also be a youth welfare agency or an association; in this case the agency or association will select the individual to provide the assistance. 5

§ 33 of the Act on Matters of Non-contentious Jurisdiction applies to the compulsory enforcement of a parent's duty of contact imposed by § 1684.1 of the German Civil Code. The relevant provisions of this section state: 6

(1) If the court imposes an obligation on a person to undertake an act whose performance depends entirely on his volition ..., it may enforce such performance by ordering him to pay a fine unless the law provides otherwise. ... 7

(3) Prior to ordering payment of the fine (subsection 1), the court must first threaten the party concerned with imposition of a fine. The fine may not exceed twenty-five thousand euros in a single case. ... 8

b) There was dispute during the legislative proceedings as to whether contact with a child should be enforceable. The draft legislation of the Federal Government did not initially provide for a right of contact on the part of the child or a duty of contact on the part of parents because it was thought that enforced contact was not in the child's best interests (*Bundestag* printed paper (*Bundestagsdrucksache* – BTDrucks) 13/4899, p. 68). However, the *Bundesrat* suggested in its own statement that the child should be granted its own right which could not be exercised until the child had turned 14 and which could only be asserted by the child personally. Nevertheless, the *Bundesrat* rejected the inclusion of means of enforcing the right of contact because the use of coercive measures for the enforcement of a personal relationship appeared to it to be very burdensome and not appropriate (*Records of the Bundestag* 13/4899, pp. 153, 161-162). On the other hand, the Committee on Legal Affairs of the *Bundestag* recommended implementing its reform goal of promoting the rights of the child 9

and giving priority to its interests by creating a subjective right of contact for it without attaching a minimum age to the right and without obliging parents to have contact with the child. This it was thought would make it clear to parents that the child's contact with them was of outstanding significance for its development. Children having their own right of contact would alter parents' level of awareness and send them a clear signal. For this reason and because a reduction in enforceability could lead to no further contact whatsoever it was thought that excluding the possibility of enforcement was not justifiable (*Bundestag* printed paper 13/8511, pp. 67-68). Ultimately, the legislature decided to follow this recommendation of the Committee on Legal Affairs.

2. There is disagreement in the case law and among legal scholars as to whether, and if so under what conditions a parental duty of contact may be enforced compulsorily against the will of the parent concerned. 10

[...] 11-14

II.

[...] 15

1. The Local Court (*Amtsgericht*) dismissed the application by the child's mother for an access arrangement between the child and its father in its order of 6 November 2000. It found that the child had so far not had any contact with the complainant. Enforced contact was not in the child's best interests. Even if the complainant could be persuaded to actually come and collect the child by the imposition of a fine, enforced contact could not under any circumstances be a pleasant affair for the child. The complainant had understandable reasons for assuming that contact with his son would be detrimental to his marriage and could also lead to its disintegration. 16

2. The Higher Regional Court obtained an opinion from an expert during appeal proceedings. According to the expert's findings contact in the presence of a social worker would not be detrimental to the child if the complainant continued to ignore the child as he claimed he would – at least not for a certain period of time. However, the expert found that the father's hostile attitude would in the long term undermine the child's feelings of self-worth; it would experience the meetings as something to be endured. In this case there was a risk of serious damage to the child. 17

The complainant and the child did not meet while the expert opinion was being prepared because the Federal Constitutional Court (*Bundesverfassungsgericht*) had on account of the violation of the complainant's general right of personality overturned the order of the Higher Regional Court threatening to fine the complainant if he refused a meeting with the child which would allow the expert to make an assessment and observe the behaviour of the complainant and the child. The Federal Constitutional Court saw no statutory foundation for this (see Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* – 18

BVerfGK) 1, 167 et seq.).

The Higher Regional Court amended the order of the Local Court in its order of 21 January 2004, which has itself been challenged by way of the constitutional complaint. 19

The Higher Regional Court grounded its decision in the fact that the legislature had deliberately drafted the child's right of contact as its own subjective right when amending § 1684.1 of the Civil Code through the Parent and Child Matters Reform Act. This corresponded with the duty of parents to have contact with their child. The decision of the legislature was based on recognition of the fact that a child's contact with its parents, especially when it does not live with them, is of outstanding significance for its development and in its best interests. 20

In view of this legislative background, the Family Court's finding that "enforced contact" – that is to say contact between the child and the father that is based solely on a court order – was not in the child's best interests did not reflect the true legal position. The Local Court failed to recognise that restriction or exclusion of the right of contact could in view of the child's subjective right to have contact with both of its parents only be considered insofar as this was necessary in the best interests of the child. As laid down in § 1684.4 of the Civil Code, courts could only issue a decision restricting or excluding the right of contact or its enforcement over an extended period or permanently if failure to do so would endanger the child's best interests. This statutory provision corresponded with the obligation of both parents under § 1684.2 of the Civil Code to refrain from everything that would render the [child's] upbringing more difficult. In light of this the complainant's objection that he did not have a relationship with his son and did not wish to establish one could be disregarded. He failed to recognise that the child's right of contact does not serve solely to maintain an existing relationship between a parent and child, but also has the purpose of establishing a new relationship between them in the interests of the child so that, among other things, the other parent can be a kind of "parent in reserve". 21

The Higher Regional Court added further that there were no serious constitutional objections to a duty of contact on the part of the father. Article 2 of the Basic Law subjected the right to freely develop one's personality to the condition that this did not violate the rights of others and did not violate public policy. Individuals were required to accept such restrictions. This also applied to the restrictions imposed by the legislature on the father through the duty of contact laid down in § 1684 of the German Civil Code. The legislature's weighing of the interests of the minor child and the father to give the child's interests precedence over the father's right to freely develop his personality were just as unobjectionable from a constitutional perspective in view of the child's need for special protection that was also expressed in Article 6 of the Basic Law as were other duties that followed from fatherhood such as, for example, the duty to pay child maintenance. 22

Nor was a violation of Article 6.1 of the Basic Law evident. The actual encroachment 23

which the complainant and his family, which is protected by Article 6.1 of the Basic Law, had to accept as a result of the duty to have contact with his illegitimate child was rather minor and not disproportionate. The threat by the complainant's wife that she would leave him if the Court ordered him to have contact with the child in the proceedings was also not sufficient to lead to a different evaluation. No one would seriously contemplate arguing that the child support claim of a child who did not belong to the immediate family should be held unconstitutional if the spouse threatened to dissolve the marriage in the event that the courts were to enforce the claim. The situation could not be any different in relation to the complainant's legitimate children.

The Senate's orders were in keeping with the recommendations in the expert's opinion, whose content was not challenged by either of the parties. Since the legislature did not exclude the assertion of the child's right from the possibility of enforcement, it could be asserted before the courts and enforced by them directly on the basis of § 33 of the Act on Matters of Non-contentious Jurisdiction. The threat was justified since the complainant had categorically refused to have contact with his son.

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III.

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The complainant argued that the right of contact was a strictly personal right which could not be enforced in execution proceedings. The Committee on Legal Affairs had assumed primarily in its recommendation that the provision would send a clear signal to parents and was a well-meant appeal to them. It was also not possible to enforce the fulfilment of marital duties; the same applied to contracts for personal service. The complainant did not go so far as to allege that the duty of contact was not enforceable; he simply objected to the threat of a fine and its subsequent imposition.

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This violated his general right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law. It was true that a child's right to have contact with a parent could be compulsorily enforced under § 33 of the Act on Matters of Non-contentious Jurisdiction. The legislature had, however, contemplated a situation in which the child's right to have contact was to be enforced against the will of the parent caring for the child. Thus its intention had been to give a child the opportunity to foster its relationship with the parent with access rights against the will of the parent caring for the child and to persuade the latter, if necessary by the imposition of a fine, to allow contact with the other parent. This did not entail the violation of a fundamental right because the parent caring for the child was not himself or herself directly affected by the contact between the child and the parent with access rights.

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The complainant further argued that in the present case, however, the application was for the enforcement of the child's contact with the parent who had a right as well as a duty to have contact. This directly impaired the complainant's right of personality. § 33 of the Act on Matters of Non-contentious Jurisdiction could not be permitted to lead to the duty of contact under § 1684 of the Civil Code being compulsorily enforced

28

against the will of the obligated parent in violation of his or her right of personality. Contact with his son would inevitably lead to his wife separating from him. He did not feel any bond with the child whom he did not know, whom he had not wanted to have and who had been conceived against his express wish; he had also refused to establish any such bond.

If the minor child had been a legitimate child and if the complainant had had custody of it, he could at any time have transferred his parental rights and duties to a third party either by giving the child up for adoption or by giving it to foster parents or by transferring its care to a third party. These options had not been available to him since the mother had sole custody rights. The enforcement of the duty of contact against his express will could also not be in the child's best interests. The child did not know the complainant who was a stranger to him. The situation would perhaps have been different if a longstanding relationship between the child and its parent had already existed. 29

Furthermore, the threat of a fine was not only a direct fine to himself, but an indirect threat to his legitimate family. It too was protected by Article 6 of the Basic Law. The preservation of the family and its relationships had to be given higher priority when weighing the interests of the child against those of its family. The absence of contact which had not yet existed represented a minimal impairment for the child, while compulsory enforcement of contact would destroy the complainant's existing family. 30

IV.

[...] 31-58

B.

The complainant's constitutional complaint is admissible (§ 90.1 and § 90.2 sentence 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*)). [...] 59

[...] 60

C.

The constitutional complaint is founded. 61

The order of the Higher Regional Court encroaches on the complainant's fundamental right to protection of his personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law to the extent that it contained the threat of a fine should the complainant refuse to have contact with his child (I.). The statutory duty of a parent to have contact with his or her child in § 1684.1 of the Civil Code concretizes parental responsibility under Article 6.2 sentence 1 of the Basic Law in a manner which is not constitutionally objectionable. Under Article 6.2 sentence 1 of the Basic Law, a child has a right to parental care and upbringing which corresponds with the parental re- 62

sponsibility and which has also been concretized by the legislature in the right of a child to have contact with its parent in § 1684.1 of the Civil Code. The legislature pursues a legitimate purpose in providing for the possibility of the threat of an imposition of a fine where a parent is unwilling to have contact with his or her child (II.). However, the threat of a fine to enforce the duty of contact of a parent who refuses to have contact with his or her child is not usually in the child's best interests and thus does not justify the encroachment on the parent's right of personality (III.). § 33.1 sentence 1 and § 33.3 of the Act on Matters of Non-Contentious Jurisdiction are thus to be interpreted in accordance with the Constitution as meaning that compulsory enforcement of the duty of contact of a parent who refuses to have contact with his or her child must be avoided unless there are sufficient indications in a specific case that enforcement would be in the child's best interests (IV.). The Higher Regional Court failed to take this sufficiently into account in its decision (V.).

I.

The threat of a fine based on § 33.1 sentence 1 in conjunction with § 33.3 sentence 1 of the Act on Matters of Non-Contentious Jurisdiction to enforce the complainant's duty to cultivate contact with his child against his will encroaches on his fundamental right to protection of his right of personality.

63

1. This fundamental right protects the narrower personal sphere and the prerequisites for it. It extends to the right of respect for one's privacy. This includes the family sphere and personal relationships with other family members (see BVerfGE 96, 56 (61)). The same applies to the relationship between a parent and his or her child. What form their relationship takes will be determined by their respective personal feelings, attitudes and experiences which influence each other. The decision to have or to refuse contact with one's child expresses the parent's personal understanding of parenthood and his or her emotional relationship with the child. Nonetheless, it is not included in the inviolable core area of private conduct of life since it has a significant social connection with the child concerned whose interests and personal sphere are affected by this decision (see BVerfGE 96, 56 (61)).

64

2. If coercive measures are threatened to force a person to have contact with his child against his will, this constitutes an encroachment on his right to have his private sphere respected. He is compelled to meet with his child and cultivate personal contact with it contrary to his own wishes. This influences his personal relationship with the child and puts him under pressure to behave in a manner towards the child that he does not wish to behave in.

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3. The fundamental right to the protection of privacy is not, however, guaranteed without restriction outside the inviolable core area of private conduct of life. It is restricted pursuant to Article 2.1 of the Basic Law through the constitutional order and the rights of others (see BVerfGE 99, 185 (195)). A statutory basis is necessary for such restrictions from which their prerequisites and scope can be determined. Individ-

66

uals are required to accept the restrictions which are undertaken in the overriding general interest or are undertaken in view of the constitutionally protected interests of third parties subject to the principle of proportionality (see BVerfGE 96, 56(61)).

§ 33.1 sentence 1 in conjunction with § 33.3 of the Act on Matters of Non-Contentious Jurisdiction is the statutory basis upon which the Higher Regional Court relied in its decision to threaten to fine the complainant if he did not fulfill his duty of contact and with which it encroached on the complainant's fundamental right to protection of his personality. However, this provision itself only provides a general description of a duty to act which is imposed by the court and which depends on the will of the person concerned as the prerequisite for the threat of a fine; furthermore, it states that the purpose of the threat of a fine is to make the person concerned comply with the duty to act ordered by the court. Thus § 1684.1 of the Civil Code must also be included in the examination of whether the purpose pursued by § 33.1 sentence 1 in conjunction with § 3.3 of the Act on Matters of Non-Contentious Jurisdiction is justified. The court ordered the complainant to have contact with his child on the basis of the provision in the Civil Code which obliges a parent to have contact with his or her child; this provision justifies the duty to act referred to in § 33.1 sentence 1 of the Act on Matters of Non-Contentious Jurisdiction. Whether the encroachment on a fundamental right resulting from the threat of a fine can be justified must be measured against this duty of contact.

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II.

The legislature pursues a legitimate purpose in providing the courts in § 33.1 sentence 1 in conjunction with § 33.3 of the Act on Matters of Non-Contentious Jurisdiction with the possibility of threatening to fine a parent to enforce a court-imposed obligation to have contact with his or her child. 68

1. The statutory duty of a parent to have contact with his or her child that is laid down in § 1684 of the Civil Code is a permissible concretization of the responsibility allocated to parents by the Basic Law. 69

a) Article 6.2 sentence 1 of the Basic Law guarantees parents the right to care for and bring up their child, but at the same time also makes this task a primary duty imposed on them. In this connection, parents may in principle decide free of state influence and according to their own ideas how they wish to live up to their responsibility as parents (see BVerfGE 107, 104 (117)). Nevertheless, their actions must be guided by what is in the best interests of the child since the parental right is a right to be exercised in the interests of the child (see BVerfGE 103, 89 (107)). They are guaranteed it for the sake of the child. The duty of parents to care for and bring up their child is not owed exclusively to the state which must guard the exercise of parental authority and which is obliged to intervene to protect the child if the parents do not live up to this responsibility (see BVerfGE 60, 79 (88); 107, 104 (117)). Parents also directly owe their child a duty to care for it and to bring it up. 70

The child has its own dignity and rights. As a subject of fundamental rights it is entitled to the protection of the state and the guarantee of its constitutionally anchored rights. When regulating interpersonal relationships, a Constitution which places human dignity at the centre of its value system may not in principle grant anyone rights to the person of another which do not have duties attached to them and which do not respect the human dignity of the other person. The same applies to the relationship between a parent and his or her child. The parental right vis-a-vis the child is justified by the fact that the child requires protection and help so that it can develop into a responsible member of society in keeping with the Basic Law's image of man (see BVerfGE 24, 119 (144)). Thus this right cannot be separated from the duty of parents to offer this protection and help to the child for its well-being. In this context, the duty does not merely relate to the child, it is also owed to the child since the child is not the subject of the parental exercise of rights; it is a legal person and a subject of fundamental rights in whose best interests parents are obliged to act. 71

b) The child's right to parental care and upbringing under Article 6.2 sentence 1 of the Basic Law corresponds with the parental duty to care for and bring up the child which is imposed by Article 6.2 sentence 1 of the Basic Law. If a duty is imposed on one person which relates to another person and which is at the same time connected with a right to influence the other person, a right to make decisions for the other person, a right to represent the other person's interests and a right to have a significant and dominant influence on the development of the other person's personality, this will 72

affect the core of such person's life development and restrict his exercise of free will. The only justification for granting parents such far-reaching influence over the life of their child is the fact that the child cannot bear responsibility for itself and would come to harm if it were not given any help. If the child needs such support from its parents and if as a result its parents have a responsibility to act only in the child's best interests, then the child also has a right to expect its parents to care first and foremost for it and a right to also have its parents fulfill the duty which cannot be separated from their parental right. Thus the right of the child is based on parental responsibility and it is therefore protected by Article 6.2 sentence 1 of the Basic Law. It is closely connected to the fundamental right of the child to protection of its personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law since it guarantees the child family ties which are significant for the development of its personality. The personal relationship with its parents, their care, help and warmth and affection contribute significantly to the child being able to develop into a person who knows that he or she is respected and who learns to respect himself or herself as well as to respect others.

c) Nevertheless, the parental right with its concurrent duty requires statutory regulation as does the right of the child to care and upbringing by its parents under Article 6.2 sentence 1 of the Basic Law. This applies to the parental right in particular because parents are jointly entitled to it. If parents are unable to agree on how to exercise their parental responsibility, then rules must be made which allocate them rights and duties vis-a-vis their child (see BVerfGE 92, 158 (178-179)). In addition, statutory rules are necessary because legal authority in relation to the child is a pre-requisite for the care and upbringing of a child also vis-a-vis third parties (see BVerfGE 84, 168 (180)) and, because of the watchdog function established for it by Article 6.2 sentence 2 of the Basic Law, the state has to ensure that the exercise of the parental right is guided by the best interests of the child and that the child's rights are respected. It must therefore regulate, on the one hand, how the child's right to care and upbringing by its parents in accordance with its best interests can be safeguarded and, on the other hand, when and under what circumstances it will limit the free exercise of the parental right for the child's sake.

d) Contact between parent and child is not merely a possible expression of parental upbringing, but a fundamental basis for the parent-child relationship and thus an essential part of Article 6.2 sentence 1 of the Basic Law. Especially in the case of a parent who does not live with his or her child, access to it is a significant prerequisite for personal contact with the child that would allow the parent to establish or maintain a closer relationship with it. Contact ensures that he or she can devote himself or herself to the child and can be involved in its development; it ensures that payment of maintenance is not the only way that the parent can exercise his or her parental responsibility. This is in keeping with the legislature's decision in § 1684.1 of the Civil Code, which grants a right of contact to parents irrespective of whether they have custody rights. Particularly in the case of a non-custodial parent, a right of contact is the main basis for exercising his or her parental right under Article 6.2 sentence 1 of

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the Basic Law.

On the other hand, the parental right to bring up a child, which is protected by Article 6.2 sentence 1 of the Basic Law, is intended as a right in the interests of the child (see BVerfGE 75, 201 (218); 103, 89 (107) and has as its aim the child's well-being. However, it is in principle in the child's best interests if through contact with its parents it gains the opportunity to get to know its father and mother, to become close with them and with the help of the contact is able to continue a personal relationship with them. Through communication with its parents, the child can experience affection, can learn and can receive inspiration and advice that give it direction, help it to form opinions and aid it in developing into an independent and responsible person. As far as the child and its development are concerned, refusal to have contact with it and thus the severance of personal ties with it represent a significant withdrawal of parental authority; at the same time, it constitutes neglect of one of the significant parts of the duty of upbringing imposed on parents by Article 6.2 sentence 1 of the Basic Law. Article 6.2 sentence 2 of the Basic Law allocates the state a duty to monitor the exercise of parental responsibility in the best interests of the child. and parental contact is an important prerequisite for this; in exercise of this duty, the legislature has therefore obligated parents in § 1684.1 of the Civil Code to have contact with their child and urged them to fulfill their responsibility to their child. In this connection, it has at the same time granted the child a right to have contact with its parents and thus concretized the right of the child under Article 6.2 sentence 1 of the Basic Law to care and upbringing by its parents.

75

2. It is of course true that - through its regulation of their right to maintain their privacy and their personal relationships - the obligation of parents to have contact with their child does encroach on their fundamental right to protection of their right of personality since it obliges them to enter into a personal relationship with their child even if they do not wish to start or continue such a relationship. This encroachment is, however, justified in particular due to the responsibility for their child guaranteed as well as imposed on parents by Article 6.2 sentence 1 of the Basic Law and due to the child's right to parental care and upbringing, which is also protected by this fundamental right.

76

The parental duty of contact serves the purpose pursued by the legislature in § 1684.1 of the Civil Code of reinforcing the legally recognized right of the child to parental contact by imposing a corresponding duty on parents in order to enable the child to have the opportunity to meet with its parents. Such contact is of outstanding significance for the development of the child. The assumption of the legislature, when it imposed this duty on parents, that ongoing personal contact between a parent and a child would have a positive influence on the child's development and be in principle in the child's best interests is supported by scientific findings and therefore no objection can be raised in this connection. The duty of contact is also a suitable means of promoting the relationship between a child and its parents. The possibility cannot be ruled out that a parent subject to a duty of contact could be influenced by the duty to

77

have contact with his or her child in § 1684.1 of the Civil Code or a judicial order concretizing such duty, and that the parent could allow himself or herself to be persuaded to fulfill this duty in the interests of the child and thus allow the child to establish or continue a relationship with him or her, even where the parent was initially not interested in regular meetings with the child and did not of his or her own initiative seek personal contact with the child. Since no more lenient means of reinforcing the child's right of contact in its own interests and assisting in the enforcement of same are evident, a parental duty to have contact is also necessary.

After all, it is also reasonable to urge a parent to cultivate contact with his or her child. There is to be sure an encroachment on the parent's fundamental right to protection of his or her right of personality associated with the duty of contact and this encroachment is not slight. As a rule, the parent is not just expected to endure a meeting with his or her child. Instead, the parent is expected to give the child warmth and affection, to communicate with it and to establish or continue a personal relationship with it. This can lead to not insignificant psychological pressure for a parent who is not prepared to do this. However, one has to take into account that under Article 6.2 sentence 1 of the Basic Law parents do not merely have a right, but also a duty to care for and bring up their child. It is true that parents can fulfill this duty by committing their child to the care of another. However, parents do not release themselves from the responsibility that they bear for their child by delegating its upbringing to another. Without contact with a child, it is scarcely possible for a parent to exert the influence that is necessary for its best interests and instrumental for its personal development. Contact with the child is in this respect a significant prerequisite and the basis for the exercise of the parental right in the interests of the child.

78

If the legislature concretizes the duty of upbringing imposed on parents in Article 6.2 sentence 1 of the Basic Law by raising contact with the child to a parental duty, it makes clear the importance to be attached to contact between a parent and child in the upbringing of a child. Seen in this light the encroachment on the parent's right of personality following from the imposition of a duty of contact does not appear particularly serious. In addition, the parental duty of contact corresponds with the child's right to have contact with its parents that the legislature granted the child in § 1684.1 of the Civil Code. The legislature took into account the child's right to care and upbringing by its parents based on Article 6.2 sentence 1 of the Basic Law by concretizing and securing one significant point in an ordinary law which makes exertion of an influence on the child's upbringing possible. If one weighs the child's interest in having steady contact with both parents against a parent's interest in not wanting or no longer wanting to have personal contact with it, then one should accord the child's desire considerably more weight than the parent's wishes. This is because as a significant basis for the development and maintenance of a family relationship and for the receipt of parental support and upbringing, the contact of a child with its parents is of considerable importance for the development of its personality and is something that contributes in principle to its well-being.

79

It is thus reasonable to oblige a parent to have contact with his or her child - even if this entails an encroachment on the parent's personal sphere if this is in the best interests of the child. Thus the legislature followed a legitimate purpose that is supported by the Basic Law by making it possible through § 33.1 sentence 1 in conjunction with § 33.3 of the Act on Matters of Non-Contentious Jurisdiction to threaten parents with a fine for failure to comply with their legal duty to have contact with their own child and with an order from the court instructing them to do so.

III.

However, as a rule, the threat of a fine to enforce the duty of contact of a parent against his or her express will is not suitable for achieving the sought purpose, i.e. to make it possible for the child to have contact with its parent in a way that would benefit the development of its personality and to assist in the enforcement of the child's right to have the parent exercise his or her responsibility in the child's best interests. If coercive measures are necessary to force an unwilling parent to have contact with a child, this contact is not usually in the best interests of the child. Where this is the case, the threat by the court to apply coercive measures constitutes an unjustified encroachment on the parent's fundamental right to the protection of his or her personality.

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1. The effect of the threat of a fine may well be to motivate a parent who is actually not willing to have contact with his or her child to have a meeting with the child, even against his or her will. The psychological and financial pressure exerted through the threat of a fine may bend the will of the parent and prompt him or her to exercise his or her right of contact.

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Unlike in the case of a judicial duty of contact, which initially only urges the parent concerned to fulfill his or her parental responsibility and which clarifies his or her legal duty with concrete orders and thus gives him or her the option of reconsidering and following the order to have contact with the child without incurring a fine, the threat of a fine pressures him or her to meet the child and be confronted by it against his or her will. However, that which it is intended to compel the parent to do by the use of pressure does not just conflict with the parent's will. The compulsory enforcement of the duty of contact, which requires not just his or her presence, but his or her emotional warmth towards the child, conflicts with the feelings the parent harbours towards the child. Where a parent's rejection of any contact with the child has been declared and demonstrated in this manner, any contact with the child that eventuates cannot fail to affect the child; the pressure exerted on the parent alone would suffice to have an impact on the child. If the parent does not change his or her hostile attitude towards the child at a forced meeting with it, the child is faced with a situation in which it does not experience the parental warmth and affection which is the purpose of the contact, but instead experiences personal rejection - and this not from just anyone but from, of all people, a parent. This poses a big risk that the child's self-esteem could be damaged. For it can scarcely understand why its parent does not want to know it and why he or she acts in such an unfriendly way and it could therefore blame itself. This usually does not benefit the child's well-being, but instead damages it.

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Nevertheless, the possibility that a forced meeting with the child could lead to the parent opening himself or herself to the child and that this would not result in any mentionable damage to the child's well-being cannot be ruled out. However, if a parent does not show cooperation and if he or she still stubbornly refuses to meet the child in spite of a court order stating that he or she has a duty to do so, it is doubtful

84

whether enforced contact can lead him or her to develop a positive attitude to the child. Thus there is much that would suggest that the child's best interests could at least be significantly impaired through contact enforced by applying coercive measures. It is, however, very difficult to predict with certainty whether this will occur in an individual case and whether the child will be damaged since it depends on the feelings of the parent and his or her reactions at the time which are scarcely foreseeable.

2. a) What counts in deciding if it would be suitable to use coercive measures to force a parent to have contact with his or her child in cases where he or she does not want such contact is not whether the contact could endanger the best interests of the child, but whether such contact is in the child's best interests. The legislature imposed a duty on parents to have contact with their child in order to strengthen the child's right of contact with its parents. This right was granted the child as being in its well-understood best interests. The legislature assumed that a child's contact with its parents was of outstanding significance for its development. This is an expression of its view that contact can establish or maintain an emotional relationship between a child and its parents and that the parent's warmth and affection during the contact is beneficial for the child's development so that contact is in the child's best interests. This benefit in relation to the child's best interests justifies the imposition on the parents of a duty to have contact with their child even though this encroaches on their fundamental right to protection of their rights of personality. However, this is only true to the extent that and for as long as contact with its parent actually serves the best interests of the child. If this is not achieved through the statutory means intended for this purpose, then this purpose cannot justify the encroachment on the parent's right of personality. This applies to not only the duty of contact imposed on parents, but in particular to the possibility offered by the law of enforcing the duty of contact against the parent's declared will through the threat of coercive measures. The proper metric for determining the suitability of contact achieved through coercion is whether the contact is in the child's best interests.

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b) The fact that § 1684.4 of the Civil Code only permits restrictions on and the exclusion of the right of contact if the best interests of the child would otherwise be endangered does not hinder the foregoing. This provision deals with the limits on the parental right of contact and not with the enforcement of the duty to have contact. Therefore, it does not apply to the relationship between a parent with a duty of contact and his or her child with a right to have contact.

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If a parent wishes to exercise his or her right of contact, he or she may only be restricted from doing this over an extended period or permanently pursuant to § 1684.4 of the Civil Code if the child's best interests would otherwise be endangered. By making the existence of a danger to the child's well-being the standard, the legislature has taken the parental right into account and sought to give it as much room as possible for development. Thus a limit on the parental right of contact is set at the point where the exercise of the right of contact threatens to conflict significantly with the best interests of the child.

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The situation is different, however, in relation to the compulsory enforcement of a duty of contact against the will of a parent subject to this duty. In this case the function of enforcement is not the realization of the parent's right of contact; it instead represents an encroachment on the parent's right of personality. This kind of encroachment can, however, only be justified if the right of the child to contact with its parent, which is intended to be realized in this way, also achieves its objective of serving the child's best interests. If there is a risk that instead of the effect which the child's right to contact was intended to achieve the opposite will arise, then the exercise of the right is of no use to the child but can instead harm it. In such case the reason for limiting the right of a parent to conduct the relationship with his or her child according to his or her own wishes and needs disappears. Thus in the case of the compulsory enforcement of contact against the will of the parent obliged to have contact, the standard can only be whether this contact serves the child's well-being.

c) In view of the emotional and psychological strain to which a child can be exposed at a meeting with a parent who rejects it and who only attends the meeting under duress, one cannot, as a rule, start by assuming that contact under such circumstances is in the child's best interests. To be sure, there are - as far as can be seen - no social science studies on the reactions and attitudes adopted in relation to his or her child by a parent compelled by coercive measures to have contact with the child or on the effects on the child of a forced meeting with a parent who refuses contact with it which one could use as a basis for assessing whether, and if so, under what circumstances contact of such kind could be in the child's best interests in spite of the unfavourable conditions under which it takes place. The reason for this is presumably that until now only very few cases have occurred or have become known in which contact was brought about by means of coercive measures. For most of the contact disputes brought before the courts relate to cases in which contrary to the will of the other parent, one parent complains about his or her right of contact with the child. On the other hand, the reason might be that the course such meetings take and how they can affect a child's psyche depend on the psychological state of the relevant persons at the time so that it is difficult to make generalizations on the basis of the results in an individual case. However, even if there are no valid scientific findings on the effects of enforced contact on a child to fall back on, it would seem evident that a parent who obviously does not want to have contact with his or her child and who does not allow a court order clarifying his or her duty to affect or change his or her hostile attitude towards the child will exhibit his or her unwillingness and hostility towards the child at a forced meeting. This is confirmed by the German Institute for Youth Research (*Deutsches Jugendinstitut*) which assumes on the basis of its findings that the hostile attitude of a parent is a prognosis factor for difficult or damaging contact for the child. For if the child's own parent really does demonstrate his or her rejection, then this is likely to leave its mark on the child's psyche; especially since the first meeting or a meeting that occurs after a longer period with its parent will be a particularly emotional event which will trigger feelings of fear and expectation in the child. If the child is not only disappointed, but in addition it feels that it is not accepted as a person, then it

seems probable that the child will suffer emotional damage. Contact with its parent, during which such detriment to the child is likely, is not in the best interests of the child.

Nevertheless, one cannot rule out the possibility that there are cases in which there is a realistic chance that through its uninhibitedness towards strangers and its psychological stability a child might be able to overcome the resistance of the parent who wants to avoid it thanks to its open and friendly behaviour so that what was initially enforced contact can be in the child's best interests after all. There may also be cases in which forced contact between the child and its parent can be in the child's interests, even if the parent expresses his or her resistance to the meeting. As was stated by the German Institute for Youth Assistance and Family Law (*Deutsches Institut für Jugendhilfe und Familienrecht*) and the German Institute for Youth Research in their opinions, an interest in meeting an unknown parent arises in the course of a child's development, usually in adolescence or early adulthood. If a child or adolescent has developed this strong interest and if he or she is primarily concerned with meeting the parent to make his or her acquaintance - even if it is only a one-time meeting - then the fulfillment of this need can be more important for the child than the possibly associated experience of finding out that the parent wants to have nothing to do with it. This is to be clarified, if necessary, with the help of an expert. In such a case, even an enforced meeting with the parent can be in the best interests of the child. The older a child is and the more developed its own personality is, the more it can be assumed that even the compulsory enforcement of its own express and emphatic wish to have contact with its parent will be in its best interests. In such cases, the encroachment on the right of privacy of the parent concerned which is associated with enforced contact is not only suitable for achieving the sought purpose of allowing the child to have contact which would be in its best interests, but also justified. More weight should be attached to ensuring the child's best interests are met than to the interest of the parent in being spared from having to have contact with his or her child. In such a case, it is reasonable to expect a parent to have contact with his or her child and, if necessary, to use coercive measures to force him or her to do so.

In the case of children who have not yet developed stable personalities, on the other hand, one can usually begin by assuming that forced contact with the reluctant parent will not serve the child's best interests unless there are enough indications to the contrary in a concrete case. Where a parent unwilling to have contact with his or her child is threatened with coercive measures in order to enforce contact and these measures fail to achieve their purpose, then the encroachment on the fundamental right to protection of personality of the parent refusing contact is not justified unless such coercive measures are suitable for achieving contact which is in the best interests of the child (see BVerfGE 99, 145 (164)).

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IV.

The fact that pursuant to § 33.1 sentence 1 and § 33.3 of the Act on Matters of Non-Contentious Jurisdiction a parent who is unwilling to have contact with his or her child may be threatened with a fine even though this violates the parent's fundamental right to protection of his or her personality does not lead to a violation of the Basic Law by these provisions. This provision is thus to be interpreted in accordance with the constitution as meaning that compulsory enforcement of the duty of contact of a parent who refuses to have contact with his or her child must be avoided unless there are sufficient indications in a specific case that enforced contact would be in the child's best interests.

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§ 33 of the Act on Matters of Non-Contentious Jurisdiction is a general provision on enforcement in non-contentious matters that covers a multitude of court-imposed obligations relating to acts that depend on the will of the person obliged; the provision allows the courts to reinforce such obligations through the threat and imposition of a fine. This also applies, for example, to the duty of the parent with whom the child lives to hand over the child to the other parent who has a right of contact so as to allow contact at the times set down by the court. The provision is discretionary. It leaves the decision as to whether non-compliance with an imposed obligation should result in enforcement to the due discretion of the court. It thus allows the court to refrain from compulsory enforcement of the obligation. Thus the provision can also be interpreted in conformity with the Basic Law in the case of a duty of contact which the court has imposed on one parent. It leads to a finding that the use of coercive measures against a parent who stubbornly refuses contact should be avoided unless there are enough indications in a concrete case that forced contact will serve the child's best interests because as a rule such contact is not in the best interests of the child. In this respect the discretion granted to the courts by § 33.1 sentence 1 of the Act on Matters of Non-Contentious Jurisdiction is restricted by the Basic Law.

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V.

The challenged decision of the Higher Regional Court does not satisfy the constitutional requirements and violates the complainant's fundamental right to the protection of his right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law insofar as it threatened him with a fine.

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When exercising the discretion to use coercive measures to compel a parent to have contact that § 33.1 sentence 1 of the Act on Matters of Non-Contentious Jurisdiction grants the courts, the Court failed to take into account that that it should have examined whether forced contact against the complainant's will would be in the child's best interests. Instead the standard it used for its examination was whether forced contact could endanger the child's best interests and answered this question in the negative. The Court assumed on the basis of the expert opinion it obtained that there was no risk of serious long-term damage to the child if the child had contact with

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the complainant in the Company of a social worker. To this extent it did not exclude the possibility of detrimental effects on the child, but considered them acceptable for the purposes of encouraging the complainant through the threat of coercive measures to comply with his duty of contact and to thus bring about contact between him and his child. However, this is not sufficient to justify an encroachment on the complainant's right of personality. For the Court did not give adequate consideration to the best interests of the child or the complainant's right to protection of his personality. It failed to recognize that contact may only be enforced against a parent who is obliged to have contact when this contact achieves its objective of serving the child's best interests (see BVerfGE 99, 145 (164)).

VI.

The Court must also consider the child's legal position which is constitutionally protected by Article 6.2 and Article 2.1 of the Basic Law and its right to a hearing in court pursuant to Article 103.1 of the Basic Law; it must also examine whether a guardian ad litem should be appointed for the child in the contested access proceedings pursuant to § 50 of the Act on Matters of Non-contentious Jurisdiction when it again hears and decides the matter (see BVerfGE 99, 145 (162-163)).

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The constitutional protection of the fundamental rights of children requires a procedural form which guarantees the independent exercise of the rights of the child and guarantees its interests. In this context, the child's custodial parent is in principle charged with this task. However, if there are indications that the child's interests might conflict with those of the parent representing it, the child must be given an opportunity to assert its own interests independently of its parent in the proceedings. This occurs in the case of children whose age does not yet permit them to exercise their own interests and rights through the guardian ad litem provided for in § 50 of the Act on Matters of Non-contentious Jurisdiction whom the court must appoint for a child in such a case. The case to be decided gives rise to doubt as to whether the application made for the child concerned by its mother in which she seeks to oblige the complainant to have contact with the child against his clearly evident will and to enforce this, if necessary, with the aid of coercive measures is really in the best interests of the child or if it is instead contrary to them.

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VII.

The order by the Higher Regional Court of 21 January 2004 must be overturned because it violates Article 2.1 in conjunction with Article 1.1 of the Basic Law to the extent that it threatens to fine the complainant (§ 95.2 of the Federal Constitutional Court Act). To this extent the matter is referred back to the Higher Regional Court for a new decision.

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The decision on the reimbursement of expenses is based on § 34a.2 of the Federal Constitutional Court Act.

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Seven judges concurred on points C.III to IV, whilst one judge dissented; otherwise the decision was unanimous. 100

Papier	Hohmann-Dennhardt	Hoffmann-Riem
Bryde	Gaier	Eichberger
Schluckebier		Kirchhof

Bundesverfassungsgericht, Urteil des Ersten Senats vom 1. April 2008 - 1 BvR 1620/04

Zitiervorschlag BVerfG, Urteil des Ersten Senats vom 1. April 2008 - 1 BvR 1620/04 - Rn. (1 - 100), http://www.bverfg.de/e/rs20080401_1bvr162004en.html

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